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ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

ADVISORY COMMITTEE ON EVIDENCE RULES

COMMITTEE MEETING

Thursday, October 22, 1998

8:33 a.m.

Thurgood Marshall Building
South Lobby Conference Room
Washington, D.C.

PARTICIPANTS

ADVISORY COMMITTEE MEMBERS PRESENT:

HONORABLE FERN M. SMITH, Chair
HONORABLE JERRY E. SMITH
HONORABLE MILTON I. SHADUR
HONORABLE DAVID C. NORTON
HONORABLE JAMES T. TURNER
HONORABLE JEFFREY L. AMESTOY
PROFESSOR KENNETH S. BROUN
HONORABLE JAMES K. ROBINSON
GREGORY P. JOSEPH, ESQ.
DAVID S. MARING, ESQ.
FREDRIC F. KAY, ESQ.
MARY FRANCES HARKENRIDER, ESQ.
PROFESSOR DANIEL J. CAPRA, Reporter

ALSO PRESENT:

HONORABLE FRANK W. BULLOCK, JR., Liaison Member
HONORABLE DAVID D. DOWD, JR., Liaison Member
PETER G. McCABE, Secretary
JOE CECIL
PROFESSOR STEPHEN A. SALTZBURG
JOHN K. RABIEJ
ROGER A. PAULEY, ESQ.

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P R O C E E D I N G S

I. OPENING REMARKS OF THE CHAIR

CHAIRPERSON SMITH: Good morning, everybody. Will the meeting please come to order.

Welcome to all of you, members and visitors. This is the beginning of public hearings on various changes to the rules of evidence that have been proposed by this Committee. These hearings precede our regular meeting and basically will deal with public comments on the Committee's proposed changes to Rules 103, 404, 701, 702, 703, 803, 6, and 902.

Before we start, let me briefly welcome some new members to our Committee. The Honorable Jeffrey Amestoy, Chief Justice of the Vermont Supreme Court, welcome.

JUDGE AMESTOY: Thank you.

CHAIRPERSON SMITH: We are delighted to have you with us, Judge.

And David Maring, Esquire, from Dakota, Fargo, North Dakota, thank you for being willing to serve on this Committee and welcome.

I'm also delighted, if I didn't say it at the last meeting, and I can't remember, to comment that Judge Shadur's membership has been extended, much to the pleasure of the Committee, and John Kobayashi's has also been extended. I don't see John here, but I think he's coming later today.

For the people who have been interested enough in the process to ask to testify today, let me say that we will have some time limits that we need to adhere to. We have a number of speakers and we do have other business later in the day. So there will be ten minutes per speaker allowed. We're going to try to keep to those time limits. The members of the Committee may have questions after your presentation.

We'll probably take a break at approximately 10:00 or 10:15, depending upon the way the speakers break. Other than that, we'll go straight through.

II. PUBLIC HEARING ON PROPOSED AMENDMENTS

RELEASED FOR PUBLIC COMMENT

CHAIRPERSON SMITH: A few of the speakers

have asked to go first, and we're happy to try to accommodate those speakers, and if I had the list in front of me, I would remember who they were.

Here we go.

Mr. Smoger from--

FLOOR SPEAKER: I work with Mr. Smoger and I can only think he has been held up in traffic. He is on his way, though.

CHAIRPERSON SMITH: All right. Well, as we say on the bench, we'll pass him for now and call him again later.

Professor James Duane of the Regent University School of Law. Professor?

MR. DUANE: I'm here. Good morning.

CHAIRPERSON SMITH: Good morning. We do have your written statement, which we appreciate having had a chance to look at, so please go ahead, Professor.

MR. DUANE: Thank you. Thank you very much. It goes without saying that I'm honored and gratified to have the opportunity to appear before you and I salute and commend the work of this

Committee.

As you know from my written statement, my only concerns that bring me here today involve the proposed amendment to Rule 103. I'd like to address three suggestions that I've raised with regard to that proposal.

The first of them concerns the first of the two sentences that this Committee proposes to add to the rule, and as I said in my statement, I have no objection whatsoever. I think it's an outstanding suggestion. I think it would represent a significant and salutary improvement in the administration of justice. But I submit, respectfully, that perhaps the Advisory Committee note an explanation of that rule to be revised, somewhat along the lines that I've proposed in the end of my concluding section of my paper.

The problem as I see it, and I admit that's, of course, an unlikely suggestion, to be worrying about fussing and retooling with the Committee notes, but in this particular vein, as the Committee is aware, we're dealing with a

situation that has generated a great deal of disagreement among the Federal and State courts around the country. A number of different approaches have been taken. If the Committee notes can be revised in a way to make them a little more clear and a little more persuasive, it might furnish some valuable Federal guidance to State courts, as well.

In that vein, what I submit is that the Committee would do well to place less reliance on the analogy to the law of exceptions, specifically FRCP 46, abolishing the need for exceptions generally, because the circuits which have been grappling with this issue over the last decade or so have not generally found that analogy persuasive, and I think with good reason, because that by itself doesn't go so far as to justify or compel the conclusion that we ought never to require the renewal of objections at trial.

And likewise, as I suggest in my paper, I think the Committee perhaps would be best advised to elide the reference to the Seventh Circuit's

holding in Favala, which seems to be misleading, quite candidly, when it says that a litigant has no reason to renew an objection at trial.

Under the Supreme Court's holding last year in United States v. Old Chief, which I see no reason for this Committee to change or revise in any respect, under Old Chief, the Supreme Court, I think, has now made it clear, perhaps for the first time, that the best way to focus on the complex matrix of institutional interests in this regard is not by adopting a strict rule of appealability per se but by focusing on the proper standards of appellate review.

And in Footnote 6 in Old Chief, the Supreme Court held that out of proper deference to the trial court's position, any review of in limine evidentiary rulings must be made from the vantage that the district court enjoyed at the time of the ruling and not with respect to hindsight. I've proposed something along those lines in the concluding section of my paper for the Committee to consider.

I might pause for a moment to see if you have any questions about that.

CHAIRPERSON SMITH: I don't really have any questions. I would simply respond that the citation that you objected to, I think, is going to be updated and changed to something different, or at least we're going to suggest that to the Committee.

I think when we talked about no reason to renew the objection, there was an implicit assumption that no new evidence had been raised. Perhaps we gave too much credit to all lawyers to think that all lawyers would understand that the objection stood at the time it was made and that if the evidence changed, they'd have reason to renew the objection. But your point was well taken, that for those to whom that is not clear, it doesn't hurt to clarify it.

MR. DUANE: Yes, that's true. I'm here to speak on behalf of the many who don't see these things in perfect clarity. As the reported case law makes abundantly clear, though, in this area,

there have been far too many appeals that have been lost because of attorneys who misunderstood the law, even in circuits where it appears to have been spelled out rather clearly.

A second comment that I might make while I'm on the subject of retooling the Committee notes, admittedly far less significant but deserving of very brief comment, I also made a passing suggestion in my paper that this Committee, I suppose speaking for a moment on behalf of legal writing instructors everywhere--I'm not one of them myself, but standing in their stead--in the Committee notes, this Committee, following what has become a universal tradition, speaks about the law governing rulings on "prior convictions", and as I explained in my paper, in this particular context, that's hopelessly redundant.

The phrase "prior convictions" is one that has been transplanted to this area of the law from another area. Frequently, in criminal cases, the prosecutor will say to the judge, for example, where the defendant is charged as a felon in

possession at the time of his arrest, the judge will say, "Your Honor, he's got several prior convictions," that is to say, prior to the date of the arrest. But in the context of Rule 609, the only kind of conviction that would be admissible is, quite literally, any conviction that is in the defendant's past, even if it is only five minutes old, by the most unlikely coincidence.

So when we speak in the Rule 609 context of a defendant's prior convictions, prior is always redundant. Make of that what you will.

I'll be the first to concede, though, that this Committee is following in a well-settled tradition. I know of no leading evidence textbook on the subject that doesn't speak of Rule 609 in terms of the rule on prior convictions, but it makes no sense and I urge you to be the first to take the right step in this direction of clarity, which is something we're trying to insist that our students learn how to write with.

My last comment concerns, as I said, the second sentence that the Committee proposes to add

to the text of Federal Rule of Evidence 103 to codify, if you will, and to expand a bit the holding in Luce and its progeny in the lower Federal courts. My recommendation to the Committee, as I've said, is that perhaps you would--the administration of justice would be better served if this Committee simply took pains in the Advisory Committee note to make it clear that you have no intention of overruling Luce but stop short of codifying this decision.

This decision has been subjected to a great deal of criticism, including myself, mostly by people more able than myself. A number of State courts that have visited the same issue have not been persuaded by the logic of Luce. The Supreme Court itself has never revisited the issue or even cited Luce once in the last 14 years--

MR. CAPRA: Have there been State courts that have been persuaded by Luce?

MR. DUANE: Yes, sir. Yes, sir, quite a few. But I think that under the circumstances--let me make a couple of analogies.

The Supreme Court held in its famous case, New Jersey v. Portesh, never been squarely overruled, still technically the law. In Portesh, the Supreme Court held that there was no impediment that the Court could see in reaching and sustaining the merits of a constitutional challenge to a pretrial ruling that allegedly operated to dissuade the defendant from testifying. Admittedly, that was a State court conviction that was being reviewed on direct appeal by the Supreme Court, but as Justice Brennan pointed out in his concurring opinion in Luce, it remains to be determined whether that factor by itself is dispositive.

And I have cited in my comment here a Seventh Circuit case decided after Luce which held, following the logic of Portesh, that there are at least some kinds of pretrial conditional rulings that ought to be preserved for appeal, at least in a situation such as Portesh where the Court can fairly decide the merits of the objection without having to speculate about what the defendant would have said, such as in Portesh they claim that the

pretrial ruling erroneously opened the door to impeachment with a statement that had been obtained under a grant of immunity.

I think that this Committee, if it were to adopt the proposed amendment codifying Luce, would all but overrule New Jersey v. Portesh, at least in the cases arising in the Federal courts, and I'm not sure that's a wise step to take. I think Portesh was a logical and sensible decision and I think that the Supreme Court itself ought to be given the license and the latitude to decide for itself, if the question ever comes up, whether Portesh ought to govern in the Federal courts. This Committee would take the question out of the Supreme Court's hands if it were to codify Luce.

CHAIRPERSON SMITH: I doubt that the Supreme Court would ever stop from acting because of anything this Committee has done. I don't think that would hamper them from revisiting anything they wanted to revisit, but--

MR. DUANE: No. No, it wouldn't stop them, but, of course, the Supreme Court on a number

of occasions has shown, short of a constitutional objection to the wording of what you've got in mind, and I don't think there is such an objection viable here, the Supreme Court has frequently shown a great degree of zeal in enforcing the language of the Federal Rules of Evidence as they're written, just like any other statute.

Perhaps I might conclude by reminding the Committee, too, of the real-world case not mentioned in my prepared statement, but you may be acquainted with the well-known case of Ronald Cotton. And putting aside all this hypothetical and abstract stuff that law professors typically dabble in, Ronald Cotton was released from a North Carolina prison a couple years ago after serving 11 years of a life term for two rapes that he didn't commit. We know that he didn't commit it. He was exonerated by DNA evidence that subsequently proved the identity of the true culprit, who then confessed, so we can be about as sure as we could ever be that an innocent man was sentenced to prison, spent 11 years there.

Subsequent investigation of the case confirms that Ronald Cotton was convicted, although he was innocent, not once, he was convicted twice, and in both trials, he did not testify. Subsequent interviews with some of the jurors confirmed that they were suspicious of the fact that, in their words, "We kept watching him and he didn't show any emotion and he just kept looking guiltier and guiltier." That's almost a verbatim quote from one of the jurors who was subsequently interviewed, what I take to be a rather transparent comment on the fact that the gentleman didn't testify, which is something that jurors are apt to notice no matter what they're instructed.

The problem was, although Mr. Cotton was innocent, as we now know, he had the unfortunate history of having been arrested and convicted for several other sexual offenses in the past also involving white women, as he was charged in that trial, and he reportedly did not testify out of concern that if he did take the stand, those prior convictions, to coin a phrase, would have come in

against him for impeachment purposes and the trial would have been, for all intents and purposes, a futility. Once the jury learns that he's already done this to other white women, this black gentleman would have had very little, if any chance of a fair trial. So--

MR. CAPRA: Well, so perhaps we should just overrule 609, then. Perhaps we should just do away with 609 and not allow criminal defendants to even be impeached.

MR. DUANE: Actually, you're right about that, but I'm not here to suggest anything--

[Laughter.]

JUDGE SHADUR: Is that a motion?

[Laughter.]

MR. JOSEPH: There's only one vote today.

JUDGE SHADUR: It was a hypothetical.

MR. DUANE: Well, yes, the truth be told, this is a precarious area of the law, as the Committee has already recognized in its drafting of the current version of 609(a)(1), which expresses the judgment that impeachment evidence with respect

to the criminal accused must be viewed with a special caution.

But the problem is, here we have a guy, and this is not, I fear, such an uncommon situation, although it may be unusual that he was innocent, but a fellow in Mr. Cotton's position is really quite hamstrung when he's told pretrial or during the trial, if you take the stand, I will let the jury learn of all these extraordinarily prejudicial prior convictions. At that point, he can either not take the stand, which is what he did in that case and run the risk of having his defense severely undermined by his failure to testify, or take the stand, bit the bullet, preserve the issue for appeal, but in the process practically kiss goodbye any hopes of obtaining a favorable verdict at trial.

As I said in my paper, I think that some of the courts that have shown special excitement and fondness for Luce would speak about, oh, we've got to make sure we guard against the danger of defense attorneys holding these issues up their

sleeve as a joker for reversal or something like that.

I think they lose sight of the fact that, in this context, these defendants were allegedly preobsessed with planting the seeds for reversible error. No defendant on earth, if Luce were to be overruled, as it should, no defendant would be able to, on his own, unilaterally plant the seeds for reversible error. He would only pull it off if he made a motion that was so clearly meritorious that he could later persuade the court of appeals that a denial of his motion was an abuse of discretion. Yes?

CHAIRPERSON SMITH: I think the problem, Professor, is that the rightness or wrongness of Luce is really not for this Committee to decide. I mean, at the moment, it is the law, and our role, I think, and what the Committee faces is simply avoiding the problem of issuing an amendment that leaves people saying, well, what does this do to Luce, and we felt we had to respond to it, that we were doing nothing to Luce because it's not our

mandate or our jurisdiction to do anything with Luce.

MR. DUANE: I understand.

MR. BROUN: If I could just, as someone who the Committee is well aware is no more fond of Luce than Professor Duane, and I think there are several of us on the Committee who are not fond of Luce, either, and for the reasons that you very articulately stated, the problem is, Luce was a unanimous decision of the United States Supreme Court. The United States Supreme Court is going to approve and, indeed, promulgate the rules that we, in fact, adopt. If they have had second thoughts about Luce, they'll have an opportunity to be heard on that issue and I don't know that anything that we would do that might call into question the Luce decision, I feel reasonably confident, would, in turn, be called into question by the Supreme Court. So I think, as much as I agree with your sentiment and with your analysis of the Luce case, I think the wisdom of going ahead with the rule as it is drafted makes sense to me.

CHAIRPERSON SMITH: Okay. Your time is up, but we did use a minute or two with our own comments, so if there is any closing comment you wanted to make, Professor. Otherwise--

MR. DUANE: If I might, one last thought that would take me less than a minute.

CHAIRPERSON SMITH: All right.

MR. DUANE: It isn't in my paper, but I just want to bring one more matter to your attention. The Committee should be aware, and perhaps it already is, that the language of the rule that you have drafted, in terms, again, of Rule 103, would appear by its plain language to resolve a question that has also generated some controversy among the circuits and that concerns the necessity for a continuing objection outside of the context of in limine rulings altogether.

If an attorney asks a question and the objection is overruled, then the question is repeated a few minutes later. Is there a need to ask a continuing objection? The case law actually is divided on the point, and although your

Committee notes don't speak of an intention to dispose of that question, the rule, as drafted, would appear to dictate an answer to that question by its plain language, and quite frankly, I'm not uncomfortable with the answer that it seems to dictate.

But if the Committee wasn't already aware of that, and I don't presume that you weren't, I just wanted to bring it to your attention, that that is another area of ubiquitous concern to the administration of justice that you appear to be on the verge of having resolved, and I salute you for doing that, too, by the way.

Thank you very much for your time and your gracious attention.

CHAIRPERSON SMITH: And we had not discussed the continuing objection issue and appreciate having it raised. Like you, we may have dealt with it implicitly.

Jim, did you want to comment?

MR. ROBINSON: I was just going to say, I had some concerns about extending Luce, as well,

but, somehow, I seem to feel like it's okay now.

[Laughter.]

CHAIRPERSON SMITH: It's funny how one's perspective changes.

MR. ROBINSON: It grows and matures.

CHAIRPERSON SMITH: Does anybody on the Committee have any questions of Professor Duane?

[No response.]

CHAIRPERSON SMITH: Professor, thank you for your thoughtful comments and for your written materials, which were very helpful.

MR. DUANE: I appreciate the time. Thank you.

CHAIRPERSON SMITH: Mr. Smoger is here now, is that correct?

MR. SMOGER: My name is Gerson Smoger and I am a last-minute substitute for the President of the American Association of Trial Lawyers of America, Mark Mandell. Mark has multiple things at multiple times and wanted to be here and just contacted me to ask me if I could come here, knowing that I had written one of the amicus briefs

in the Kumho Tire case that were due, I guess, on Monday. This Committee has prepared comments from ATLA. I happen to practice law in Dallas. I have my practice headquartered in Texas and California.

I'm going to digress from the prepared comments and just go into some details of the note and the intro. The basic thrust of ATLA's position is that--and I am only here to talk about Rule 702--is that Rule 702 should not be changed and that there's no need for it, nor does it state what we believed that the Supreme Court had to state in Daubert.

Now, one of the aspects of the action items for Rule 702 was to say that the intention was to conform Rule 702 to Daubert, which is really a tautology in reading the Daubert decision, because in Daubert, the Supreme Court said they were conforming the opinion of expert testimony to Rule 702. I mean, that's the whole thrust, that the 702 overrule--we're interpreting 702 and now we're back, we're saying now we've got to change 702 because you said this. So we really don't

think it's necessary. The Supreme Court has already spoken.

This is especially true given the fact that, essentially, the changes to reliability, which is by its nature a very nebulous concept in the rule spoken goes to the extensive Advisory Committee note, which essentially takes a laundry list of different cases and says, this court said that evidence can't come in for this basis and this court said it can't come in for this basis. But I think we should look closer, because a lot of those decisions are sui generis and if we make them part of the Advisory Committee note, or if this Committee makes them a part of the Advisory Committee note, then some severe havoc could be wrought where the facts aren't exactly as presented in the case that gendered those notes.

Now, before I go into the notes themselves, and I think that the reliability aspect really, and this is the real thrust of ATLA's position, is that the determination of testimony--I mean, we have to go back and say, who is usually

the proponent of the expert witness testimony? Who needs it more? Well, it's clearly needed more by any party bearing the burden of proof, which is why it's an issue for ATLA, which is why it should be an issue in all criminal settings for the prosecution. That's where the Daubert cases have come up probably more than anything else, is in criminal, though that's not my field.

But in any case, whether it's antitrust or contract, the person bearing the burden of proof is the one that requires expert testimony usually more, and, essentially, the reliability aspects of this place the judge in the determination of the expert witness testimony, and if we assume that in this day and age very often the predicate for getting past a summary judgment is that an expert witness will testify to a proposition, then we're really making the judicial system the judge part of the judicial system, the trier of fact and taking that away from the jury.

CHAIRPERSON SMITH: But didn't Daubert in making the trial judge the gatekeeper basically

give us a responsibility that we now have to meet?

MR. SMOGER: I don't think that Daubert ever changed that responsibility. The trial judge was always the gatekeeper to the extent that 702 set requirements. So Daubert only used the word "gatekeeper".

Now, there are certain bare minimums. The trial judge always had to say that this person was qualified to testify, and in any trial court, when you brought forth an expert witness, the first thing you do is lay a predicate for his qualifications. At that point, the trial judge had a gatekeeping function of saying that this person is not qualified to testify by his training or experience. That was a gatekeeping function.

The second thing, the predicate for any testimony, was to say that the relationship of his qualifications went to an issue in the case, and if it was felt that it didn't go to an issue of the case, the trial judge could say, no, it does not and this person can't testify.

The third predicate was to say whether

expert testimony is necessary for the point that's being raised, and there were a number of decisions on that, and again, a gatekeeping function. So we're not talking about whether there is any gatekeeping function. We're talking to the extent of that gatekeeping function.

Now, Daubert itself went to a specific, judicially-mandated addition to 702, which was the Frye rule, and spoke to whether that was an acceptable additional gatekeeping function. The court in Daubert said it was not. It overruled Frye, said that 702 was more liberal than Frye, and then set up the factors, which we believe were gatekeeping factors for novel scientific evidence or novel evidence. So the predicate of Daubert was to say, here is fraud. This is one of the gatekeeping functions.

We think that when 702 came into effect, it overruled Frye. Now, what do we have in its place? What do we give guidance for things that are novel? And quite predominately, if one looks at the case history, it was toxicological and

epidemiological testimony. There was a whole long list of cases that had difficulty in the admission of that type of testimony, and if you look at them, probably half of them related to the subject of Bendectin, which was the subject of Daubert.

But there wasn't very much controversy at all in the normal, everyday, expert testimony, engineering testimony, which is the issue of Kumho Tire. That was not controversial before Daubert and it was only in the struggle of the courts to interpret Daubert and to see what the breadth of it, because the Supreme Court left it ambiguous, which one assumes that they will tighten up in a decision in Kumho Tire that has created a plethora of decisions in the last five years that never existed in the 50 years before.

MR. JOSEPH: Well, Mr. Smoger, your position is that Daubert only addressed scientific testimony. Then isn't that inconsistent with your earlier suggestion that since Daubert was merely interpreting the rule, there was no need to conform the rule to Daubert? Wouldn't that be necessary in

order to make it clear that the basic principles of Daubert do apply to all kinds of testimony?

MR. SMOGER: Well, I don't think it does apply to all, and I didn't--

MR. JOSEPH: That's a different issue.

MR. SMOGER: I didn't mean to say that it was scientific testimony. I think it was applying it to what Frye would have covered before. The problem that the Supreme Court faced was Frye.

MR. JOSEPH: So that's even narrower.

MR. SMOGER: It's novel testimony, and I don't know if you--if one calls the polygraph test, which is the original purpose of Frye, scientific, or one calls it a technique that was novel, then quantitative electroencephographs, there's some question in whether that technique is a novel technique or an accepted technique.

So I really viewed it as, in my view, there's two aspects that were of concern to the courts. The first aspect was, do we have some type of test that we can predicate a finding on and is that test so not accepted that we are afraid to let

the jury see the results of that test? That was the lie detector scenario. Thermograms is another scenario for where a number of courts said that would not be admissible because we don't trust the results of the test.

The other aspect that went into novel was when a scientist interpreted the data or the studies of other scientists, which were predominately toxicology and epidemiology, then epidemiologists never said, I looked at this person. He's my patient and I viewed him. What that person said is, I'm trying to interpret studies of others, and there was some difficulty in dealing with that.

But there was never a difficulty dealing with the person who testified from their personal experience. In Kumho Tire, the person that's seen thousands of tires, or somebody that has done the engineering for something, a policeman that saw a scene at an accident and testified as to speed. That was not the thrust of the problem. So I interpret the problem not as being novel evidence,

and the word used, "scientific", because it mostly came up in the scientific parameter.

MR. JOSEPH: Well, that was what the court was interpreting--

MR. SMOGER: Yes.

MR. JOSEPH: --the word "scientific".

MR. SMOGER: Yes, and that was, because it was talking about epidemiological evidence at the time in the Bendectin case.

One of the problems is the process. Now, the former process, and this is what I view as a very large problem and it's in the note, I think, at 193, the prior process that we went through in the courts had a presumptive admissibility for expert testimony, and the mechanism--in conformance with the liberal thrust of the rules. And the mechanism that we went by for that presumptive admissibility is, at first, the person would be qualified. Then the court would say that the testimony is germane to the subject matter. Then, if the opponent of the testimony wanted to come forward and object to that testimony, then they had

the burden.

And if we look on, I guess it's 123 in here, it cites, I think, 104, and it says that the burden is on behalf of the party that's bringing forth the testimony and to look at what, I think, havoc that will wreak, because if the burden is always on the person that's putting forward the testimony, then all that is necessary is a notice of a Daubert challenge, which is going on in a number of circuits, I think particularly the Third Circuit.

So once that notice is there without any substantiation behind the notice for any reason, to say, here is our notice, we have a problem here, and we notice we want this reliability. Well, what happens then? The proponent of the testimony has to prepare the affidavits or go through whatever process, but now they have the burden. So it's, in one sense, extremely costly. I think it would be malpractice not to make a Daubert challenge to every expert in every case because there's no downside to it in the way it's written.

CHAIRPERSON SMITH: I would argue that there is. I mean, if somebody made a Daubert challenge, I think, to your typical trial judge for an orthopedist, for example, I would think sanctions would be quick to follow.

MR. SMOGER: It is being done. It is being done on soft tissue, saying that there is no real evidence of soft tissue injuries related to an impact of a certain amount. So the orthopedist says, this injury, I examined the day after, and then they're saying that doesn't conform to the testing because we have testing authority that says that you can't have a soft tissue injury for an impact of less than X miles an hour. So that is happening, though given the parameters I've just stated.

If you get into a complex area, why not make the challenge, and then the evidence has to be put forward by the proponent of the expert. It's a wonderful opportunity for free discovery and it puts no burden on the one changing it.

JUDGE SHADUR: Oh, come on, now. Rule 26

has made that discovery just garden variety right from day one. The drafters of Rule 26 have said with some optimism that, very often, the need for the report may obviate the need to take the deposition to begin with. So if any lawyer has permitted himself or herself to get into the case and get surprised by expert testimony, that lawyer is really--ought to have the premiums paid up for the coverage.

MR. SMOGER: I don't think that the-- though I commend aspects of Rule 26, I don't think it's been as broadly followed to the full extent of all--

JUDGE SHADUR: You're lucky you practice in your district and not mine.

[Laughter.]

CHAIRPERSON SMITH: Mr. Smoger, your time is up, but we've taken a couple of minutes from you, so I'm willing to give them back to you now if you would like.

MR. SMOGER: I didn't get to the aspects of the notes, but if add the additional five points

that we have--I think that they were added to the notes, and we throw in things that are--the normal thrust of cross examination, does an expert--is his opinion created for the purpose of testifying? Well, that's always going to be cross examined. In almost any engineering case, the engineer, unless he is the designer of that particular piece and he's applying his engineering expert [sic], of course his testimony was developed for the purpose of testifying. But is that singularly enough, which the note might indicate, for his testimony to be thrown out?

If we looked at all the factors in 124 and 125, that's where I said that they're sui generis and I won't go into them to the extent I was, that we can see that what we're doing is giving an unbridled opportunity to say that these experts can testify without really any parameters to it.

And when we take that with Joiner, with the Joiner decision, that what I view as a summary judgment--in effect, when experts are told that they can't testify, we're really talking about

summary judgment--when Joiner said that that can only be reviewed on an abuse of discretion basis, then we're really changing the terms of summary judgment as we liberalize the ability for courts to exclude expert witness testimony because the court of appeals don't have the same discretion in reviewing that decision.

I thank you.

CHAIRPERSON SMITH: Thank you. Are there any questions from the Committee of Mr. Smoger?

MR. BROUN: Can I take a minute of his time?

CHAIRPERSON SMITH: Of course.

MR. BROUN: As I understand your position, Mr. Smoger, it is that the best thing for this Committee to do at this point is nothing and leave the matter for judicial resolution, is that basically your position?

MR. SMOGER: Absolutely, and particularly since we know that judicial resolution is going to come shortly.

MR. BROUN: Well, judicial resolution, at

least in the Kumho case, as to that aspect of it, will come shortly. But none of the trends, at least, in the case law since Daubert has picked up on the points that you're raising. I understand the points that you're raising and I understand your concerns about it, but certainly the trend of judicial resolution of this--I have no way of knowing how the Supreme Court is going to come out on the Kumho case, but certainly the trend of all the lower court cases has been toward a more restrictive use of expert testimony.

Furthermore, the concern that I would have is that leaving the matter for judicial resolution won't leave the matter for judicial resolution, it'll leave the matter for Congressional resolution. I don't know if you're familiar with the proposals that have been made by Congress at this point. I'd be interested as to whether you would prefer those proposals as opposed to the ones that were proposed by the Committee.

MR. SMOGER: Now you're asking me to make a political assessment of this Congress.

MR. BROUN: Yes.

MR. SMOGER: I would say, though, that it's not as clear. The Second, Sixth, Seventh, Ninth, Tenth, and D.C. Circuits have all said that it doesn't--all have decisions saying that Daubert does not apply outside of the scientific setting, so--

MR. JOSEPH: The Seventh Circuit--

MR. CAPRA: The Ninth Circuit said the Daubert factors don't apply. The gatekeeping function does apply and should be applied flexibly to not scientific--

MR. SMOGER: The Ninth Circuit said both. They have said it didn't apply and they have said it does apply in certain circumstances. But there have been decisions out of each circuit, and I shouldn't say that the circuit in general, but there's a decision out of each circuit.

So, obviously--and, obviously, the reason this Committee's taking it up is that there's a struggle that's going on in all of the circuits with how to handle this, but I think that,

hopefully, there'll be much more guidance when the Kumho case gets decided and maybe that will lead some guidance to Congress, which I can't even guess as to what they might do. So I'm not going to even touch that question.

MR. CAPRA: Well, the current proposal requires that expert testimony not only satisfy the Frye test but also satisfy the Daubert factors. So, essentially, that proposal that's in Congress now is more strict than the rule that you have before you.

MR. SMOGER: In the interpretation of some of the courts, they are much more restrictive than Frye and say that Frye alone, and they've gone back and almost said that if it doesn't fit within the scientific community, and I think it's in your notes, that the vast majority says on one side, then that was a basis for admissibility. So some courts have incorporated Frye into the factors.

MR. JOSEPH: Well, that's a factor in Daubert.

MR. SMOGER: Well, it is, but the question

is whether--the difficulty is the flexibility used with which to interpret the factors, and there are courts that are saying--are basically making the factors immutable and saying there's a check-off list and unless you fit all these factors, you can't testify. That's the difficulty, and they're not using the flexibility that the Supreme Court stated.

JUDGE SHADUR: Of course, one of the purposes of this proposal is to get rid of that degree of inflexibility and to make it plain that although there's a gatekeeper function, it's variable, obviously, depending on the nature of the testimony. There have been some courts, you're quite right, that have gone on to say, look, unless there's peer review, which is nonsense as applied to a great many areas of evidence, it's not going to get in.

Well, we want to cure that problem, in part, by making it plain that what we're doing is to extend the notion of gatekeeping but to make it clear that the gatekeeping function is not that

Animal Farm is at work. Some areas of testimony are more equal than others. So the criticism based on what some courts have done is precisely what, at least, our Committee has sought to do in connection with the proposed revision.

MR. SMOGER: Thank you.

CHAIRPERSON SMITH: Thank you. Our next speaker, is it Mr. Katriel? If I'm mispronouncing your name, please feel free to correct me.

MR. KATRIEL: That was close enough. Thank you. Madam Chairperson and members of the Advisory Committee, good morning. It is my pleasure to be here before you this morning to comment on the proposed amendments to Federal Rule of Evidence 702 being considered by the Committee. I thank you, of course, for accommodating me and granting me the opportunity to be heard on this important issue and to present the views of the Evidence Project on this matter.

While I come to this table as an attorney, my thoughts on the matter of expert evidence in general are shaped by the prism of my experiences,

those experiences, which include a technical and scientific background, as I hold undergraduate degrees in applied physics and in biomedical engineering, and a graduate degree in biomechanics, and, moreover, an experience which includes testifying myself as an expert witness in the foregoing disciplines in some 50 trials across the country, as well as numerous other expert depositions and arbitrations.

Therefore, it is not surprising to me, at least, that I take particular interest in Article VII of the Federal Evidence Code dealing with opinion testimony and in Federal Rule of Evidence 702, in particular, dealing with expert evidence that is premised on scientific, technical, or other specialized knowledge.

That last point, what Rule 702 actually addresses, brings me to my first substantive point regarding the proposed amendments to Federal Rule of Evidence 702. Rule 702, though currently structured as a single rule with no subsections or subheadings, actually encompasses two distinct and

what I would term independent points, one, the qualifications of the actual testifying expert witness, and two, the reliability of the principles, scientific or otherwise, that underlie the proposed expert testimony.

And that these two points are discrete and distinct, independent of each other, can easily be confirmed by noting that proposed expert testimony can be excluded on any one of these two grounds. That is, the trial judge, as gatekeeper, may find that the reliability of the underlying methodology, or the methodology underlying the expert evidence, is reliable but merely that the witness being offered does not possess the qualifications to testify. Or, conversely, the judge may find that the witness being offered is the most knowledgeable person on the subject matter being offered but merely that the reliability of the methodology that that witness used has not merited sufficient reliability as to warrant admission into evidence.

MR. CAPRA: Might the judge find that the more qualified the expert, the more likely it is to

be reliable?

MR. KATRIEL: That may or may not occur.

MR. CAPRA: Didn't that occur in, for example, the Third Circuit in Paoli and in your own circuit in the--it's not the Amberzini case, it's the other case where the court said this person was a very qualified expert and, therefore, we basically give them deference in terms of their methodology because you don't get to be so highly qualified unless you have a sound methodology. So aren't they actually more related than you say?

MR. KATRIEL: I do not argue that there is a sort of a barrier between the two that is solid and uncrossable between the two, but I do believe that they are two discrete points. In fact, the typical challenges that are done to expert testimony can be characterized as voir dire, which goes to the actual qualifications of the witness without touching the discipline, or a Daubert type challenge, which goes to the discipline.

So what we would propose is a structural change, not a radical change, as our first change,

a structural change in the composition of the rule, where the rule would be split up into two discrete parts or into two separate rules, with one rule addressing the standards of qualification for the expert, which essentially would leave those standards unchanged, and one which would address the Daubert type issues, if you will, and that is--

MR. CAPRA: What would be the benefit of a structural change?

MR. KATRIEL: Well, I think it would be the same type of benefit that this Committee deemed would be the benefit when it made the changes, the structural changes to the residual exceptions to the hearsay rule when it moved the residual exceptions from Rule 803(2)(4) and 804(b)(5) to a single residual exception under Rule 807, a type of housekeeping to clean that matter up.

I think, however, here, and when the opinion testimony and expert evidence is at stake, the matters are even more prone to confusion because you're mixing now the qualifications of the expert with the methodology, and as you say, those

two are not always distinctly separate, they're not always distinctly interrelated. You have--

MR. CAPRA: But the justification for the Rule 807, as I understand it, and I was not the reporter at that time, was that the way the rule was structured, you couldn't add new hearsay exceptions unless you got 803(2)(4) and 804(b)(5) out of there. So there was a need for that structural change, and I just wonder if that need exists in this circumstance.

MR. KATRIEL: I would argue that, as a housekeeping matter, it does. I would argue, also, that under 803(2)(4) and 804(b)(5), I think that one could argue that that wasn't necessarily the case, that you could always argue, add other hearsay exceptions but simply put them under the guise of a different rule number. I mean, if one wants to get creative about these rule proposals, then I think one can find a way.

But my point is that as a structural matter, it would make more sense to recognize what is really out there, that there are two issues that

we are dealing with. One is the witness's qualifications and the other is that we are dealing with the reliability of the underlying principles and methodologies and we should treat those two as two distinct animals.

Indeed, I would, in looking back at the Daubert decision itself, one should recall that during the oral argument and in briefing before the Supreme Court of that decision, one of the initial issues that the litigants and the court had to grapple with was whether Rule 702 was, in fact, the proper rule to address the subject matter or whether Rule 702 was only a general type of language that addressed whether the qualifications of the expert were at stake.

Having addressed the structural change that we proposed to Federal Rule of Evidence 702, I'd like to move on to sort of substantive change that I see with regard to Rule 702, and in particular to address some of the proposed amendments.

The proposed amendments to Rule 702 being

considered now add that as a precondition to admissibility, it must be shown that, one, the testimony is based upon reliable facts or data; that, two, the testimony is the product of reliable principles and methods; and three, the witness has applied the principles and methods reliably to the facts of the case.

The Committee note following the proposed amendment indicates that the proposed rule, while affirming the Daubert premise of the judge as a gatekeeper, provides some general standards that the trial court must use to assess the reliability and helpfulness of the proposed expert testimony. Yet the actual text of the proposed rule fails to address two key points, in my opinion. One is, what is meant by reliable or reliably, or stated otherwise, whose definition of reliable is to be applied in making that finding? And two, by what legal burden must the general standards alluded to be shown by the proponent of the evidence?

Addressing these two points, in my opinion, is crucial to prevent Rule 702 from

becoming an uncalled for, insurmountable obstacle to the admission of a significant amount of expert testimony that should rightfully be heard by a jury. If no legal standard and definition is provided for in the rule, courts will be all too tempted, as they have, to equate reliability for admissibility in the courtroom with scientific acceptance, an exercise that would, in effect, revert us back to the days of Frye, despite the Supreme Court's shunning of that "austere" standard by the more liberal thrust of the Federal Rules of Evidence.

By way of example, in toxic tort cases, an epidemiological finding may not be deemed to be scientifically conclusive unless it can be made with a confidence level exceeding 95 percent. Now, if that standard of confidence were imported into the Rule 702 calculus, then a proponent of such expert testimony would be faced with the prospect, the perverse prospect, I would say, of having to make a showing for admissibility by meeting a burden of greater than 95 percent in a case where

the ultimate burden of persuasion on the ultimate issue before the case was a preponderance of the evidence standard, i.e., a burden of persuasion of 50 percent plus one. That result is simply logically untenable and would result not only in the unwarranted exclusion of much evidence, but would mean that a finding of admissibility would trump the ultimate finding of the ultimate issue of the whole case.

To solve that problem, the Evidence Project has proposed grafting an explicit legal standard onto the text of the rule. That is, trial judges would still be charged with being the gatekeepers but would now have a legally cognizable standard to guide them in making that decision.

CHAIRPERSON SMITH: Isn't there already a presumption, really, in the Rules of Evidence that judicial determinations under those rules are in a preponderance standard?

MR. KATRIEL: That brings me to another point. The Committee note addressed that the finding would be under rule 104(a), and, hence,

citing Bourjelais v. United States, it said the preponderance of the evidence would govern. If that is the position of the Advisory Committee, my point would be that it should be grafted onto the text of the rule.

MR. CAPRA: Is there any other rule which contains such a grafting?

MR. KATRIEL: I think there is. If you look at Article IX which is essentially what we argue this is--

MR. CAPRA: Not a preponderance standard, though.

MR. KATRIEL: No, but it is a standard, and we could argue about what the standard should be, but--

MR. CAPRA: But if I'm not mistaken, the only place in the rules which contains burdens are those which are not the preponderance standards, like 104(a), 901, correct?

JUDGE SHADUR: Three-oh-one.

MR. CAPRA: Three-oh-one being another.

MR. ROBINSON: One-oh-four-B.

MR. CAPRA: Oh, excuse me, 104(b). Sorry. So 104(b), 301, 901. Those are the three places where there is an explication of the burden of proof. None of them are preponderance standards, so what conclusion might one draw from that?

MR. KATRIEL: Well, I suppose that rather than let one draw a conclusion from it, one can explicitly state it in the rule. But my point is that where you have--

MR. CAPRA: But if you state it in this rule, what does that do to all of the other rules where it's not stated?

MR. KATRIEL: I don't think that there's-- I think that we have Rule 104(a) and 104(b) and the problem with scientific evidence is that there has been some debate as to whether 104(a) or 104(b) should govern. Now, granted, the court resolved that in Daubert by stating that it should be under 104(a) --

MR. CAPRA: But your point is not what the standard of proof should be. Your point is that it should be in the rule.

MR. KATRIEL: Yes.

MR. CAPRA: Now, if the standard of proof is a 104(a) standard, why put it in the rule? Doesn't that create a negative inference about all the other evidence rules, or do we have to go back and put it in all the other evidence rules?

MR. KATRIEL: I don't think that it creates a negative inference because--

MR. CAPRA: Like, for example, 803. Shouldn't we put it in all, that the proponent has the burden of showing that the person's under the influence of a startling event, that the statement is related to the event. Should we go back and do that?

MR. KATRIEL: I think that has been resolved by case law.

MR. CAPRA: Well, so has this.

MR. KATRIEL: Except that now you're changing the rule that that case law addressed.

MR. CAPRA: But my point is, if you change this rule and put in the standard of proof, don't you have to go back and change all the other rules?

MR. KATRIEL: I'll leave that to another day.

[Laughter.]

JUDGE SHADUR: But we can't.

MR. KATRIEL: But my point here is that this is different because unlike hearsay exceptions, there are here two parallel standards. There is the scientific standard, which sometimes commands and requires confidence levels of 95 percent and higher, and there's the legal standard, which may command something as low as a preponderance of the evidence standard.

That simply doesn't exist in the parallel analogy of hearsay exceptions, and because of that potential for confusion, an explicit drafting of the requisite standard is called for in this case, given the circumstances that are present here. Those are simply absent in the parallel analogies that you have mentioned.

Now, what that would do to the other rules is a matter that I would leave to your discretion as to how to handle what you perceive would be a

confusion on that.

I think that once one recognizes that the Committee note following that rule basically endorsed a Bourjelais type finding of Rule 104(a) preponderance of the evidence standard, if that were to be grafted onto the rule itself, then basically the proposals of the Evidence Project and the proposed amendments being considered by the Committee are not that far apart.

Our main objection is that judges, trial judges, should be given the guidance explicitly in the rule to make those determinations because failure to do that results in what we have seen today. That is, judges essentially are all over the board in discerning how to make decisions about the admissibility of proposed expert evidence that involves--

MR. BROUN: Has any judge, to your recollection, used anything other than a preponderance standard in dealing with this issue? Has that even been a problem?

MR. KATRIEL: Well, I think it has been a

problem and that problem may very well be masked because judges do not articulate what standard they're using. They go through the factors of Daubert. They say it's been subject to peer review or it's been subject to publication, it's subject to falsifiability, and, therefore, I let it in. But how convinced must that judge be before making that determination is the key point, and on that point, typically, opinions are silent.

Certainly, the ones that endorse a 104(a) or that follow a 104(a) type analysis on occasion put it there, but the ones that we ought to worry about are the ones that don't mention it, and particularly the ones that don't mention it and then keep opinions out. If they are led to keep opinions out because they feel that scientific conclusiveness has not been established, then, in fact, we are masking a preponderance of the evidence standard by a scientific admissibility standard, which is much higher, and that is the problem that we perceive.

Having addressed the substantive and the

structural changes to Rule 702, that is the bulk of my remarks, and unless you have any further questions, I'd be happy--

CHAIRPERSON SMITH: Actually, your time is up, but we did use some of your time, so I'm going to give you an extra few minutes.

MR. KATRIEL: In that last minute, I would merely like to refer the Committee to a judicial survey that the Evidence Project itself sponsored and conducted, wherein we sent surveys of questions dealing with these rules to various Federal judges across the country to gauge their reaction. The results of those are cited in the written submission that we filed before the Committee and I would commend the members of the Committee to that.

MR. CAPRA: How many respondents did you get?

MR. KATRIEL: We got different responses to different numbers of questions. I don't know if off the top of my head, but it's in the appendix to the submission. I would refer it there. I would say that one figure that comes to mind is in the

structural change that I mentioned to Rule 702. That was endorsed by some 83 percent of the respondents.

MR. CAPRA: I guess my question is, do you think there was a statistically significant sample?

MR. KATRIEL: I think that there was a sample that was significant.

JUDGE SHADUR: Under Daubert standards.

MR. KATRIEL: I think that we got a response rate that is greater than the typical response rate for a typical survey, which my understanding is in the order of some three percent of actual surveys sent. And, moreover, I would say that we plan on making the survey an ongoing project and we would be happy to share the results of that, those ongoing results with the Committee as they become available.

CHAIRPERSON SMITH: Are there any questions? Steve?

MR. SALTZBURG: I have a question. I don't know why I get so sensitive on Bourjelais.

MR. CAPRA: Why does everybody look at

Steve?

[Laughter.]

MR. SALTZBURG: I'm letting you know, I did argue for the preponderance standard, while losing everything else.

I have a question. The concept of reasonable reliance has been in Rule 703 from the beginning, for 23 years, and it's very close to the concept that the Committee has now put in Rule 702. Now, my question is, you talked about judges having difficulty understanding the term "reliable", and I'm unaware in 23 years there's been a single opinion where a judge has expressed doubts about what reasonably reliable means under 703. Have you found any?

MR. KATRIEL: Well, I would point to Chief Justice Rehnquist's dissent in Daubert, saying that reliability is not something that is defined anywhere in the evidence code and that, essentially--

MR. SALTZBURG: In 803(18)?

MR. KATRIEL: And that judges are being

asked to take judicial notice of something that is not typically judicially noticeable.

MR. SALTZBURG: I just want to know, did you find, or did the Evidence Project find any cases where the words "reasonably relied" in 703 had caused a problem for the courts?

MR. KATRIEL: I don't know that it's been expressed in those explicit terms, but I think that the results of the decisions would speak for themselves on that point. I don't think that a judge is going to admit in an opinion that he doesn't know or she doesn't know what reasonable reliance is and then proceeds to write the opinion. If you're asking for that type of explicit determination, there's not a citation that I can give you.

CHAIRPERSON SMITH: Any other questions?

[No response.]

CHAIRPERSON SMITH: Thank you very much.

MR. KATRIEL: Thank you.

CHAIRPERSON SMITH: Our next speaker is Libby Porta. Ms. Porta?

MS. PORTA: Good morning, Madam Chair and members of the Committee. My name is Libreta Porta and I am also testifying on behalf of the Evidence Project from American University, Washington College of Law. While I was at American, I was the principal reporter for the Evidence Project. I will be addressing the revisions to Rule 703.

I want to start out by saying that my comments this morning will be brief because, although at first glance at the Evidence Project's proposals, one may consider it a radical change to the evidence rules or starkly different than what's proposed by the Committee, we would argue that, actually, what we are proposing is merely an extension of what the Advisory Committee is proposing to do to Rule 703.

The Evidence Project agrees with the Advisory Committee that Rule 703 must be revised to clarify the permissible basis for an expert's opinion and the use of that basis at trial. The Project disagrees with the Evidence Committee's proposal because it does not admit the facts for

truth. It merely allows the jury to hear the facts, to evaluate the expert's conclusion.

Under the principles of logic, however, the Project argues that the Jury cannot accept a conclusion for truth without inherently accepting the underlying basis of that conclusion for truth.

In addition, injecting a balancing test in the rule does little to remedy the current split in courts as to whether to reveal the underlying basis at all. This revision could still allow the experts to supersede the role of the finder of fact by merely testifying to a conclusion or to only part of the basis of the underlying conclusion that passes the Advisory Committee's proposed balancing test.

We would argue that a jury should not be expected to reach a conclusion on a limited set of facts that the expert would not reach if limited to those same facts. The Evidence Project proposes that the Advisory Committee adopt a rule that limits the use of inadmissible evidence by imposing a tightened judicial screen on such evidence. The

finder of fact would be permitted to hear and consider the statements in the same way as the expert. As a result, all of the rule conflicts currently within Rule 703 and perpetuated in the Committee's current proposal would be avoided.

The Project's proposal, however, would not preclude the use of all hearsay statements that are not currently admissible under the Federal Rules hearsay exceptions. We propose the creation of a new hearsay exception that would permit the expert to demonstrate the reliability of hearsay statements used to reach the conclusion.

A similar problem presented itself under the common law when doctors testified to medical diagnoses and part of the basis of their conclusion were hearsay statements by patients, and when the Federal rules were promulgated, the Advisory Committee at that time created a hearsay exception for those statements, recognizing that a doctor can demonstrate some inherent trustworthiness in statements from patients for treatment.

MR. CAPRA: Can I interrupt for just a

second? Does your proposal deal with anything other than inadmissible hearsay? In other words, an expert might be relying on all sorts of inadmissible information. It may be inadmissible because of a hearsay rule. It might be inadmissible because of the character evidence rule. A psychologist might rely on character evidence that would not be admissible. It might be inadmissible because of the subsequent remedial measure. How would your proposal deal with those uses of inadmissible evidence?

MS. PORTA: Well, in a similar fashion, the expert can demonstrate--if the expert can demonstrate to the court that there was something in that particular type of evidence that was relied on that would then demonstrate that, aside from the rule that prevents it from coming in, in this particular instance, it should come in for the jury because it doesn't have the harm. The balancing test is in place--

MR. CAPRA: There wouldn't be anything in the rule that would permit that, though, would

there? I mean, you would need an exception to subsequent remedial measures. You'd need an exception to the character. You're creating a hearsay exception, correct?

MS. PORTA: Yes.

MR. CAPRA: That takes care of one aspect of the problem. What would you do with the other aspect of the problem? The expert couldn't just say, well, I'm relying on a subsequent remedial measure and, therefore, it should be admissible.

MS. PORTA: Well, if the expert is relying on a subsequent remedial measure and testifies to the conclusion and--

MR. CAPRA: I think the way your proposal would come out is that the expert couldn't testify-

MS. PORTA: Yes.

MR. CAPRA: --because they'd be relying on inadmissible information.

MS. PORTA: Yes, and perhaps certain experts should not testify at trial because trial lawyers and trial judges will agree that,

currently, experts can easily be used as back doors to get information that's stopped from other Federal evidence rules from the trial. There's a reason that those measures are kept out and--

MR. CAPRA: So you think it's better that they don't testify as opposed to testify without declaring their basis?

MS. PORTA: If they're relying on something that's inadmissible, yes. If that's the basis of their conclusion, then yes, the Evidence Project would say that it is better that those experts don't testify merely to a conclusion and usurp the role of the finder of fact.

CHAIRPERSON SMITH: Where would this reliability be demonstrated, in a 104 hearing or in front of the jury?

MS. PORTA: The reliability would be demonstrated to the court. It could either be done through a motion limine--as was pointed out earlier, in civil practice now, the case is fairly clear before you reach the trial door. So it could be addressed in a motion in limine. It could be

objected to just as any other. If you know that the expert will be relying on hearsay, you object to the expert testifying.

But once--under the Advisory Committee's proposal, the trial judge is going to have to perform a balancing test with these otherwise inadmissible facts and the Project submits that the same analysis that the trial judge is going to have to go through is to look at the inherent reliability of these facts. What would make these facts probative versus prejudicial?

The Project submits that the logical extension of such a balancing test is once you probe, once you get from that expert why these facts are probative, why they are inherently reliable, have the expert demonstrate to the court that there is a substantial guarantee of trustworthiness to these underlying facts, then there's little reason not to allow the jury to hear the reliability of the facts and to consider those facts for truth. This would return the role of the expert to an advisor to the finder of fact, as the

expert was under the common law.

And as I said, my comments are brief this morning. I would welcome any questions, and I would actually, just on a second note, clarify the answer to Professor Capra's question earlier. I believe there was a five percent return on the Federal Judicial Survey, and of those, I believe it was Article III trial judges as well as magistrates, we had about an equal return from both, and 60 percent of the responses indicated that the judges and magistrates agree that the jury should have the same facts that the expert has. We would submit that there is a simple way to do it. It's not a radical extension of what the Committee is actually proposing to do.

If there are no questions, I thank you for your time.

CHAIRPERSON SMITH: Thank you. Any questions of Ms. Porta?

[No response.]

CHAIRPERSON SMITH: Ms. Porta, thank you very much.

The next speaker on the agenda is Professor Laird Kirkpatrick. Professor?

MR. KIRKPATRICK: I appreciate the opportunity to be here this morning. I currently serve as Chair of the Evidence Section of the American Association of Law Schools, which consists of all the evidence professors at the American law schools, although I want to make clear I'm here in my individual capacity.

I will say on behalf of the section that the section strongly endorses, or many of its members have worked to help create the Evidence Advisory Committee, signed petitions. We're very supportive of the creation of this Committee and I think the membership of our section very much applauds this as the proper way to make new evidence rules a deliberative process of distinguished judges and law professors as members and an able report. I think, with public hearings and careful deliberation, I think this is exactly how amendments to the Federal Rules should be made and I think that's the sense of the membership of

the Evidence Section.

I have comments on most of the rules here this morning, and I won't go over all the details of my written comments.

I would first say, with respect to Rule 103, that I strongly agree with the Committee's decision to not require renewal of the objections. I am concerned that by using the word "definitive", the Committee may succeed in its objective in only about 60, maybe 80 percent of the cases, because I think there will be continuing uncertainty as to what is a definitive objection. I think there is inherent tension between what the lawyers will want to have in the record, that it is definitive, and a judge may say, well, I might change my mind at trial or I never say never, and then both sides have to worry, will an appellate court find that to be a definitive ruling.

CHAIRPERSON SMITH: If it's any consolation, Professor, we struggled mightily with that word, and if you can come up with some suggestions, we'd just love to hear them. We

finally settled on definitive because I think it's used in the Kentucky rule and apparently had not run into any trouble. "Final" was clearly not a good word to use, and so we're open to suggestions.

MR. KIRKPATRICK: I do understand the struggle, and I'll just throw out two thoughts to you. One, you might want in your Committee's note to encourage the self-labeling process, to say self-labeling by a trial judge that is definitive, even though you've already noted that that doesn't bind the judge from changing his or her mind at trial. But you could endorse the idea that self-labeling is enough to preserve the record here.

You could also consider--this is going one step further--actually having the rule give the authority to the trial judge to say that the requirements of 103 are satisfied. Right now, the way it's worded, you, in essence, are giving the power to the appellate court to decide whether the record is made, and so the trial judge says certain things, the lawyer tries to get the record settled. But in other areas of the law, the trial judge has

power to say, this is final for purpose of 103. You've made your record. You might want to go so far as to give the trial judge that power.

But those would be my two suggestions, but I think right now, you're going to have a struggle where 60 or 80 percent of the time, it will seem settled, but you're going to have 20 to 40 percent of the time where lawyers feel, gee, I really--to be absolutely certain, I'm going to have to take trial time and make this offer of proof a second time or make the objection again.

MR. JOSEPH: All they have to do is ask.

MR. KIRKPATRICK: I'm sorry?

MR. JOSEPH: All they have to do is ask the judge.

MR. KIRKPATRICK: Well, but what I'm afraid the response will be is, yes, I think it's final for now unless something happens at trial, and is an appellate court going to say--

MR. JOSEPH: It doesn't sound very definitive at that point.

MR. KIRKPATRICK: Is that definitive or

not? I don't know. I mean, I--

MR. JOSEPH: Professor, all we're trying to do is identify it so the lawyers at least are on notice that they could identify it to the court and see if they can nail it down.

MR. KIRKPATRICK: Well, I think you do the right thing by saying the burden is on the lawyer to try to nail it down, but what if you've got a resistant judge? I'm just saying, I think you'll succeed 60, 70 percent of the time.

MR. JOSEPH: There are judges like that.

CHAIRPERSON SMITH: None on this Committee.

[Laughter.]

MR. KIRKPATRICK: So those would be my suggestions with the first part. I think it could be tightened up a little bit more, maybe in the notes, maybe in the rule itself.

On the second part, I do disagree with the second sentence. I am from one of several States where our State Supreme Court has rejected Luce. I'm not asking the Committee to reconsider Luce. I

am simply saying that I don't think it needs to be codified. I think there are a number of Federal interpretations, Federal court interpretations of the Federal Rules of Evidence and I think it's dangerous to start codifying them.

To do so puts States like ours and several other States in the position that either the legislature would have to adopt this and overrule the State Supreme Court decision that rejects Luce or else have the Oregon rule, for example, that's now identical to Federal Rule 103, now be inconsistent, and--

CHAIRPERSON SMITH: Let me ask this, and I certainly understand the problem you're talking about from a State's standpoint, but from a Federal standpoint, not mentioning Luce at all, doesn't that leave open the probability, not the possibility but the probability, that people will then say, well, this doesn't mention Luce. It must implicitly say Luce doesn't apply anymore.

MR. KIRKPATRICK: Oh, I think you could just say in the Advisory Committee notes that this

doesn't overrule Luce, there may be a need in order to show that the error affected the substantial rights of the party to have the testimony on the record. I think that's what Luce was about, not making the 609 objection a second time but just having the testimony in the record so that you could show whether it was harmless error or not, and so you could say some States require that to complete the record, some don't.

But the only thing you are changing in the first part of the rule is just not requiring the 609 objection to be made a second time, but I don't think that overrules Luce. So I think you could put that in the Advisory Committee notes. And I think there is a real advantage of having a framework where the State rules can be the same as the Federal rules, with the basic framework, even though States may disagree with some of the Federal court interpretation.

MR. CAPRA: Well, it doesn't overrule those, but doesn't it kind of damn it with faint praise by saying we're not going to touch it in the

Advisory Committee note?

MR. KIRKPATRICK: Well, I think you should put it in the Advisory Committee notes. I'm saying--

MR. CAPRA: Well, but what you would say in the Advisory Committee note is we're not doing anything about it.

MR. KIRKPATRICK: But do you need to codify it? I mean, that's kind of just forcing it down the throats of States that don't like Luce. If they want to stick with the Federal rules, they've got to now go along with the Federal court interpretation that many courts disagree with. I'm just not sure--

MR. CAPRA: If you look to the Distinguished Evidence in America treatise, there's a lot of State rules which have a Federal model which differ in substantial degree on particular rules.

MR. KIRKPATRICK: There is variation. In my State, I would say 90 percent of our Oregon rules are based on the Federal rules. We have ten

percent variation. But I think there is some real advantage in terms of using treatises by Saltzburg and Capra and Joseph, of State lawyers being able to look to the Federal law and finding the same basic framework. But the more you start codifying Federal decisions that aren't accepted by all States, the more you're going to have variation between State codes and evidence codes and I think there's some real downsides to that.

So unless it's really necessary to do, it seems that reference to Federal interpretations of the rules should be in the Committee notes rather than codified so that States have to adopt them or risk having their codes now start deviating from the Federal rule.

With respect to Rule 404, I think the Committee's note and explanation is exactly on target of the purpose of the amendment. I do think the language you actually use in the black letter of the rule is unfortunate and over-broad.

The example I gave in my written comments that I assume you have would be a multi-count

indictment, where somebody is charged with drug dealing and then resisting arrest and assault on a Federal officer. I assume what the Committee was trying to say is that the defendant says, well, the Federal officer had a reputation of beating up people during an arrest. The government can put on evidence of the defendant's reputation for violence to kind of have a parity there. But the way it's worded, by just making reference to a pertinent character trait, a pertinent--

JUDGE SHADUR: To say the same.

MR. KIRKPATRICK: Well, you say corresponding in your advisory notes. I think that's the word to use, corresponding rather than pertinent. I think that gets the equity. That gets the fairness. But if you say pertinent, it might be pertinent to some other count rather than pertinent to the count that the defendant introduced the evidence on. So I think corresponding, which is what you use in the note, I think if you would just replace pertinent with corresponding, I think it would solve the problem.

CHAIRPERSON SMITH: What if it were the same?

JUDGE SHADUR: Literally the same.

CHAIRPERSON SMITH: Does that make it then too tight, or do you think corresponding is a better--

MR. KIRKPATRICK: I think either one would avoid the problem. I'm talking about where you get into a totally different character trait because of some other count of the indictment.

CHAIRPERSON SMITH: Sure.

JUDGE SHADUR: Yes.

MR. JOSEPH: Yes, but you're talking about a situation--it's a classic situation where the issue is who's the aggressor, that kind of thing. Who's got the violent personality? But what if it's a complimentary character trait?

I mean, putting aside the sexual connotation, because that's a separate kind of rule now, anyway, but in a financial case where the claim is that there was some kind of a financial fraud and the victim was allegedly lulled into it,

the character trait the defendant wants to put on is that this is an aggressive investor and the corresponding character trait is that this is a guy that cons people. You know, it may not be the same. I don't know what corresponding means. Maybe corresponding works, but it can't be the same, because it wouldn't have to be the same, depending on the nature of the offense.

I also think that your example is an excellent example in the materials that you submitted, and I don't know if corresponding does or doesn't work. We tried to use words that are otherwise used in the rules, and that maybe we're being too limited in doing that.

MR. KIRKPATRICK: Well, I think pertinent is just going to be over-broad in this context. I realize you got that from the rule itself, but I think the word--

MR. BROUN: Corresponding, in my judgment, runs into the same problem that Laird is pointing out with regard to pertinent. I am more comfortable with the same. This is going to have

limited application, I think, in the sense that it's got to be admissible under 404(a)(2) anyhow and we're talking about a very limited kind of proof, usually self-event.

MR. JOSEPH: Well, I don't want to take up the Professor's time while we debate it, but I do think that there's an issue as to the same, because I think it's too limited and I just don't know what the right word is to come up with, but I appreciate the point.

MR. KIRKPATRICK: The only other point I made in my comments on 404, although it is something, I think, is worth noting in your Committee's note, is that there's a lot of confusion sometimes when a defendant does introduce evidence of the victim's reputation for violence. Say somebody shoots a person that they thought was a drug dealer going after them for non-payment of a debt. They may put on evidence of that person's reputation for violence to show why they used self-defense, why they were frightened of this person, why they reached for their gun quickly.

That's not a 404 use, and I've seen a lot of confusion on that and State courts, of course, thinking that's a 404 use. That's simply a use where you are talking about the victim's character to show why you felt it was reasonable to use self-defense in that situation, but that shouldn't open the door. I think that goes beyond the purpose of your amendment and should not open the door to evidence of the defendant's character. So I think your notes might want to clarify that.

MR. CAPRA: Well, it wouldn't under the rule, under the proposed rule, because that would not be offered under 404(a).

MR. KIRKPATRICK: Oh, no, I agree, it wouldn't be, but I'm just saying, in your notes, you might want to head off any confusion on that point because I'm seeing confusion out in the courts, where they think that's a 404 use and I don't think it is. You may just want to make a mention of that in your Committee's note to avoid that type of confusion.

MR. CAPRA: Just for your information, I

proposed an amendment to the Advisory Committee note to take account of that, according to your suggestion, and also uses the case that you use. The Committee will be considering that at its meeting.

MR. KIRKPATRICK: Okay. Thank you.

With respect to Rule 701, I understand the Committee's concern about people using 701 as a backdoor way to get 702 evidence in, but I really think the ramifications of this amendment are fairly substantial. I think there are a lot of cases out there that would be overruled by your definition of--

MR. CAPRA: You're a spokesperson for the Justice Department.

[Laughter.]

JUDGE SHADUR: Do you want to reconsider?

MR. CAPRA: Do you want to think about that for a minute?

[Laughter.]

MR. KIRKPATRICK: I used to be an Assistant U.S. Attorney, so I understand those

issues, but there are a lot of cases where people say, I smelled marijuana, or we've got the Oregon case where somebody said they smelled a dead body. They told the judge, I was in Vietnam. I know what a dead body smells like and that was a dead body I smelled in the dumpster, but I'm sure he wouldn't qualify as an expert on smelling dead bodies. He wouldn't be a 702 expert--

MR. CAPRA: Well, wouldn't you have to establish a foundation?

MR. KIRKPATRICK: Well, but the courts under 701 seem to say, like in the marijuana cases, well, have you ever smelled pot before? They don't--

MR. CAPRA: And wouldn't that be exactly what you would have to do if they were denominated an expert?

MR. KIRKPATRICK: Well, maybe, but I think some of the opinions that have been let in, on the smell cases, for example, and a variety of others, I'm not sure the person could meet 702, especially the enhanced 702 you've got going, but they are a

lay witness who just happens to be familiar with what pot smells like. They're not an expert on pot smelling, but they're not being qualified as experts. If you want all those people to now have to be qualified as experts, I think that's, in essence, what would happen.

MR. BROUN: But isn't the difference, though, between them being qualified as experts and having a particular aspect of a witness's testimony be expert testimony? It seems to me that in all of the examples you've given in this instance, there is specialized knowledge that the person has over and above that of the average layperson, and at this point, they are using special knowledge, and to that limited extent. No one stamps on their forehead, "expert". That's not a good practice anyhow.

But in this particular instance, somebody who has the ability to smell dead bodies is using specialized knowledge, just as somebody who has enough knowledge with a narcotic drug to be able to identify it under those circumstances can be

qualified. Isn't that what's happening in this?

MR. KIRKPATRICK: It is. It's just that I think your proposal would make a major change in how that's handled, because traditionally, the courts have said witnesses with just kind of a generalized specialized knowledge, I mean, something like pot smelling or, let's say, a mother testifying that her son was insane--you might have an insanity defense case, the mother saying, my son was behaving very strangely and I think he was mentally disturbed, and then you have an expert, a psychiatrist saying he's mentally disturbed. I think your proposal will lump the mother, who has traditionally been viewed as a lay opinion witness, with the expert psychiatrist, so they're both going to be experts.

MR. BROUN: But sanity and insanity is different. A lay person can give their opinions in regard to sanity without using specialized knowledge, right?

MR. KIRKPATRICK: Well, but the mother, her specialized knowledge came from watching her

son and so forth, so that's--

MR. BROUN: But that's personal familiarity.

MR. KIRKPATRICK: Well, but she's got specialized knowledge that other people don't. It's just that I think you're going to be moving a tremendous number of cases over that used to be 701 cases and are now going to be 702 cases. The other thing I think I would predict is going to happen is a lot of lawyers are going to say, well, Your Honor, this isn't opinion evidence at all. This is just a fact. My witness is just testifying to the fact that there was a dead body there or the fact that the person was smoking marijuana.

The old fact/opinion distinction that was so prominent at common law, I think, is going to get resurrected by this amendment. The lawyers will try to avoid what you're doing here by saying it's a fact witness and not an opinion witness, and maybe we can live with that, but--

MR. CAPRA: That doesn't get you out of the requirements at all.

MR. KIRKPATRICK: Well, if it's--

MR. CAPRA: Experts testify to facts, too, in that sense. I don't think that that argument's really--that that's going to make any difference.

MR. JOSEPH: No, but it will if they're included under Rule 26 because you haven't filed an extra report.

MR. CAPRA: Well, that might be so, yes.

MR. JOSEPH: For a criminal rule, those are discoverable.

CHAIRPERSON SMITH: I think what the concern of the Committee was, Professor, is the fact that the opposite is now happening and that too many people are being moved from 702 into 701 as a tactic to avoid disclosure and/or the scrutiny of the gatekeeping function and that the Committee felt perhaps larger harm was being done in that area. Do you have any thoughts? I mean, there's a line, obviously, that--

MR. KIRKPATRICK: Well, I understand that concern, Your Honor, and it just seemed to me that maybe that could be handled better with the

discovery rules or you could put a stop to this end run some other way than what I think will be a fairly major change in evidence law.

MR. JOSEPH: Well, but that doesn't really work because of decisions like Aspen that says that these aren't experts. I mean, that's really what we're confronting, is attempting to deal with that, and the reason we used the same language as the language in 702 is an attempt to avoid the issue that you're raising, which we've discussed, and it is definitely the issue, whether that constitutes specialized knowledge, and it may in the lay sense. I don't think that the kind of example that you're giving with the mother and child would as an expert sense, but I also don't know that that's a 701 opinion.

JUDGE SHADUR: I'm sorry, Greg. Go ahead.

MR. JOSEPH: It does have these other preclusion effects because of Rule 26.

JUDGE SHADUR: Keep in mind, of course, that the distinctions we tried to make is not between witnesses but between types of testimony in

light of the fact that what is set up in 702, what is intended to be set up in 702, is a general gatekeeping requirement, which may differ depending on the nature of the testimony. So the same witness may be dealing in part with 701 testimony, in part with 702, and it's to the extent that it's 702 that the trial court is given that gatekeeping responsibility. There are all those trade-offs in this area, but that's the thing that we're essentially focusing on.

MR. KIRKPATRICK: Well, I understand the objective and it may work, but I think, especially given the enhanced gatekeeping function you're assigning under 702, there's going to be a lot of scrutiny of people that used to be able to testify as lay witnesses. Now they're going to be saying, well, that's expert testimony. We've got to handle this under 702. We've got this new scrutiny. I think it's going to be a very significant change in lay opinion testimony.

I don't know how much the Committee takes into account the fact that because three-fourths of

the States generally go with the Federal rules, follow the Federal rules, that any amendment you make has ten times the impact on State court, where there are ten times as many cases.

MR. CAPRA: Well, you may be interested to know that we're following at least three States on this. This was what generated this whole thing, is that the Delaware rule, South Carolina rule, and, I believe, the Florida rule all have these--I know you know the State cases better than I, but in each of those States, there haven't been the kind of problem that you're talking about.

MR. JOSEPH: I don't know that they have the exact language.

MR. CAPRA: No, specialized knowledge.

MR. JOSEPH: Well, they have the phrase.

MR. CAPRA: Yes.

MR. JOSEPH: They have the phrase.

MR. KIRKPATRICK: With respect to 702, I'll just be very brief since so many other speakers are addressing that. It's a broad gatekeeping function. Of your three criteria, I

think the third is the one that is going to be the most controversial or most, I think, would be perceived as expanding the gatekeeping role, and I just would raise the question, without much comment, as to whether if you were modifying the rule, whether you need the third criteria. If you have that the testimony is the product of reliable principle and methods, that partly incorporates the idea that those principles and methods were applied correctly.

So you might reduce some of the opposition that you're receiving to Rule 702 if it just had the first and the second criteria with the second being viewed as kind of incorporating the thrust of the third. So that's just one possible idea I would throw out.

With respect to Rule 703, I think the Committee clearly made the right choice with its proposed rule there. I suggested some minor tinkering with the language in the black letter law to confirm more with your Committee's note. I think the language you use in your note is probably

a little bit more apt than the language in the rule itself, so I have some minor suggestions there.

With respect to your amendment on business records, I think that this is going to generate an enormous amount of testing of the limits of the confrontation clause. Every Federal case that's been decided under 18 USC 3505 has had extensive debate, objection by the defendant on confrontation clause grounds, and I think once you extend this provision to domestic business records and if the States pick it up, there's going to be tremendous testing, or tremendous confrontation issues being raised.

I think, at a minimum, some of the confrontation issues should be commented on in your note, specifically the idea that you can't use business records as a back-door way of getting public records in on behalf of the government, law enforcement records, maybe make reference to the Oats case from the Second Circuit. But I also think not all business records satisfy the confrontation clause. I mean, sometimes courts

loosely say, well, the business records exception is a firmly rooted hearsay exception, but I think we could all think of business records that would not qualify under the confrontation clause.

Take a shoplifting case. If a shoplifting case were tried, well, here is the report from the store detective, filed routinely. They say you shoplifted on a given day. It's qualified as a business record. Here's the certificate. So the whole State's case is the certificate from the undercover detective that works at that store that this person shoplifted on that day. I think all of us would say that doesn't meet the confrontation clause that--

MR. CAPRA: But you're arguing that it would if you had a custodian come in and testify to how these records are kept?

MR. KIRKPATRICK: Well, I think what happens is because--

MR. CAPRA: Isn't it the underlying business record that--

MR. KIRKPATRICK: --since the store has to

send in somebody anyway, they now send in the store detective, or--

MR. CAPRA: But what if they only send in the custodian, which they can under 803(6)?

MR. KIRKPATRICK: Well, if they only send in the custodian, I think that might be a problem. But I think what--

MR. CAPRA: But the point is, then, your problem is with 803(6). Your problem is not with 902.

MR. KIRKPATRICK: Now. I think, again, just to give a prediction, what would happen when this gets to State courts, what you're going to see is key documents, like hospital records saying-- from maybe even a private hospital that's not covered by the 803(8)--that the person was intoxicated coming into a vehicular homicide case. I think you'll see D.A.s, State prosecutors try to avoid calling the testing lab personnel--

MR. CAPRA: But they can currently get in under just bringing in the custodian, who knows nothing about the recordkeeping, other than that

there is recordkeeping.

MR. KIRKPATRICK: But at least there is some testing about how these records were made. I mean, I think one of the reasons 803(6) has been held to be constitutional is you've got that foundation. Somebody can come in and be cross examined. Where did you get this information? What are the procedures you adopt?

MR. CAPRA: I think the cases that deal with 3505 say that it's not reliable because you bring in a custodian. It's reliable because it's regularly kept.

MR. KIRKPATRICK: But some of the advisory notes even to the original business records exception make reference to the idea of some procedural protection by you can cross examine somebody who's familiar with how those records are kept.

The analogy I would give is what if you took 803(5), the past recollection recorded, and you no longer required the person who made the notes to come forward. Right now--

MR. CAPRA: What about 803(10)?

MR. KIRKPATRICK: Well, but 803(5), I think, is the better analogy--

MR. CAPRA: Eight-oh-three-ten is a situation where the government official just simply files an affidavit that they checked the records and nothing came up.

MR. KIRKPATRICK: Well, that's a public record, though, but--

MR. JOSEPH: Isn't it addressed by the fact that the person has the opportunity to call anybody they want? The certification has to be something they get notice of in advance so the adversary process can work.

MR. KIRKPATRICK: Well, one of the reasons I guess I mentioned this as an issue is because Oregon tried to do something very similar. Our State has a provision that says the testing lab report can come in by certification to avoid the lab analysis having to come repeatedly in the court. That was challenged on constitutional grounds and the only thing that saved it in the

Ninth Circuit was the fact that if the defendant says, I want you to bring in the person that did this study, the government has to do it.

The way yours is drafted, it puts the burden on the defendant to round up the government witness. What if the person that did the lab test is unavailable at the time of trial? Should the government take the risk of loss of the unavailability of the lab technician or should the defendant? I think that's where you have your confrontation, is you've got the burden--

MR. JOSEPH: Well, I mean, isn't ultimately the burden of establishing reliability under 803(6) on the proponent in any event? And that's what the last clause of 803(6) says.

MR. KIRKPATRICK: But how much testing and reliability can there be if there's just a certificate? There's nobody to cross examine about the testing procedures or does your hospital ever make mistakes. You indicate my client had a blood sample--

MR. CAPRA: The same with 803(10).

MR. KIRKPATRICK: I'm sorry?

MR. CAPRA: The same with 803(10).

MR. KIRKPATRICK: No, but that's government records again and you're extending it not to government records, you're extending it to--

MR. CAPRA: It's an affidavit from a government official.

MR. KIRKPATRICK: I know, but I'm saying, you would be extending it to non-government entities, just any business, any private hospital, any private testing lab. So this is a much greater extension. All I'm saying is I think there's going to be, just like there's been a lot--there hasn't been that much litigation on 183505, but all the cases that have dealt with it, the defense lawyers have made a vigorous confrontation argument. The one law review that's been written on that section says it's flatly unconstitutional, the law review literature.

So I'm not saying there's anything you can do about it other than to note that there's--

JUDGE SHADUR: They all lost, I guess,

didn't they?

MR. CAPRA: Yes, they did.

MR. KIRKPATRICK: Well, but the courts did it on a case-by-case basis. They said, as applied here, these bank records from Switzerland were reliable, or whatever, but even the courts were kind of cautious to say not every business record would qualify here.

So I'm just saying there's a huge confrontation issue and I think it'll be more pronounced in State court. In the Federal courts, the Department of Justice can just issue a bulletin to the U.S. Attorneys Manual and don't push it in this situation or can put some guidance, but once this becomes part of State law and the States that follow the Federal rules, you're going to have prosecutors pushing it to whatever limit it can be pushed and I think there is going to be an explosion of confrontation challenges to it.

So to not even have that issue mentioned, to not incorporate the Oats case by reference, that this isn't a back-door way around public records, I

just think maybe you would want to have an expanded Committee note, at a minimum, dealing with this.

CHAIRPERSON SMITH: Let me ask you this, Professor. What we're really trying to accomplish is simply to avoid bringing a custodial who knows nothing about the records other than the person is in charge of the records, they open the file drawer, that's where they keep those records, the person pulled them out. The judge certainly still has the right to say, no, I want the particular technician that did this test, whatever. We're simply substituting that custodian for the declaration.

Isn't the same right still there for the judge to say, no, in this case, I want the person who actually did the test, or I want the person who actually saw the accident and made the report there?

MR. KIRKPATRICK: I think the rule, Your Honor, requires that the person called, that lays the foundation, has to be familiar with the process. So, presumably, they're subject to some

testing, that some of the purposes of the confrontation clause are met by having that person you can ask about general reliability about the records. You can't ask that of a certificate.

CHAIRPERSON SMITH: Well, but do they have to be familiar with the process of keeping the record or of actually doing the test?

MR. KIRKPATRICK: Well, they have to be familiar with the process. So it's a limited cross examination, but it's certainly more cross examination, more confrontation protection than there is when it's just an affidavit, when there's no way to ask you, does your hospital ever make--

MR. CAPRA: Indeed, courts have held that they don't even have to have personal knowledge of the process. They can get their information about the process from other people.

MR. KIRKPATRICK: But still, they can say, I've been--they have to have some familiarity that can be tested. I mean, it's not a lot, but it's more than cross examining a certificate. So I think that's part of what's made those courts that

have said the business records exception meets confrontation concerns have said it partly because there was a foundation witness there with some testing.

Once you take away that foundation witness, I think it very much exacerbates the potential confrontation challenges, so to not even have that mentioned in the Committee's notes, I just think maybe is unfortunate, given that I think there will be a lot of pushing of this particular rule in criminal cases and maybe some reference to what the issues are would be helpful in the Committee's note.

MR. ROBINSON: What's your view about it in the ordinary civil setting, though, about this change?

MR. KIRKPATRICK: I think, there, we don't have the confrontation clause applying, and I think, there, it's a desirable rule generally and the deposition procedures will take care of it. I think the real serious issue is the criminal cases where the person or the defense lawyer wants to

cross examine about was this an accurate drug test, did you really--is that my client's blood that you say had this high intoxication level at the hospital? If that person is not available at the time of the criminal trial, who takes the risk? So it's the criminal context, I think, Mr. Robinson.

MR. ROBINSON: Thank you.

CHAIRPERSON SMITH: Any further questions of the Professor?

[No response.]

CHAIRPERSON SMITH: Thank you very much for your comments and your materials.

I think we'll take a short break now, 15 minutes.

[Recess.]

CHAIRPERSON SMITH: Do we have our next speaker? I'm not sure. Oh, yes. There you are, Professor. The meeting will come to order again, please, and we'll continue with our hearings. Our next speaker is Professor Richard Friedman from the University of North Carolina.

MR. FRIEDMAN: University of Michigan.

MR. BROUN: It says University of North Carolina--

CHAIRPERSON SMITH: It does.

MR. BROUN: --and I would like to state for the record that we would be delighted--

[Laughter.]

CHAIRPERSON SMITH: It's not in my venue to make those decisions. Otherwise--

MR. BROUN: But he is a proud member of the University of Michigan.

MR. FRIEDMAN: I appreciate that. Although I'm keeping my feet below the table, I feel the need to apologize for coming here in sneakers. I very carefully got my shoes reheeled yesterday and then succumbed to the occupational disease and forgot to put them in my suitcase, so--

CHAIRPERSON SMITH: I'm sure your feet are much warmer than mine are and I envy you.

[Laughter.]

MR. FRIEDMAN: May I say, I would like to associate myself with practically all the remarks by Professors Duane and Kirkpatrick and also by Mr.

Smoger. I agree with practically everything. Let me see if I can quickly offer comments on each of these rules.

On the first sentence of Rule 103, I raised a similar concern to the one that Jim Duane raised, and I think also Laird, and I do think that that can be taken care of in commentary and I hope you will do that, and I spoke to Dan Capra about it.

As far as the definitive matter, which is not something I did address, it seems to me perhaps the best thing is to strike the word "definitive" and then to add some language saying something like, "unless the court indicates that renewal of the objection or offer of proof is necessary for this purpose," at the end of the sentence.

In other words, as I understand it, this rule is meant for the situation in which the lawyer doesn't remember--I mean, sure, if it doesn't hurt to renew the objection, you might as well. So this rule is meant to protect the lawyer who doesn't do it later, and so I don't think it's enough to say,

well, the lawyer can ask for a definitive ruling. It's a default rule, and I think it makes sense to say that unless the judge says, come back to me later, we should treat it--that effectively would be making it definitive.

On Luce, I can get pretty exorcised about this.

CHAIRPERSON SMITH: Well, you are part of a large club.

[Laughter.]

MR. FRIEDMAN: I know, and I hope the Committee appreciates it. As I understand, I mean, some of the discussion with Jim Duane was to the effect that while Luce may be bad, but we're stuck with it and so we might as well codify it. This is our best deal. I disagree. I think that's wrong.

First of all, Judge Smith, Luce definitely is within the Committee's jurisdiction in the sense that Luce was not a constitutional decision. It was a decision on the Rules of Evidence, interpreting the Rules of Evidence. Personally, as with some of the other commentators, I think the

best result would be if you said, as you did in Green v. Bach, well, we don't like the result that the Supreme Court has reached in interpreting the Federal Rules of Evidence so we're going to change the rules. But I'm not going to ask for--

MR. CAPRA: In Green v. Bach, didn't they invite us to change the rule?

MR. FRIEDMAN: Well, maybe they did, maybe they didn't, but it doesn't matter whether they did or not. You can do it, just as Congress can. But I'm not asking for the stars, just not to do something which I think would be a very bad thing.

What you are proposing is extending Luce and making this principle--putting this principle beyond challenge because the Supreme Court would not be unable to undo it, because since Luce is an interpretation of the Federal rules and since you would now be making the rules--take the principle and broaden the principle, there would be nothing left for the Supreme Court to decide. They would just be stuck with it.

MR. SALTZBURG: Can I ask you a question?

MR. FRIEDMAN: Yes.

MR. SALTZBURG: For a moment, let's not argue about Luce itself.

MR. FRIEDMAN: No, I haven't been.

MR. SALTZBURG: I have a question about how you read this rule, because I read it somewhat differently, I think, than some people. Suppose you have a civil case. This is not unusual. Judges will find this to be typical. You've got a civil rights case and you've got three claims. There's a racial discrimination claim, a gender discrimination claim, and an Americans with Disabilities Act claim.

And on the third claim, the Americans with Disabilities Act, the plaintiff has an expert who will come in to testify as to accommodations that could be provided and the defendant moves to exclude expert testimony under Daubert. The judge has a hearing and says, I can't stop you from going forward on the claim, you can testify, but I'm not going to let this person testify as an expert. I think under Daubert I'm going to exclude.

Plaintiff says, well, then I'm not going to go forward on the third claim. It's key to me and I'll go for it on race and gender, and loses.

This rule says, if under the court's ruling there is a condition precedent to admission or exclusion, and it says such as the pursuit of a certain claim or defense, no claim of error may be predicated.

Now, my question is, do you read this rule as saying that my plaintiff in this case cannot on appeal raise the issue of whether the judge erred under Daubert?

MR. FRIEDMAN: If I understand the hypothetical, it would fit within that. The plaintiff said, I'm not going to pursue the claim or defense. I'm not going to pursue the claim. And since you said that the admissibility of the evidence--you denied admissibility of the evidence--I'm sorry. It was yours that you denied admissibility? Actually, I guess it's stronger if the judge rules certain evidence admissible.

MR. SALTZBURG: To be clear, the defendant

moves to exclude the testimony and also for summary judgment.

MR. FRIEDMAN: The defendant moves to--
yes.

MR. SALTZBURG: Moves to summary judgment. The judge says, you can go forward, but I'm excluding the testimony. My question is, do you read this as saying if you don't put the claim on and lose it, you can't appeal?

MR. FRIEDMAN: All right. Well--

MR. JOSEPH: No. That's not what it says. What it says is that if he had said or she had said, I'm only going to allow this expert to testify on this particular claim, and then you decided not to pursue the claim, you couldn't predicate error on a ruling that excluded--but it's not a condition precedent to that testimony that that claim be pursued. That testimony has already been excluded.

MR. SALTZBURG: I just wondered if--my point really is, some of us who aren't so smart read this rule as not being clear on that

hypothetical I gave you. If you think it's all clear, then any exclusion of testimony and someone says, I'm not going forward with the claim but I want to appeal, in a case where it's not summary judgment, the judge hasn't thrown me out of court, I just wanted to know if you read it the way I read it, because--

MR. FRIEDMAN: Right.

CHAIRPERSON SMITH: Well, I'd like to know, too. Do you?

MR. FRIEDMAN: Well, you know, I'm feeling like a law student, where after I give complicated hypothetical, the student wishes it were in writing.

[Laughter.]

MR. FRIEDMAN: I suppose, I mean, a party might say that, well, my pursuit of the claim isn't really a condition precedent to exclusion of the evidence because if I didn't pursue the claim, it wouldn't be relevant, but you're saying if I do pursue it, it's not going to be relevant, so maybe it wouldn't apply.

I'm satisfied for the Committee to strike this sentence on the basis that it's unclear.

[Laughter.]

MR. FRIEDMAN: That's, of course, not the principal point, but, I mean, my main point is that if you think Luce is bad--I haven't yet argued that, and I'm not sure if the Committee wants to hear anything about it, but if you think it's bad or might be bad or is subject to the possibility of reevaluation, and let's remember that Luce itself was very carefully qualified. It's nowhere near as broad as this, as this principle.

So if you think that there's possibly some question about it and you take into account the fact that, as Jim Duane said, everybody who isn't paid to like it or enforce it can't stand it and many commentators have opposed it and some State courts have opposed it, then do you really want to put it in a position where it can't be challenged, where it's enshrined?

If you feel the need to say that you don't intend to alter the situation of Luce, it's a very

simple thing to say so in the Committee notes, and I hope that's the most you can do.

Now, I don't know--I mean, I worked up an argument about just how bad Luce is, how terribly unfair it is, which might have appealed to Mr. Robinson until June--

[Laughter.]

MR. FRIEDMAN: --but I don't know if you're interested in hearing that, but maybe I'll--

MR. ROBINSON: I've become a convert now, and us converts even believe even more strongly than others.

MR. FRIEDMAN: Right. I can believe it. Let me just say, I mean, Luce is predicated on the possibility of reversible error in this area. If there's no possibility, there's no significant possibility of reversible error, there's no problem, because if the defendant comes up to the appellate court complaining, well, I didn't testify but the judge kept me off the stand because of this ruling, if there's no possibility of reversible error, then the appellate court should just slice

it away. It's not a problem.

Luce is a rule because there is a possibility of reversible error and it only comes into play, really, when there's error, when the judge below has made an error, and in those situations, it forces a defendant into a terribly unfair choice. It's a terribly unfair choice. I can--

MR. CAPRA: But the real point, Richard, is not that there is error or not but that the appellate court doesn't have to determine whether there's error or not. Isn't that the real point?

MR. FRIEDMAN: Of course, it doesn't. It makes things much easier for the appellate court--

MR. CAPRA: I mean, you're presuming that there's an error, but the very point is that the appellate court doesn't have to determine it under the Luce--

MR. FRIEDMAN: Of course, it doesn't. It makes things much easier for the appellate court--

MR. CAPRA: But that's not every case of error, and I would guess that 98 percent of them,

there's no error anyway, certainly under the broad balancing test of 609(a)(1).

MR. FRIEDMAN: I mean, the determination of error is not usually a particular difficult job. If it's just meant to, say, work for the appellate court, I'm sure it does that. But what it does is it keeps lots of defendants off the stand who very well might have gone on and it means that those who--

MR. CAPRA: But they're compelled to stand by Rule 609, not by Luce, the vast majority of them.

MR. FRIEDMAN: They may be kept off the stand, and those--I'm sorry. Those who regard it as preferable not to testify than to testify with the priors, those that believe that narrow is made, and who are right, that's where it comes in. Those who are right that narrow is made nevertheless are forced to say, well, I'm not going to testify at all because otherwise I have to increase the chance of conviction.

MR. CAPRA: Those who believe that they

were subject to error.

MR. FRIEDMAN: Those who--that's right. That's right. And the only time the rule ever really cuts is when they're right, and some of them are going to be right. If they're not right, then this whole thing is not a concern.

Look, as I say, I'm not particularly asking that you resolve right now that Luce is bad. I think, over time, I'm hoping that it can be resolved. But there's just no reason, I don't think, to put it beyond debate. And it's easily--I mean, the problems that the Supreme Court and others have raised, I think, are easily enough satisfied. I'd be delighted to get into a discussion on that, but I'll move on.

Four-oh-four, I think Laird Kirkpatrick has raised some good points. I raised one other one in my statement, that I think sometimes character of the defense is not necessary to rebut an implication that may be drawn from evidence in the character of the victim, and I think the rule should be just qualified slightly to indicate that.

I'll go in the order of the rules. I presented them in slightly different order, but I'll speak about 701. I agree with Laird again. I mean, I think that this would be an unfortunate change. I haven't seen that the supposed misuse of 701 is particularly grave. The beginning of the rule--first of all, it seems to me to resolve the issue of the witness is not testifying as an expert and it requires that the testimony be rationally based on the perception of the witness.

If that's true, sure, the judge has a gatekeeping function even here. The judge has to decide whether 701 is satisfied. If it satisfies those requirements, then I think it would be unfortunately to have to get into a discussion of whether this is specialized knowledge, which is just a very difficult area to get into.

To me, it seems that the greater danger is going to be to shift more lay-type opinions into the expert mold, and so you are going to wind up with people who thought they were just going to testify that they knew what a dead body smells like

now having to file expert reports and do all that. It's going to bureaucratize a lot of the presentation of evidence and I don't see very much gain in it.

CHAIRPERSON SMITH: But doesn't the Rule 26 eliminate some of that, because it only requires reports be filed for retained experts. I mean, clearly the mother isn't a retained expert and the soldier from Vietnam isn't a retained expert.

MR. FRIEDMAN: Well, I suppose--

CHAIRPERSON SMITH: So I don't think we have that problem.

MR. FRIEDMAN: Yes.

CHAIRPERSON SMITH: There is a disclosure that's required.

MS. HARKENRIDER: And in the criminal context.

CHAIRPERSON SMITH: Yes.

MR. FRIEDMAN: And it will, as I said, it just alters fundamentally the way that you have to treat this kind of information when the person says, this is something that I know based on what I

have experienced over life. It would be very good for law professors because it would make it much easier, I think, to write exams. I mean, it will give us lots of exam questions. But in a way, I think your job should be more to put us out of business than to do that.

On 702, I read the rule and then I read the Advisory Committee notes and I was wondering, what is the purpose? I guess I have a better sense of it now, but I don't think it accomplishes it in a productive way. Again, I think this over-complicates things and over--it over-rigidifies.

Now, let me say, of course, a gatekeeping function applies. It's always been clear that the judge had a gatekeeping function in determining whether expert evidence is admissible, as with respect to any evidence. Of course, there's a gatekeeping function. The problem is determining what the function is.

This rule, I don't think, increases flexibility by, as I understand it, grafting it on top of Daubert. It's not meant to supplant

Daubert, and if it is meant to supplant Daubert, I suppose that would have to be clarified. But now you say, well, it's got to satisfy Daubert if it comes within the realm of Daubert, whatever that is--we'll find out soon enough--and we have to go through this one, two three.

I think there's much too much of an emphasis on reliability. I know Daubert spoke about that, but I think it's an unfortunate use of terms because, as Mr. Smoger says, it does suggest, in effect, that the court has to decide the accuracy of the opinion ahead of time. I think that's just wrong. I think, as Laird said, it puts too much of an emphasis on principles and methods, and for that matter of fact, on data.

If, let's say, you wind up with your dead body expert having to fit in within this because you've acquired 701, I think it's going to be awfully hard for that person or the proponent to start justifying the basis of dead body smells, of human ability to determine dead body smells.

If the perceived need is to tighten up

somewhat, to give somewhat more guidance to the district courts to be tighter, if the need is perceived to jiggle the rule somewhat and if there's a perceived political need to show Congress that you're doing something, I think it would be better to make a relatively narrow change in the rule and one that doesn't add a complicated mechanism.

Do something like, before the word "assist" add the word "substantially", if you don't mind putting an adverb between verbs, which I don't, or somewhere in there, stick in the word "substantially", and then write whatever commentary you want. That would be my preferred solution, the simplest, I think.

I think better than what you have would be simply a listing of considerations, something like saying, in considering admissibility, the court shall give due consideration to any facts or data in which the witness applies any principles and methods that the witness applies in the application of such facts and principles and methods to the

facts of the case.

CHAIRPERSON SMITH: If we would do that, then we'll get the challenge that your typical judge doesn't--there's nothing that tells us what "substantially" means or what that "due regard" means or whatever.

MR. FRIEDMAN: Well, I mean, if we're going to wipe out the word "substantial" from the law, we might as well go for reasonable, too, and then we really are out of business. I mean, I think there's no way of writing a rule in this area that's going to prescribe results that you're going to be satisfied with, and I think this rule tends to rigidify the method of determination and in a way that's going to be unfortunate for some types of expertise.

On 703, like Laird, I think it's very good. I confess that after about 15 years of this, I had not focused on the idea that the underlying basis that might come in under 703 is really meant only to support the opinion and isn't meant to come in for substantive purposes. It seems to me that

that's actually quite an important principle, which the Committee notes express. I think maybe it could be made more explicit and it could be made explicit on the face of the rule.

And it's not simply a matter of, will the jury understand this distinction, which often is a tough distinction. It's a matter, also, that if there are facts on which the expert has relied but there's insufficient other support for those facts and they are crucial to the proponent, that that could make the difference between judgment as a matter of law and not.

MR. CAPRA: Is there anyplace else in the evidence rules that defines probative value and prejudicial effects in that specific--

MR. FRIEDMAN: I'm not saying to define probative value. I'm just saying to say that it should be admissible for one purpose and not for another, or that it's admissible only for this particular purpose, and there certainly are other areas in the Federal rules that do that.

MR. CAPRA: In 105.

MR. FRIEDMAN: One-oh-five is--is what?

MR. CAPRA: Is the limited admissibility.

MR. FRIEDMAN: Oh, limited admissibility.

Yes, but also--

MR. CAPRA: And 404(b).

MR. FRIEDMAN: Or 404(b). I mean, that's standard, right, for that matter, admissibility for impeachment. If it's not explicit in the rules, it's at least clear.

But as I said, you know, maybe everybody else knew this but me, but somehow it escaped me. So I figured, well, all right. I'm guessing there are other people whom it had escaped out there, and if the purpose is to enforce that distinction, it's a good distinction to enforce. I think it could be made clearer.

With respect to 803(6) and 902, I agree again with Laird, and I should say, I thought I was going first and then he was going after me and then I was hoping that he was going to say, I agree with Rich a lot, but here we go.

I agree that there is a confrontation

problem, and I also have to agree with Dan that part of the problem, I mean, to the extent that 803(6) supposedly satisfies the confrontation clause, okay, that's taken care of. I mean, I think it's bad law, but I'm not asking you here to redraft our understanding of the confrontation clause.

But there is an extra problem if you have a witness who authenticates a document and that witness isn't subject to cross examination, and that's an extra problem that's created by the rule. But I think it can be fairly simply satisfied by adding language of the sort that I suggest in my prepared statement, which is that the proponent must ensure that the certifying person is reasonably available for a deposition on the subject matter of the certification at the insistence of any adverse party.

I say, reasonably available for a deposition. If there's no real question that the deposition--if there's no real question of authenticity, in most cases, at least in most civil

cases, the opponent is not going to ask for the deposition because it's a waste of time. If there is a real question, then in criminal cases, the defendant certainly ought to be able to avail himself of the deposition, and I would say, for that matter, even in a civil case, if the proponent is saying, I am claiming this is an authentic document, I'm presenting this certification, it's fine to shift the onus of the initiative to the other side to say, well, I've really got some questions about it, but I think that the proponent ought to be putting somebody up who can testify about that if the other side finds it worthwhile.

So I think that's a very--I mean, I think the idea of the amendment is a very good one. I think it will simplify a lot of things, I would think, make things much more expeditious. But I think this amendment--

MR. CAPRA: But all you're substituting is a deposition for actual testimony. I mean, how does that make it any--

MR. FRIEDMAN: I'm substituting the

possibility of the deposition, at the insistence--

MR. CAPRA: For the possibility of testimony.

MR. FRIEDMAN: No, because it's different, because as the rule now stands, the proponent has to bring in the custodian--

MR. CAPRA: But the way this occurs, if I'm not mistaken, is they ask for a stipulation, right, and then the other side will just deny it and then you've got to produce. So, essentially, it comes out the same way.

MR. FRIEDMAN: Sometimes yes, sometimes not. I mean, often a party won't ask for a stipulation. Let's put it this way. There's an awful lot of custodians who testify at trial. So I think, in some cases, you wouldn't--

JUDGE NORTON: Not in Federal court.

[Laughter.]

MR. FRIEDMAN: Well, maybe not in the types of cases you litigate, is my guess. I would think that there would be many litigators who don't have the wherewithal, the anticipation to go ahead

and get the stipulation early.

I'm saying, in some cases, there would be no deposition at all. You wouldn't have testimony. If there would be a deposition, it's much more efficient taking depositions than it is presenting trial testimony, much. And the burden, again, would be on the opponent to do it, so there'd be a reason not to.

CHAIRPERSON SMITH: One of the reasons we did this is because foreign records could come in with a certification--

MR. FRIEDMAN: Right.

CHAIRPERSON SMITH: --and it seemed, to some of us, rather bizarre that foreign records were actually treated as being more--implicitly treated as being more trustworthy than domestic records--

MR. FRIEDMAN: Yes.

CHAIRPERSON SMITH: --and this was to even it out.

MR. FRIEDMAN: Yes. I don't think it was that foreign records were treated implicitly as

being more trustworthy. I think it was just more of a problem and it was sort of a balance of the benefits and the costs. I mean, I think it's unfortunate if the attitude is, well, yes, there's a confrontation problem, but too far. At least in the civil context, if it's a balancing, look, usually, there's not going to be this problem. We've got the certification. That's the best we can do. It's worth the risk. That's reasonable enough. Domestically, it should be easy enough to ensure that a custodian is available for a deposition.

Can I just go back to Dan's point? If it's always taken care of by stipulation, I suppose there's no problem whatsoever.

MR. CAPRA: The problem is that sometimes parties don't get along and at the expense of everybody tries to put the other person to the mat.

MR. FRIEDMAN: Okay. If the defendant doesn't get along and doesn't want to stipulate--if the opponent, I should say--

MR. CAPRA: Or any party.

MR. FRIEDMAN: If the opponent doesn't want to stipulate, as it now stands, then, the proponent has to bring the witness in. What I'm saying, even if it's just trivial, if the authentication is trivial and the opponent has no questions on cross.

MR. CAPRA: Right.

MR. FRIEDMAN: What I'm saying is if you say, proponent, just ensure they are available for the certification, you are now making the opponent put his money where his mouth is and say, well, it's on my dime to take the deposition. Do I really want to bother? I'm not putting them to much work. But it preserves that right, and I think it's an important one, even in a civil case.

MR. SALTZBURG: On the confrontation issue, I must have missed something. Explain that. I thought--is there not nationwide subpoena power in a Federal criminal trial?

MR. FRIEDMAN: Yes, but--

MR. SALTZBURG: Is there? I mean, that hasn't been changed. Then anytime the defendant in

a criminal case wants to actually challenge the business record, they can subpoena the custodian. I mean, they're not going to do it frivolously because you'll have a lot of unhappy judges--

MR. FRIEDMAN: Yes.

MR. SALTZBURG: --but how do you get a confrontation problem there?

MR. FRIEDMAN: If he can be reached, that's all. If he can be reached. If it's somebody who's going to be--

MR. SALTZBURG: Well, he can't be deposed if he can't be reached.

MR. FRIEDMAN: If--

MR. SALTZBURG: Let me be clear. I don't know, why do you need a deposition provision? If he can't be reached, he can't be deposed. But if, in fact, you're worried about confrontation, the subpoena is there.

MR. FRIEDMAN: What I'm saying is the proponent should have the burden of ensuring that he can be reached, by subpoena or deposition, I suppose, so that it's not, for instance, somebody

who's about to leave the country.

MR. CAPRA: Usually speaking, there's not only just one witness that we're talking about. It's not like an eyewitness to an event. There could be 100 witnesses who could be qualified witnesses. So I--

MR. FRIEDMAN: Whoever it is who is providing that testimony. As it now stands, the prosecution would bring in somebody to authenticate the document. The proposal of the Committee says that there has to be--all you have to have is a certification by one of those 100.

MR. CAPRA: Yes.

MR. FRIEDMAN: And I'm saying, fine. The proponent should just ensure that that person can be reached, and if he's reachable by subpoena, then no problem. That's all. I think there's no problem. The court might disagree by saying that you're making the defendant reach out for him. But if that person is reachable, no problem.

But I'm saying that at least the proponents should make sure that the opponent has

not only the name but the address, the location, and should make it easy enough, saying at these particular times, the person will be available. And then it's not somebody who's about to leave the country.

MR. CAPRA: If a particular person becomes unavailable--

MR. FRIEDMAN: Yes. Provide somebody else.

MR. CAPRA: --then what the proponent would do is just get an affidavit from somebody else.

MR. FRIEDMAN: Fine. Fine. If they have somebody else, fine. Look, if it's an easy burden, it's no problem, right?

MR. CAPRA: Well, it's just a bureaucracy.

MR. FRIEDMAN: Why, it's a very, very simple one. It's simply a matter of providing a witness so that this point which may be a key point can be challenged if the other side feels that there's some value in challenging it. I mean, litigation is about getting testimony, and I think

it shouldn't be put beyond the ability of the opponent to challenge it.

CHAIRPERSON SMITH: Professor, I've gotten lax in my timekeeping duties.

MR. FRIEDMAN: Thank you. I appreciate your being lax on my time. Thank you very much.

CHAIRPERSON SMITH: Are there any more questions of Professor Friedman?

[No response.]

CHAIRPERSON SMITH: Thank you very much.

Our last witness is Mr. Morrison.

Apparently, that was our last witness.

MR. FRIEDMAN: Laird is saying he does want to say--

[Laughter.]

CHAIRPERSON SMITH: That will be noted for the record.

I believe, then, we have called on all of the speakers who wanted to testify, and for those that are still remaining in the room, let me say again, we appreciate your interest and the time you've spent and your contribution to this process.

So thank you all for being here.

III. APPROVAL OF MINUTES OF APRIL MEETING

CHAIRPERSON SMITH: At this time, then, we will proceed to go into the regular Evidence Committee meeting. You all have your agenda books.

The first matter would be approval of the minutes of the April meeting. I assume they have been read and reviewed.

MR. BROUN: So moved.

JUDGE SHADUR: Second.

CHAIRPERSON SMITH: We have a motion that may be approved, or is there any comment that need to be made first? Corrections, additions, omissions?

[No response.]

CHAIRPERSON SMITH: Move that they be approved.

MR. BROUN: So moved.

CHAIRPERSON SMITH: Any objections?

[No response.]

CHAIRPERSON SMITH: The minutes stand approved as read.

There is a very complete draft of the minutes of the last Standing Committee meeting. As you can see, it had a lot of very significant issues by all of the committees. I have to say, not because Professor Coquillette is here, but just because I really mean it, that committee takes on a tremendous amount of work and it was really impressive to see how much could be gotten through in a relatively compact period of time.

The things that we brought to the attention of the Standing Committee were all approved, namely that the proposed amendments go out for public comment. There's really nothing more I need to add about the Committee. Dan, is there anything you want to add to that?

MR. CAPRA: No.

CHAIRPERSON SMITH: If you have any questions, we'll be happy to answer them.

The next--actually, I'm going to change the agenda slightly. Professor Coquillette has asked if he could go first with a brief issue that he's like to bring before us, so if you'd like to

proceed.

IV. RULES REGARDING ATTORNEY CONDUCT

MR. COQUILLETTE: Thank you very much. Judge Sirica, the new chair of the Standing Committee, will be joining us after lunch and he sends his apologies. He's at a training session for new committee chairs.

The matter I'd like to just mention briefly is the Standing Committee's initiative with regard to rules governing attorney conduct. Of course, this Committee has considered this and discussed this already and I'm very indebted to Dan Capra for help already on proposed drafts. But I think for the benefit of new members and also just because there's been a good deal of recent developments, particularly in Congress, I'd like to just go very briefly where that project came from and how it affects this Committee.

The Standing Committee is a Congressionally-mandated committee and we have a Congressional mandate in Title 28, and that is to ensure the consistency of the Federal rules system

and otherwise promote the interest of justice. In part of that mandate, you have a consistent system. The Standing Committee has always been particularly concerned about local rule proliferation, not just inconsistency between local rules but inconsistency with Uniform Federal Rules and inconsistency with Title 28.

As part of going over all of the local rules, as part of the Local Rules Project, the Standing Committee became aware that attorney conduct is regulated throughout the system by local rules, that these local rules are very often inconsistent with each other, with the State rules of the State in which the district court is located, sometimes with uniform rules like Rule 11 or Rule 46 of the appellate rules that govern attorney conduct.

So it's become a major concern of the Standing Committee to reduce this inconsistency. I think, also, the Standing Committee would like to defer to the States as much as possible while still protecting important Federal interests in the area

of attorney conduct.

The Standing Committee wants input from the advisory committees and has asked this Committee and the others for input at the spring meetings, and I think quite sensibly, all of the advisory committees came to the conclusion that if they took on this subject, it would ruin their ordinary agenda and they would never get anything else done.

So the suggestion was made by the Civil Rules Committee and then followed by everybody else that the best way to do this is to have each advisory committee select two representatives to create an ad hoc committee which, in turn, will consist of two members of the Standing Committee, Jeffrey Hazard and Chief Justice Diezy [ph.], representatives from the Department of Justice, and liaison members from Federal, State, and court administration and case management. That committee now has been formed.

Judge Sirica has decided that it would be a bad thing for this committee to get out of hand

on some of the current developments, particularly negotiations between the DOJ and the National Conference of Chief Justices and the ABA Ethics 2000 Project.

Also, we were concerned about initiatives in Congress. Those have just come to pass, one of them. The Congress has passed the so-called McDade addition to the appropriation bill. This would make the Department of Justice subject to State standards and Federal local rules in a way that defies human understanding. I'm sure that there are Department of Justice representatives who will say how excellent this law is, but it certainly has made our problems more complicated. It's made the DOJ's life much more complicated.

So, in short, this committee will begin to meet at March at the latest, and may have a meeting before then because of the legislation, and your representatives are going to be Judge Jerry E. Smith and Professor Dan Capra.

The last thing I'd like to say, there's been a number of things out there that have been

said about this project that really aren't right. The most recent one has been the New York Law Journal saying that the Standing Committee has already decided on about ten Federal rules and so forth and so on. The Standing Committee drafts up to now have been for discussion purposes only. There are two major options that are out there that the Standing Committee is working on, is focusing on.

One option is to get out of the attorney conduct business as much as possible by having a single uniform Federal rule that directs Federal district courts to adopt the State standards in each State in which the district court is located. That option, the so-called State standard option, is strongly supported, of course, by the National Conference of Chief Justices.

An alternative to that would be to select a small core of rules that are particularly important to Federal courts or to Federal agencies, like the Department of Justice, and then to have State standards for everything else. That's the

so-called core approach.

The experts at our two invitational conferences have tended to divide between those two basic approaches to the problem and the top priority of this ad hoc committee is going to see if we can come to some kind of consensus about which of those approaches is the most desirable.

There are two ancillary issues that are currently under study. One is what to do about courts of appeals. They have a uniform rule governing attorney conduct, Rule 46, but it is very vague. It's been subject to various constitutional criticisms and in re Schneider and others.

Basically, the Supreme Court said that Rule 46 itself, which is simply a conduct unbecoming a member of the bar standard, has got to be given more content, and so nine of the courts of appeals have adopted their own local rules. Those also are inconsistent with State rules and with each other.

And finally, there are the bankruptcy courts. There have been very serious problems with

conflict of interest standards and other matters. At the Bankruptcy Advisory Committee meeting last week, that committee voted to authorize the Federal Judicial Center to undertake a major study, which will be going on this year, to chief judges of bankruptcy courts and clerks asking them about attorney conduct problems in these bankruptcy courts.

Another reason why Judge Sirica would like to hold off a meeting of our Committee for a little bit is to get the results and the benefit of this Federal Judicial Center study, and the essence there is whether bankruptcy courts should be part of this or should have their own separate set of uniform rules.

So it's a difficult and complicated subject. You have appointed two very able representatives from your Committee and I'd be happy to answer any questions that you might have.

CHAIRPERSON SMITH: Thank you.

Any questions for Professor Coquillette on this?

MR. JOSEPH: Just one question. Did you say that the McDade bill now says that prosecutors are all subject to State conduct standards?

MR. COQUILLETTE: Let me defer--

MR. PAULEY: A 180-day deferred effective date.

MR. JOSEPH: Well, we've seen what good that does when they gave us the opportunity to write 413(4).

MS. HARKENRIDER: Well, they don't do that here.

CHAIRPERSON SMITH: Thank you for that report.

Let me go back again and just make another statement about the minutes of the Standing Committee. I really would commend, for those on this Committee who haven't read those minutes, that you do so. It's a wonderful summary of really what's going on generally as far as rules are concerned of all the various committees and it's really a great way to see the interrelatedness of a lot of these issues, and so I hope you take the

time to read them.

I also have been informed that Mr.--was there anything else, Professor, that you'd like to bring up?

MR. COQUILLETTE: That's it. Thank you very much.

CHAIRPERSON SMITH: I've also been informed that Mr. Morrison is now here, so we can backtrack a little. We do have another speaker who would like to comment on the rules.

MR. MORRISON: Thank you, Your Honor.

CHAIRPERSON SMITH: You're welcome.

JUDGE NORTON: Being Mr. Morrison's law school classmate, he was always late to class, also.

[Laughter.]

MR. MORRISON: Judge Norton, if I had known--

[Laughter.]

MR. MORRISON: Thank you for the opportunity to express my views on the proposed revisions to Rule 701, 702, and 703.

CHAIRPERSON SMITH: Let me just add, before you start, you weren't here for the fact that I granted everyone ten minutes, so don't take it personally if I tell you in ten minutes that your time has run out.

MR. MORRISON: I don't. I hope to stay within that, although Judge Norton could probably give you an affidavit that that's unlikely, the way it goes, but--

JUDGE NORTON: Impossible.

MR. MORRISON: My comments reflect my own experience as a partner and a practitioner in the law firm of Nelson, Mullins, Riley, and Scarborough in Columbia, South Carolina, as well as input I've received from members of Lawyers for Civil Justice, which is a national coalition of leading corporate counsel and defense bar leaders, of which I currently serve as President. It also reflects my experience as general counsel of a technology company, Policy Management Systems Corporation, which is traded on the New York Stock Exchange. It's a computer software and services company, and

my recent experience as President of the Defense Research Institute, which is an organization of 21,000 lawyers who try cases on the defense side, civil cases, in America's courts every day.

While my firm has over 200 lawyers in North Carolina, South Carolina, and Georgia, my testimony is primarily based on personal experience as lead trial counsel in over 20 States and the privilege I've had to try 200 cases or more to a jury verdict. Most of my work in the past 20 years in litigation has either involved personal injury or commercial damages. It's almost always involved expert testimony and scientific evidence.

For over a decade, Lawyers for Civil Justice and the Defense Research Institute and I, personally, have worked to ensure some measure of credible scientific reliability and that that accompanies all technical evidence submitted in our trial courts. We have consistently spoken out against the abuses which have come to be known as junk science.

The Advisory Committee on Rules of

Evidence is to be commended for undertaking the examination of Rule 701, 702, and 703, and the impact of those rules on our legal system.

Expressing my appreciation to Judge Smith and the members of the Advisory Committee, I wish to acknowledge the extraordinary significance of your efforts to clarify this complex legal subject, which is more than deserving of your attention and all lawyers' attention.

The proposed revisions to Rule 702, in my opinion, will strengthen judicial decision making by ensuring that scientific testimony will have a greater degree of reliability before it's presented to the jury. By enhancing the trial court's role as gatekeeper for the admission of expert evidence, the proposed revision adds emphasis to the principles articulated five years ago by the U.S. Supreme Court in Daubert and in General Electric v. Joiner last year.

The non-exclusive checklist articulated by the court in Daubert is further clarified in the threshold requirements expressed in proposed

revisions to Rule 702. While the Committee notes acknowledge that these requires are neither dispositive nor exclusive, they provide important guideposts for furthering the underlying goal, and that is that expert testimony has some minimum characteristics of reliability before it's presented to the jury.

Overall, this amendment goes far in addressing the conflicts in the courts about the meaning of Daubert. The revisions to 702 further clarify the scope of Daubert and end confusion among the circuits by applying the trial court's gatekeeping function to testimony by any expert. Specifically, numerous courts have addressed whether Daubert is applicable to all expert testimony or merely scientific testimony. Although there's some divergence among the courts on this point, there is simply no practical or policy reason why the Daubert standard should not apply to all expert testimony. The proposed Rule 702 eliminates any doubts as to its application by embracing uniform standards for expert testimony

set out in the Watkins case.

As the Committee notes bluntly but accurately emphasize, an opinion from an expert who is a scientist should receive the same degree of scrutiny for reliability as a scientist. Quite simply, the gatekeeping function should apply to both.

In short, I believe the proposed Rule 702 enforces the important principles of Daubert, clarifies ambiguities and conflicts in interpretation, and wisely affirms the vital role of the trial judge as the gatekeeper for all expert testimony.

My experience leads me to support particularly the clear statement that the trial judge in all cases of proffered testimony must find that it is properly grounded, well reasoned, and not speculative before it can be admitted. The amendment properly provides that if there is a well-accepted body of learning and experience in the expert's field, the expert's testimony must be grounded in that learning and experience to be

reliable and the expert has to explain how the conclusion is grounded.

If the witness is relying solely or primarily on experience, then I believe the amendment wisely provides that the witness must explain how that experience leads to the conclusion reached. The trial court's gatekeeping function requires much more than taking the expert's word for it, and that has been the problem in the courts in the past decade. The Advisory Committee has fairly concluded that the more controversial and subjective the expert's inquiry, the more likely the testimony should be excluded.

I also endorse the clarifications in Rule 702 that the gatekeeper function applies not only to the methodology employed by the expert, but also to the application of that methodology, and I think that's a significant innovation, the application of that methodology to the facts of the case.

I agree with the statement that Judge Edward R. Becker made in his reasoning in in re Paoli where he wrote that any step that renders the

analysis unreliable renders the expert testimony inadmissible. This is true whether the step completely changes a reliable methodology or merely misapplies that particular methodology.

The proposed amendment to Rule 701 eliminates an ambiguity regarding experts and that is the technique of proffering an expert as a lay witness and thereby end-running both the reliability requirements of 702 and the disclosure requirements pertaining to expert testimony. Specifically, we endorse the rule revision that rightly distinguishes between expert and lay witness testimony rather than expert and lay witnesses.

The sound underlying rationale for this reason is, quite simply, that if a witness is providing scientific, technical, or other specialized information, then the witness's testimony should be subject to the rules regarding expert testimony. This revision virtually eliminates the growing and very troubling prospect that expert testimony is being sneaked in under the

guise of lay witness because of the lower threshold of standards for lay witnesses. By focusing on the testimony rather than the witness, the revision makes clear that any portion of a lay witness's testimony that is based on expert knowledge must necessarily meet 702 standards.

Finally, Your Honor, I support in concept the proposed amendment to Rule 703, which would limit the disclosure to the jury of any inadmissible information that's used as a basis of the expert's opinion. Under current law, litigants can evade an exclusionary rule of evidence by having an expert rely on inadmissible evidence in forming an opinion. The inadmissible information is then disclosed to the jury under the guise of the expert's basis.

However, the specific language in the revision and the practical impact of it troubles me somewhat. Although setting out to cure a glaring defect, the suggested language still encourages the admission of back-door hearsay as long as it is relevant and as long as a limiting instruction is

given upon request.

The implication of the recommended language is that back-door hearsay, which is more prejudicial than probative, should still come into evidence unless the objecting party can show the dangers of admission substantially outweigh the probative value of the evidence.

Based on my experience, courts need more guidance in applying the suggested limiting instructions. Among the criteria I would suggest they take into account are the following. Is the underlying data reasonable and trustworthy? Is the underlying data seriously disputed? Is the underlying data case specific? Does the opponent rebut the underlying data of a type that, if disputed, can he rebut it meaningfully? In other words, do you have a meaningful opportunity to rebut the underlying data if it is disputed?

I believe that in addressing these issues in the future, you would provide the trial courts with necessary guidance on limiting inadmissible information into the proceedings under the guise of

703. On this issue, I respectfully request the Committee to make further changes. These suggestions for improvements to the revisions outlined in 703 in no way diminishes my personal support or the support of those whom I have spoken with for the Committee's overall goals as they have been articulated or for the step of improving 703 as it's written right now.

Overall, Your Honor, we appreciate very much all the work that has been done and we endorse these changes. Thank you very much for the opportunity to be here and for taking me out of turn.

CHAIRPERSON SMITH: Thank you, Mr. Morrison. It's difficult for me to challenge such laudatory comments, particularly with regard to 703.

Let me ask you this, because I discussed this specific issue this morning with Dan Capra. In 403, judges have been for some time told to balance the probative value versus the prejudicial impact. I find it difficult, I guess, simply

speaking as a trial judge now, to see why this is really any different and why judges need specific guidelines to tell them how to make such a balance.

MR. MORRISON: Your Honor, in the application of the rules, I would agree with you, that from a philosophical standpoint, if you look at 703 and you say, well, we're going to allow otherwise inadmissible evidence in, we're going to test it for prejudicial value versus probative value, or prejudicial effect versus probative value, that's how it ought to be done.

Unfortunately, as a practical matter, it's that first test that gets applied. In other words, has the expert relied on it, or reasonably relied upon it, and then that next step is actually frequently not happening, and all I'm suggesting is that there is a set of guidelines underlying that that should give that evidence even more scrutiny that really is not being applied. That would be the experience that I've had.

MR. CAPRA: But isn't it enough to add this fairly strict balancing test that we've added?

MR. MORRISON: It's helpful to add that fairly strict balancing test, and I don't want to argue that it is not. It is helpful and, I guess I'd go further, it's very helpful. But I do think that the underlying data, if it's hotly contested underlying data, seriously disputed, if it is not case specific data, if the underlying data is not reasonable and trustworthy, then it's really hard to rebut that as an opponent.

It's very hard to take, to use the words, I mean, junk science and to prove that it's junk science. It can be done, but it's very difficult when you get into that battle. It's better to keep it out, and it's very collateral to most of the cases.

An example, down in Beaufort, I was trying a case with one of Judge Norton's colleagues and the expert on the other side had taken--it had to do with gas leaking out of a battery and the expert had taken a riding lawnmower and put it in a refrigerator box and run it up to a high level of heat and then let the refrigerator box, or sealed

it up with a piece of tape and then measured the gas as it came out within that refrigerator box.

Well, it was going to be real difficult to deal with that in the courtroom, as it turned out. Now, the judge measured that, went down the lines through the Daubert steps, and excluded that evidence, but it was what that expert relied upon. That was appealed to the Fourth Circuit Court of Appeals. That portion of that order was upheld.

But that's the kind of thing we see all the time, and with a different judge in a different place, that evidence wouldn't have received that scrutiny, and that's the kind of guidance that I would hope for.

JUDGE SHADUR: If the kinds of factors that you've talked about were to be included in the Advisory Committee note--

MR. MORRISON: Yes.

JUDGE SHADUR: --would you then have a problem with our also including the balancing standard to make it plain that you not only look at the various factors, but keep in mind always that

we're looking at the relationship between probative value and prejudicial effect?

MR. MORRISON: I would endorse that. I just think the factors would be very valuable, in addition to that.

CHAIRPERSON SMITH: Are there any other questions of Mr. Morrison from anybody?

[No response.]

CHAIRPERSON SMITH: Thank you very much for your time.

MR. MORRISON: Thank you very much. Thank you. It's excellent work. Thank you very much.

V. CONSIDERATION OF PUBLIC COMMENTS

ON PROPOSED AMENDMENTS

CHAIRPERSON SMITH: Okay. I think rather than start now on any consideration or--well, let me ask the Committee if there's a preference to start on discussing some of the comments that have been made and what the Committee wants to do, if anything, about changes, whether we should instead take some of the other issues on the agenda, namely Roman numeral IV, consideration of other evidence

rules, Rule 1101 and 609, and then Professor Rader's report before lunch, then adjourn for lunch and take up the changes. Ken?

MR. BROUN: My only thought is, I'd rather we begin discussing it while it's still fresh in our minds. That's my opinion.

CHAIRPERSON SMITH: Okay.

JUDGE SMITH: I would agree, because some of those who have commented are here and are probably interested in what we're saying, so--

CHAIRPERSON SMITH: Okay. Then why don't we just take the agenda in order and start with consideration of public comments on the proposed amendments. And again, we'll go in numerical order.

MR. CAPRA: I'd like to draw your attention to a memorandum that's in front of everybody, I believe, Agenda for Advisory Committee Meeting, Possible Changes to Proposed Rules. This tried to take, I think, what were the most, I guess, discussable proposals on the part of the public commentators and tries to come through some

kind of changes for the Committee to consider.

When we start on 103, I think we'd like to before lunch, because the Luce issue, I think, is probably going to take a bit more time than that-- I'm sorry?

JUDGE SMITH: I would hope not.

[Laughter.]

MR. CAPRA: --is to discuss this proposal, and it comes from a number of commentators, that is in front of you on page one with respect to changing the Advisory Committee notes.

And then we can--I hope, then, after that, if we get this resolved, that we can go right to the Luce issue, the Luce issue being, I think, just to set this up, not is it right or wrong but do we take the second sentence out of the rule and put it as kind of a proviso in the Advisory Committee notes that we're not dealing with Luce, if that's the issue. But maybe we can discuss these Advisory Committee, possible Advisory Committee changes first.

The first one on page one deals with just

simply a change of a case. There was an objection to the Seventh Circuit cases being perhaps misleading. I really have no opinion on the matter, but I've tried to put in a different quote that seemed to say that it's definitive rulings that need not be revisited. If anybody has objection to that, maybe--but I think it seems fine to me. Any problems with the wording of it or inclusion of it or anything?

JUDGE SHADUR: I'm all in favor of taking up the Seventh Circuit.

MR. CAPRA: So you did it, Judge.

JUDGE SHADUR: Don't quote me.

CHAIRPERSON SMITH: But I would also comment that, interestingly, the new cite Dan has included here does use the word "definitive" ruling.

MR. CAPRA: I thought that would be a very good idea. We use the word "definitive".

CHAIRPERSON SMITH: And I understand the concern about whether definitive means the same thing to all people, but I guess that means that,

perhaps, until somebody can give us a better word, that's probably as good a word as any.

MR. CAPRA: My judgment is that the courts are using that word already. It has been used in State provisions and it's a very fine word.

JUDGE SHADUR: Did you catch the typo in "nature" in that quote?

MR. CAPRA: I'm sorry, did I--oh. Thank you, Judge. I will say that all this was turned over--I got seven reports on Monday. All of it got turned over in my computer on Monday, so there will be some typos and stuff and I appreciate you telling me if there are any, and I can't believe my spell check didn't deal with that one, but I will change that, nature.

MR. JOSEPH: The "TH" elevated--

MR. CAPRA: I'm sorry, the--

MR. JOSEPH: The "TH" is elevated, you know, little things.

MR. CAPRA: But that comes out in giving it to the--that's my computer.

Then the second one is, I guess, somewhat

of a more substantial one. It's on the next page. It's the entry on the Advisory Committee note. This is not the entire Advisory Committee note, as I'm sure you're aware, because there's all the Luce stuff afterwards, but it's a matter that Richard Friedman and I discussed and I also discussed it with Steve Saltzburg. What happens if the ruling is definitive but then subsequent changes occur at trial and subsequent developments occur at trial?

I worked on this language with Richard and with Steve, as well, and this is the language that we came up with, and if you want to consider it for a second, it seems to be good language. It cites the Old Chief case and it seems to deal with a problem that is worthy of dealing with in the notes, not in the rule.

Now, I guess, then we go to the Luce issue, right?

CHAIRPERSON SMITH: I guess we do.

JUDGE TURNER: Before we leave that--

CHAIRPERSON SMITH: Sure.

JUDGE TURNER: --I had one other comment

on the first sentence. I'm wondering if in the third line as it appears--

MR. CAPRA: You have before you in the book

JUDGE TURNER: Yes, the one that says, "need not renew an objection or offer proof." I'm wondering if we don't need, after "or" a "make an", so that it reads, "a party need not renew an objection or make an offer of proof." We're talking about what goes on at the trial after an adverse ruling. Otherwise, the sense of it is, a party need not renew an offer of proof.

MR. JOSEPH: Jim, I thought that the point was we're just talking about the renewal issue.

CHAIRPERSON SMITH: Right.

MR. JOSEPH: It was made true.

MR. CAPRA: May have already made it.

CHAIRPERSON SMITH: An earlier offer of proof.

MR. JOSEPH: Renewal actually helps because it makes it clear that you're going back to prior time.

JUDGE TURNER: It's nothing I'd push hard.
If everybody else thinks--

JUDGE SHADUR: You've already won the
point.

JUDGE TURNER: Thank you. Driven to
perfection.

[Laughter.]

CHAIRPERSON SMITH: Okay. Luce. Let me
just say as an introductory comment before this
discussion is opened, as I know you all remember,
except for our new members, we have discussed this
several times in several forums before us and it
seems that it was the strong opinion of the
Committee that Luce had to be at least
acknowledged.

I would only further add that Dan and I
came away from the Standing Committee last time
believing that it was the strong belief of the
Standing Committee that we should not only deal
with Luce but deal with how it extends, if at all,
in other cases that they wanted this problem
resolved.

Clearly, we're an Advisory Committee and we can advise them if we think they're wrong, but I think you should have the benefit of knowing that before we start, that that was, I think, we felt--

MR. JOSEPH: But that first version did not extend--

MR. CAPRA: Let me just clarify, though, that what happened, I think, in terms of the Standing Committee is the first version of Luce was limited to criminal cases and the critique of that was that that's insufficient. So I think what's clear from the Standing Committee is--maybe one way to phrase it is if you're going to put Luce in, you've got to go with the whole thought. You've got to do the whole thing.

My understanding, although they expressed that you ought to put Luce in, but that was not explicitly--that part of it was not totally explicit. What was totally explicit to me and made painfully clear at that meeting that I'll remember forever is that if you're going to put Luce in, all the logical extensions of Luce have to apply.

So I don't know what the Standing Committee will do if we cut it out and put it in the Advisory Committee note. I know we have to at least mention it. If we don't mention it, that will be trouble.

CHAIRPERSON SMITH: Well, and my recollection is that when Judge Stotler was at our Committee meeting, she did express personally--

MR. CAPRA: Yes. Judge Stotler did, yes.

CHAIRPERSON SMITH: --a strong preference, and perhaps I shouldn't extrapolate. She's not the Committee chair any longer. But at least as an individual, she certainly expressed a preference that we deal with it. As I said, that doesn't mean that we have to.

MR. BROUN: As perhaps the leading anti-Luce-ite, and actually, I agree with both Richard and Laird--

JUDGE SHADUR: As one of the leading anti-Luce-ites.

MR. BROUN: Okay. I'm sorry. As one of the leading anti-Luce-ites, I agree that we've got

to include it and I think that the nature of the situation is such that we've got to include it to its logical extent and deal with those issues.

I have to say I was intrigued, though, by Steve's comments on its application particularly in the civil context. I don't think that we ought to limit it to criminal cases, but I really ask Steve if he might explore that a little further. I was really interested in that.

MR. SALTZBURG: I came today because my good friend, my buddy, Dan Capra, was so hurt. People wrote letters in criticizing, and I said I'd come. If anybody criticized him, you know, I'd defend him, and here I am--

MR. CAPRA: Here he comes.

MR. SALTZBURG: I can defend him. He does a great job. But I did raise some questions, and I just wanted you to know about--the thing about Luce that I find interesting is that people who come at this different ways come up with surprising results.

My friend, former Federal Judge Herb

Stern, as many of you know, is a tough prosecutor. He's the guy who extended mail fraud prosecution beyond any plain meaning of the language until the Supreme Court finally said, you can't do this anymore. He said he thought, as a tough prosecutor, that Luce was just wrong. He said he thought that defendants ought to have the benefit of being able to appeal.

I happen to come at this the other way, and the difference is, I've seen so many defendants by the time they take the stand be so bad that the impeachment ruling on conviction didn't matter because they blew it in their own testimony and that's just the genius, I thought, of Luce.

So I have no quarrel with Luce as a case, but if you take the language as the Committee has it--let me give you another hypothetical. I did want to be sure you're reaching the results you want to reach because the results are results I wouldn't reach.

Here's an example of either a civil or a criminal case, and it comes out of the Second

Circuit. The plaintiff or the prosecutor, pick your case, alleges fraud on the part of the defendant in a securities case. The defendant says, I've got two defenses here. One is what I said was true, and second, if I made a mistake, it was ignorance of the requirements of the law, okay? There's a case which I think is wrong which says, if you go to the second round, you claim ignorance of the law, you waive your attorney-client privilege, even though you didn't say advise of counsel. This extends it. It says, if you claim ignorance, then you have to give up your attorney-client privilege.

Now, my hypothetical is, the defendant, civil or criminal, says that's wrong. I'm not going to waive attorney-client privilege. I don't want to waive attorney-client privilege. The judge says, well, if you put forward defense, you waive. Then I won't put forward the defense, loses civil or criminal case in appeals and says it was error to put me to that choice. It's not Luce. It's not the context. The Supreme Court never addressed it.

That's case number one.

Your rule, as I read it, said you'll lose your right to appeal. That's wrong, in my view, but if that's the result you want to reach--

MR. BROUN: Would a change in the language in that second sentence--because the Luce problem is really the first "such as" clause, not the second. Would a tinkering of that language deal with it, because I don't think--at least, that's not the result that I--

MR. CAPRA: Well, if we're going to tinker with language to change the result, you ought to know that that would change the rule in the Second Circuit. I mean, you can't do that lightly. That is the rule in the Second Circuit, and it's the rule in a number of other circuits, too. So that was the problem that we had when we went to the Standing Committee with the proposals we had, that Easterbrook got up and says, this changes the law in the Seventh Circuit and before you do that, you've got to think it through.

I guess what I would take from Steve's

point is, maybe we shouldn't touch it, but I don't think tinkering with it--

CHAIRPERSON SMITH: What if we just exclude that clause?

MR. SALTZBURG: Well, why don't we take out the examples?

MR. BROUN: If we simply say, such as the introduction of certain testimony--

CHAIRPERSON SMITH: Right.

MR. BROUN: --no claim of error may be--

MR. JOSEPH: It's purely illustrative, so that doesn't necessarily--

MR. BROUN: It doesn't necessarily deal with it, but at least finesses it more eloquently.

MR. SALTZBURG: One more hypothetical that shows you how many different forms this took. This is what I was trying to say to Dan. This goes so far beyond Luce in the situation that I just don't think the Committee has thought about.

Suppose you have a civil or criminal case, it doesn't matter, and the defendant says self-defense. Now, I know no judge here would do this,

but suppose the plaintiff or the prosecutor says, "Your Honor, we move, if they're going to rely on self-defense, that we be allowed to offer character evidence regarding the defendant," and the judge says, "Well, I think if he does that, character is an issue and I'm going to allow in prior convictions, prior acts." Error. If you go forward on that defense, I'm not going to go forward. I mean, it would be nuts to go forward if you're going to let that stuff in. Loses, and then wants to appeal.

The way this is written, you can't, and I don't think you intended that. I think the problem, and I raised this a little while ago, was that the Supreme Court, I think it's well said, has never after Luce had occasion to address again when you lose your right to appeal. I think you could take--I mean, I realize the Standing Committee may think this is a simple problem, just say, codify Luce.

It's not simple, and these examples--I mean, I could give you more, but there are dozens

of examples where I think if you voted around the room, should you lose the right to appeal, you'd at least have an equal division, maybe a majority saying no. And that before you go down that path, it seems to me, you've got to think about all the ramifications.

If you just add in the Advisory Committee note, this does not disturb Luce v. United States because Luce said you can't appeal if you don't testify. It didn't say anything--I mean, it did say--there is dictum in the case. Chief Justice Burger's opinion has dictum saying a motion limine is not final, but that's not what you're addressing here. The first part takes care of that. You've dealt with that. It was the second part, where he went on, and I think that it's just dangerous territory.

CHAIRPERSON SMITH: Anybody else?

JUDGE TURNER: Steve, you'd just take the whole sentence out?

MR. SALTZBURG: I've been unable to fix it.

JUDGE TURNER: All right.

MR. SALTZBURG: I've been unable to. I'm just not that good enough a drafter to take care of Luce without--I mean, Dan did all that a person could do, it seems to me, to try and capture this, but as soon as you recognize that you're really dealing with all kinds of potential rulings that a judge is going to make that do damage to a case, where most people would say a party should be forced to go forward in that circumstance, I think you realize that you really--you may not want to have this in the rule.

MR. CAPRA: Greg, did you have a comment?

MR. JOSEPH: My concern is that the first sentence can be construed as addressing Luce, which is the reason we put in the second sentence to begin with, which makes it problematic to say we're going to put it in the Committee note because people may or may not--some justices may or may not ever consult the Committee note.

MR. CAPRA: That's how we ended up where we are.

MR. SALTZBURG: Let me just raise one other point. It's sort of an obvious one. You know, it's odd, but Luce is a 1984 case. There has been nothing in the rule about it and the courts have done fine. I mean, it is possible, I suppose, in this bizarre world, that if you put in Jim Turner's definitive ruling, you know, sentence, and in the Advisory Committee say we want to make clear there's no intent here to disturb Luce, that in a bizarre world, judges would get that wrong.

I find that hard to believe, that they would get that wrong, but I suppose it's possible, or that the Supreme Court would want to punish the Committee somehow, which is what it would take to disregard clear intent. I mean, when you do the two together, and, indeed, this will go to the court and it will have it before it. I know it's possible Justice Scalia will again say, I don't look to the Advisory Committee notes because no one, as he said, no one on the Committee reads them, but, you know, I think maybe he'd be dissuaded that three people on the Committee

actually read the notes.

MR. PAULEY: This will also go to the court, and if it doesn't want to attempt to codify Luce in this way, it can say--

MR. SALTZBURG: But, Roger, I don't think--I think one of the problems is, unless they also get the hypotheticals, that people don't stop and--they read the language and say, oh, okay. But I'm offering these up. I could offer you, as I say, a dozen more of these and we'd sit here and I'd say, is that the result you want, and if the answer is, I don't know, then it's not a rule that--well, I've said enough.

MR. PAULEY: I observed the same Standing Committee meeting that Dan did and I just--my take on the meeting is that the Standing Committee wants Luce in the rule, and I think that the first part of what we do in 103 is extremely valuable. I would hate to risk it. This rule has been a long time hatching.

MR. CAPRA: We definitely don't want to lose the first sentence just because of the Luce

issue.

MR. PAULEY: Right.

MR. CAPRA: So you can't scrap this rule just because of the Luce issue.

CHAIRPERSON SMITH: Although, I might say, the Standing Committee's opinion was based on what it knew at the time, much as 103 decisions are. That's not to say that were not new evidence brought before it, that it has the right to change its opinions and its rulings.

MR. CAPRA: Also, the Standing Committee was the personnel at the time, so that's changed.

MS. HARKENRIDER: I don't think, Steve, that most of your hypotheticals, except for your civil rights case with the three claims, actually aren't dealt within the notes. I mean, they are similar to cases that have been decided, indeed--

MR. SALTZBURG: There are other cases that go the other way.

MS. HARKENRIDER: Right, but, I mean, those types of hypotheticals have been considered.

MR. JOSEPH: If we wanted to deal with it

as purely an extension of Luce, it could be written along the lines that were suggested, I think you suggested, Ken, but a little differently, to say if under the court's ruling the introduction of certain testimony is a condition preceding to admission or exclusion, no claim of error may be predicated upon the ruling unless that testimony is offered. I mean, you could limit it to actually what is talked about, which was testimony.

CHAIRPERSON SMITH: Could I suggest this? This has been a very difficult issue for the Committee. This has been a very difficult rule for the Committee. This is now, what, the third time we've tried to deal with 103 and the Luce factor has made it more complicated.

I would like to send this back to the subcommittee--oh, no, we didn't have a subcommittee on 103.

MR. CAPRA: We did.

CHAIRPERSON SMITH: We did, but that--

MR. CAPRA: Greg, Judge Turner, and myself.

CHAIRPERSON SMITH: That was a long--yes. I guess I'm concerned about our making a decision today without a little more time to think about this one.

MR. CAPRA: If I might just clarify the discussion, I think the discussion--I really don't think that we can tinker with that rule here or probably at all, with that second sentence. I think we either have to bite the bullet with that second sentence, which I think it's well crafted and leads to results that Steve says they will lead to in many cases, and we have to either bite that bullet or we have to take that sentence out and put it in the Advisory Committee note that we're not touching it at all. Those are the two options that we have. I think maybe we should, after lunch, visit that question.

MR. : What question exactly?

MR. CAPRA: The question is, do we keep the language as it is and keep the Advisory Committee note as it is, as we've just amended it on other details, or do we take that second

sentence out and put in the Advisory Committee note a disclaimer that we're not dealing with the Luce issue. Those are the two options that I see.

MR. : Just kind of as a procedural question, we're having hearings in, what, December and January?

CHAIRPERSON SMITH: December and January, yes.

MR. : So those will be addressed to some of these same issues.

[Off the record at 11:47 a.m.]

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