

Advisory Committee on Evidence Rules

Minutes of the Meeting of April 23-24, 2009

Washington, D.C.

The Judicial Conference Advisory Committee on the Federal Rules of Evidence (the “Committee”) met on May 23rd and 24th in Washington, D.C..

The following members of the Committee were present:

Hon. Robert L. Hinkle, Chair
Hon. Joseph F. Anderson, Jr.
Hon. Anita B. Brody
Hon. Joan N. Ericksen.
Hon. Andrew D. Hurwitz
William T. Hangle, Esq.
Marjorie A. Meyers, Esq.,
William W. Taylor, III, Esq.
Elizabeth J. Shapiro, Esq., Department of Justice

Also present were:

Hon. Lee H. Rosenthal, Chair of the Committee on Rules of Practice and Procedure (“Standing Committee”)
Hon. Marilyn L. Huff, Liaison from the Committee on Rules of Practice and Procedure and member of the Standing Committee’s Style Subcommittee
Hon. James A. Teilborg, Chair of the Standing Committee’s Style Subcommittee
Hon. Michael M. Baylson, Liaison from the Civil Rules Committee
Hon. John F. Keenan, Liaison from the Criminal Rules Committee
Hon. Judith H. Wiznur, Liaison from the Bankruptcy Rules Committee
John K. Rabiej, Esq., Chief, Rules Committee Support Office
James Ishida, Esq., Rules Committee Support Office
Peter McCabe, Esq., Secretary to the Standing Committee on Rules of Practice and Procedure.
Professor Daniel J. Capra, Reporter to the Evidence Rules Committee
Professor Kenneth S. Broun, Consultant to the Evidence Rules Committee
Professor R. Joseph Kimble, Consultant to the Standing Committee’s Style Subcommittee
Professor Daniel R. Coquillette, Reporter to the Standing Committee
Thomas E. Willging, Esq., Federal Judicial Center
Jeffrey Barr, Esq., Rules Committee Support Office
Professor Stephen A. Saltzburg, Representative of the ABA Section on Criminal Justice

Alan Rudlin, Esq., Representative of the ABA Section of Litigation

Opening Business

Judge Hinkle welcomed the members and other participants to the meeting.

The Committee approved the minutes of the Spring 2008 meeting.

Judge Hinkle reported on developments since the last meeting. At its January 2009 meeting, the Standing Committee approved for publication the proposed amendment to the proposed restyled Rules 501-706. He noted that the Standing Committee amended the proposed Rules 501 and 601 from the restyled version approved by the Advisory Committee. The Standing Committee determined that the restyled language in both rules may have made a change in the substantive law on the applicability of state laws of privilege in cases where both federal and state claims are brought. Most federal courts have applied federal law to both state and federal claims in this situation, and the Standing Committee determined that the rules as restyled by the Evidence Rules Committee could be read to require that state law would govern both claims.

Judge Hinkle also reported that two members of the Standing Committee dissented from the vote to approve Rules 501-706 for public comment. Those members expressed concern with some of the style conventions, but were not opposed in principle to the restyling project.

Finally, Judge Hinkle informed the Committee that the Standing Committee has established a Subcommittee on Privacy, chaired by Judge Reena Raggi. The Privacy Subcommittee will investigate problems and developments arising since the enactment of the e-government rules, which require redaction of certain information from court filings. Each Advisory Committee has designated one member to serve on the Subcommittee. Judge Hinkle is the representative from the Evidence Rules Committee. Professor Capra has been appointed Reporter to the Privacy Subcommittee.

I. Restyling Project

A. Introduction

At the Spring 2007 meeting, the Committee voted unanimously to begin a project to restyle the Evidence Rules. At the Fall 2007 meeting, the Committee agreed upon a protocol and a timetable for the restyling project. At the Spring 2008 meeting the Committee approved the restyled Rules 101-415; the Standing Committee authorized those rules to be released for public comment, but publication will be delayed until all the Evidence Rules are restyled. The Committee approved Restyled Rules 501-706 at its Fall 2008 meeting, and as discussed above, the Standing Committee approved release for publication, with a minor amendment to two Rules.

At the Spring 2009 meeting the Committee reviewed a draft of restyled Rules 801-1103. The draft had been prepared in the following steps: 1) Professor Kimble prepared a first draft, which was reviewed by the Reporter; 2) Professor Kimble made some changes in response to the Reporter's comment; 3) the revised draft was reviewed by the Evidence Rules Committee, and Professor Kimble made some further revisions in light of Committee comments; 4) the Style Subcommittee reviewed the draft and implemented changes, resolving most of the open questions left in the draft. The Advisory Committee reviewed the Style Subcommittee's approved version at the Spring 2009 meeting.

At the meeting, the Committee reviewed each rule to determine whether any change was one of substance rather than style (with "substance" defined as changing an evidentiary result or method of analysis, or changing language that is so heavily engrained in the practice as to constitute a "sacred phrase"). Under the protocol for the restyling project, if a significant minority of Evidence Rules Committee members agree that the proposed change is substantive, then that change should not be implemented. The Committee also reviewed each rule to determine whether to recommend that a change, even though one of style, might be considered by the Style Subcommittee of the Standing Committee.

After considering possible changes of both substance and style, the Committee unanimously voted to refer the Restyled Rules 801-1103 to the Standing Committee, with the recommendation that they be released for public comment.

In order to assure consistency throughout the Restyled Rules, Professor Kimble made a number of suggested changes to Rules 101-706, which had previously been approved for public comment. The Committee reviewed these changes and, as discussed below, most were approved, some were rejected and some were modified. **The Committee then voted unanimously to refer the entire package of Restyled Rules to the Standing Committee with the recommendation that they be approved for release for public comment in August, 2009.**

What follows is a description of the Committee's determinations, rule by rule. **It should be noted that a number of the rules required no discussion because any drafting questions in those rules had already been resolved in the extensive vetting process described above.**

The Committee also noted that it might be necessary to make minor changes to the Rules as approved by the Committee, in order to assure internal consistency, correct typographical errors and the like. The Committee gave the Chair, the Reporter and the Style Consultant the authority to make these minor changes.

B. Rules 801-1103

Many of these Rules are essentially a independent rules placed under one rule number.

Accordingly, the Committee reviewed some of these rules subdivision by subdivision, and others as a single rule. These minutes reflect that delineation.

Rule 801(a)-(c)

Rule 801(a)-(c) currently provides as follows:

Rule 801. Definitions

The following definitions apply under this article:

(a) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) Declarant. A "declarant" is a person who makes a statement.

(c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

The restyled version of Rule 801(a)-(c), reviewed by the Committee at the meeting, provides as follows:

(a) Statement. "Statement" means:

- (1) a person's oral or written assertion; or
- (2) a person's nonverbal conduct, if the person intended it as an assertion.

(b) Declarant. "Declarant" means the person who made the statement.

(c) Hearsay. "Hearsay" means a prior statement — one not made by someone while testifying at the current trial or hearing — that a party offers in evidence to prove the truth of the matter asserted by the declarant.

Committee Discussion:

1. Committee members observed that the reference to "one not made by someone" was vague. Because the rule already defines the one who makes the statement as the "declarant," it would be more precise to refer explicitly to the declarant as opposed to "someone."

2. Professor Kimble and the Style Subcommittee agreed with the change from "one not made

by someone” to “the declarant.”

Committee Vote:

The Committee voted unanimously to recommend that the restyled Rule 801(a)-(c) be released for public comment, with the substitution of “the declarant” for “one not made by someone.”

Rule 801(d)(1)

Rule 801(d)(1) currently provides as follows:

(d) Statements which are not hearsay. A statement is not hearsay if-

(1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person; or

The restyled version of Rule 801(d)(1), reviewed by the Committee at the meeting, provides as follows:

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

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

(A) is inconsistent with the declarant’s testimony and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition;

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

(C) identifies a person as someone the declarant perceived earlier.

Committee Discussion:

1. Professor Kimble proposed two minor changes to the rule as approved by the Style Subcommittee — both intended to clarify that the hearsay statement offered is that of the witness: first, changing the heading to “A *Declarant-Witness’s* Prior Statement”; second, to refer to “cross-examination about the *prior* statement.” The Committee agreed with both clarifications.

2. Judge Hinkle observed that the restyled provision on prior consistent statements made a substantive change because the requirement of recency is made to apply only to fabrication and not to improper influence or motive. The substantive law requires that the “recency” requirement applies to both kinds of attacks on the witness. **The Committee unanimously agreed that the restyled version made a substantive change to Rule 801(d)(1)(B). The Committee unanimously adopted the following change:**

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

3. The Style Subcommittee agreed with the change.

Committee Vote

The Committee unanimously approved the restyled version of Rule 801(d)(1), as modified by the stylistic changes proposed by Professor Kimble, and with the addition of the term *recent* before “improper influence or motive.”

Rule 801(d)(2) — Title

The restyling changed the title of Rule 801(d)(2) from “Admission by Party-Opponent” to “An Opposing Party’s Statement.” Some Committee members argued that a change from the term “admissions” would be jarring to lawyers and courts, as that term has been used to describe hearsay statements made by a party, and offered against that party, for more than 30 years. But other members of the Committee found the change to be very useful. They noted that many lawyers are confused by the term “admissions” — thinking that such statements must “admit” something to qualify the statement; and others confuse admissions with declarations against interest.

After discussion, the Committee unanimously approved the restyled heading to Rule 801(d)(2). It also unanimously approved a Committee Note to the change, describing the motivation for the change and stating that there is no intent to change substantive law. (See discussion on Committee Notes later in these Minutes).

Rule 801(d)(2)(A)

Rule 801(d)(2)(A) currently provides as follows:

The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity or

The restyled version of Rule 801(d)(2)(A), reviewed by the Committee at the meeting, provides as follows:

The statement is offered against an opposing party and:

(A) was made by the party in an individual or representative capacity;

Committee Vote:

The Committee unanimously approved the restyled version of Rule 801(d)(2)(A).

Rule 801(d)(2)(B)

Rule 801(d)(2)(B) currently provides as follows:

(B) a statement of which the party has manifested an adoption or belief in its truth, or

The restyled version of Rule 801(d)(2)(B), reviewed by the Committee at the meeting, provides as follows:

(B) is one that the party adopted or the party accepted as true;

Committee Discussion:

1. Members expressed a concern about the change from “manifested an adoption or belief”

to “that the party adopted or the party accepted as true.” Members believed that the change was substantive because deleting the word “manifested” could persuade a court that adoption should be found more easily than previously. One member noted that in a criminal case, admitting an accusation because it was adopted raised confrontation questions. Consequently, any change that could be interpreted to find adoptions more easily was extremely problematic. **The Committee voted unanimously that the proposed change would effectuate a substantive change.**

2. Professor Kimble prepared several alternatives for restyling Rule 801(d)(2)(B) in a different way. He noted that the word “manifested” was awkward and that any attempt to include it would result in a poorly styled rule. After discussion, the Committee agreed on the following language for Rule 801(d)(2)(B):

“is one that the party appeared to adopt or to accept as true;”

Committee Vote

The Committee voted unanimously to approve an amendment to Rule 801(2)(B), stating that the hearsay exemption applies to a statement “that the party appeared to adopt or to accept as true.”

Rules 801(d)(2)(C) and (D)

Rules 801(d)(2)(C) and (D) currently provide as follows:

or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party’s agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or

The restyled version of Rules 801(d)(2)(C) and (D), reviewed by the Committee at the meeting, provide as follows:

(C) was made by a person whom the party authorized to make a statement on the subject;

(D) was made by the party’s agent or employee on a matter within the scope of that relationship and while it existed; or

Committee Vote:

The Committee voted unanimously to approve Rules 801(d)(2)(C) and (D) as restyled.

Rule 801(d)(2)(E)

Rule 801(d)(2)(E) currently provides as follows:

(E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

The restyled version of Rules 801(d)(2)(C) and (D), reviewed by the Committee at the meeting, provide as follows:

(E) was made by the party's co-conspirator during the conspiracy and to further it.

Committee Discussion:

1. Some Committee members thought the phrase “during the course and in furtherance of the conspiracy” was a so-called “sacred phrase” that cannot be restyled. It was observed that the language was taken from the substantive law of conspiracy, which Rule 801(d)(2)(E) was designed to track. Others disagreed.

2. After substantial discussion, the Committee determined that changing “during the course of” to “during” could never result in a difference in result in applying the coconspirator exception.

3. **In contrast, Committee members concluded that substituting “to further it” for “in furtherance of” could be interpreted as a substantive change.** The “in furtherance of” requirement, as applied in the cases, is relatively mild. The more assertive phrase “to further it” could be interpreted to require more in the way of intent and action than is the case under the current law.

Committee Vote:

A motion was made to retain “during the course and in furtherance of the conspiracy” as a substantively required phrase. That vote failed by a vote of 6 to 3.

Thereafter, the Committee unanimously agreed that the change of the “in furtherance of” language was substantive. It unanimously approved the following language for Rule 801(d)(2)(E):

“was made by the party's co-conspirator during and in furtherance of the conspiracy.”

Rule 801(d)(2), last sentence

The last sentence Rule 801(d)(2) currently provides as follows:

The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).

The restyled version of the last sentence of Rule 801(d)(2) is set out as an independent paragraph, and provides as follows:

The statement must be considered but does not by itself establish the declarant's authority under (C); the existence or scope of the relationship under (D); or the existence of the conspiracy or participation in it under (E).

Committee Vote:

The Committee voted unanimously to approve the restyled version of the last sentence of Rule 801(d)(2)(E).

Rule 802

Rule 802 currently provides as follows:

Rule 802. Hearsay Rule

Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.

The restyled version of Rule 802, reviewed by the Committee at the meeting, provides as follows:

Hearsay is not admissible unless any of the following provides otherwise:

- a federal statute;
- these rules; or
- other rules prescribed by the Supreme Court.

Committee Discussion:

Professor Kimble and the Reporter noted that the reference to Supreme Court rules as being under “statutory authority” had been eliminated from the Rule, but not as a substantive change. Rather, the new definitions section would define Supreme Court rules as those being prescribed under statutory authority. The definitions section was considered later at the meeting. (See below).

Committee Vote:

The Committee unanimously approved the restyled version of Rule 802.

Rule 803, Structure

The Style Subcommittee and Professor Kimble proposed to restructure Rule 803 so that the hearsay exceptions would be set forth under a new subdivision (a), and a new subdivision (b) would define “record” for purposes of some Rule 803 exceptions as including a memorandum, report or data compilation in any form. The rationale for the restructuring is that the existing Rule follows a number (803) with another number — whereas the proper structure is to follow a number with a letter, with a number, and so forth. Professor Kimble also argued that the new subdivision (b) would streamline the records-based exceptions under Rule 803, by eliminating the need to repeat “memorandum, data compilation” etc. in all those rules.

Committee members were generally opposed to restructuring Rule 803 because it would disrupt electronic searches and impose transaction costs that far outweighed any benefit. Members argued that it made little sense to define “record” only in Rule 803 when the word “record” appears throughout the Evidence Rules. **Indeed it would be a substantive change to define “record” in Rule 803 differently from any other rule.** The Committee determined that it would make much more sense to define “record” in the general definitions section (see below), and retain the existing, albeit idiosyncratic, structure of Rule 803.

Committee Vote

The Committee voted unanimously to retain the existing structure of Rule 803, and to move the proposed definition of “record” to the general definitions section in the proposed restyling. The Style Subcommittee agreed with and implemented this suggestion.

Rule 803(1)

Rule 803(1) currently provides as follows:

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

(1) Present sense impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

The restyled version of Rule 803(1), reviewed by the Committee at the meeting, provides as follows:

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

(1) Present Sense Impression. A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.

Committee Vote:

The Committee voted unanimously to approve the restyled version of Rule 803(1).

Rule 803(2)

Rule 803(2) currently provides as follows:

(2) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

The restyled version of Rule 803(2), reviewed by the Committee at the meeting, provides as follows:

(2) **Excited Utterance.** A statement related to a startling event or condition, made while the declarant was under the stress or excitement that it caused.

Committee Discussion:

Committee members believed that the change from “relating to” to “related to” could substantively alter the scope of the exception. The term “relating to” has been construed to cover statements that are not necessarily “related” in terms of subject matter, but rather are part of the same transaction as the startling event.

Committee Vote:

The Committee voted unanimously that the change from “relating to” to “related to” was substantive. The Style Committee agreed to restore the term “relating to.” As so modified, the Committee voted unanimously to approve the restyled Rule 803(2).

Rule 803(3)

Rule 803(3) currently provides as follows:

(3) Then existing mental, emotional, or physical condition. A statement of the declarant’s then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant’s will.

The restyled version of Rule 803(3), reviewed by the Committee at the meeting, provides as follows:

(3) **Then-Existing Mental, Emotional, or Physical Condition.** A statement of the declarant’s then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant’s will.

Committee Vote:

The Committee voted unanimously to approve the restyled Rule 803(3).

Rule 803(4)

Rule 803(4) currently provides as follows:

(4) Statements for purposes of medical diagnosis or treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

The restyled version of Rule 803(4), reviewed by the Committee at the meeting, provides as follows:

- (4) Statement Made for Medical Diagnosis or Treatment. A statement that:
- (A) is made for — and is reasonably pertinent to — medical diagnosis or treatment; and
 - (B) describes medical history; past or present symptoms or sensations; or the inception or general character of their cause.

Committee Discussion:

Two Committee members objected to the deletion of the word “pain” from the rule. They contended that most of the cases under this exception involve statements about the declarant’s pain, and that “pain” is an evocative word to describe the kinds of statements covered by the exception. But other members argued that the word “pain” is unnecessary because it is covered by the words “symptoms” and “sensations.” The Reporter noted that Professor Broun had surveyed the case law and found no indication that deletion of the word “pain” would lead to any substantive change.

Committee Vote:

The Committee voted 7 to 2 to approve the restyled version of Rule 803(4).

Rule 803(5)

Rule 803(5) currently provides as follows:

(5) Recorded recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

The restyled version of Rule 803(5), reviewed by the Committee at the meeting, provides as follows:

(5) Recorded Recollection. A record that:

(A) is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately;

(B) was made or adopted by the witness when the matter was fresh in the witness's memory; and

(C) accurately reflects the witness's knowledge.

If admitted, the record may be read into evidence but may be received as an exhibit only if offered by an adverse party.

Committee Vote:

The Committee voted unanimously to approve the restyled Rule 803(5).

Rule 803(6)

Rule 803(6) currently provides as follows:

(6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term “business” as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

The restyled version of Rule 803(6), reviewed by the Committee at the meeting, provides as follows:

(6) Records of a Regularly Conducted Activity. A record of an act, event, condition, opinion, or diagnosis if:

(A) the record was made at or near the time by — or from information transmitted by — someone with knowledge;

(B) the record was kept in the course of a regularly conducted business activity;

(C) making the record was a regular practice of that business activity;

(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(b)(11) or (12) or with a statute permitting certification; and

(E) the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

“Business” in this paragraph (6) includes any kind of organization, occupation, or calling, whether or not conducted for profit.

Committee Discussion:

1. The Reporter noted that the proposed restyling provided a helpful clarification that if the basic admissibility requirements of regularly conducted activity, regularly recorded are met, then

it is the opponent that has the burden of showing that the record is untrustworthy despite fitting those requirements. Unfortunately, a recent case stated in passing that it is the proponent who has the burden of showing, essentially, lack of untrustworthiness. **Accordingly, under the style protocol, any explicit allocation of the burden of proof on the untrustworthiness factor would be a substantive change because it would change the case law in at least one circuit.** Professor Kimble suggested that the untrustworthiness clause be altered to provide that Rule 803(6) “does not apply” if the source of information, etc., indicate a lack of trustworthiness. The Committee agreed with this solution. The question then was where to put the language. The problem was that it does not fit in the list of admissibility requirements, and so cannot really be placed as its own subdivision. Various solutions were discussed. Eventually the Committee decided that the best place to put the trustworthiness clause was as a dangling sentence at the end of the rule. (See below).

2. Professor Kimble proposed a change in which the last sentence of the restyled Rule 803(6)— the definition of “business” — would be moved up in the rule. The goal of this move would be to eliminate a dangling sentence at the end of the rule — and this would seem especially required because the trustworthiness clause had to be moved from being an admissibility requirement, essentially to retain the lack of clarity over which party had the burden of proof on that point. The problem with the move of the “business” definition is that it could not be placed as a freestanding admissibility requirement, because it is simply a definition. Some Committee members argued that the move raised the risk of an inadvertent change in the meaning and application of the rule — a cost that outweighed any benefit of eliminating a dangling sentence. But other members thought that the definition could be moved in a way that would make the rule more compact and understandable.

Committee Vote:

The Committee voted 6 to 3 in favor of adopting the following restyled version of Rule 803(6) (with the three dissenters objecting to moving the definition of “business” into the body of the rule):

- (6) Records of a Regularly Conducted Activity.** A record of an act, event, condition, opinion, or diagnosis if:
 - (A)** the record was made at or near the time by — or from information transmitted by — someone with knowledge;
 - (B)** the record was kept in the course of a regularly conducted business activity, including the regular activity of any kind of organization, occupation, or calling, whether or not for profit;
 - (C)** making the record was a regular practice of that activity; and

(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(b)(11) or (12) or with a statute permitting certification.

But this exception does not apply if the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

Rule 803(7)

Rule 803(7) currently provides as follows:

(7) Absence of entry in records kept in accordance with the provisions of paragraph (6). Evidence that a matter is not included in the memoranda reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

The restyled version of Rule 803(7), reviewed by the Committee at the meeting, provides as follows:

(7) **Absence of a Record of a Regularly Conducted Activity.** Evidence that a matter is not included in a record described in paragraph (6), if:

- (A) the evidence is offered to prove that the matter did not occur or exist;
- (B) a record was regularly kept for a matter of that kind; and
- (C) the opponent does not show that the possible source of the information or other circumstances indicate a lack of trustworthiness.

Committee Discussion:

1. Committee members observed that the trustworthiness clause of Rule 803(7) needed to be consistent with the same clause that was changed in 803(6). That is, it could not explicitly allocate the burden of proof of showing untrustworthiness, because courts have not been clear in allocating that burden. Consequently, the Committee determined that the clause would have to be placed as a dangling sentence at the end of the rule.

2. Committee members observed that the language “the evidence is offered to prove” is problematic because admissibility is not determined by an offer. It is determined by whether the judge finds that the admissibility requirements are met. **Thus the use of the word “offered” is substantively inaccurate.** The Committee agreed that the word should be changed to “admitted” to reflect the judge’s decision on admissibility.

Committee Vote:

The Committee unanimously approved the following version of Rule 803(7):

(7) Absence a Record of a Regularly Conducted Activity. Evidence that a matter is not included in a record described in paragraph (6) if:

- (A)** the evidence is admitted to prove that the matter did not occur or exist; and
- (B)** a record was regularly kept for a matter of that kind.

But this exception does not apply if the possible source of the information or other circumstances indicate a lack of trustworthiness.

The Style Subcommittee approved the version adopted by the Committee.

Rule 803(8)

Rule 803(8) currently provides as follows:

(8) Public records and reports. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

The restyled version of Rule 803(8), reviewed by the Committee at the meeting, provides as follows:

- (8) **Public Records.** A record of a public office or agency setting out:
- (A) the office’s or agency’s activities;
 - (B) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by someone officially engaged in law-enforcement;
or
 - (C) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation.

But the record is not admissible if the opponent shows that the source of information or other circumstances indicate a lack of trustworthiness.

Committee Discussion:

1. As with Rule 803(6) and 803(7), the Committee determined that the explicit allocation of the burden as to untrustworthiness had to be changed, because the case law is not clear on that allocation.

2. Members expressed concern about changing “police officers and other law enforcement personnel” in subdivision (B) to “someone officially engaged in law enforcement.” **The change could result in a substantive limitation on the existing exclusion.** For example, a report of an undercover informant or cooperating witness would undoubtedly be excluded under the existing rule, but it might not be excluded under the restyled rule because such a person might not be considered as a person “officially engaged in law-enforcement.” The Committee decided that it was necessary to retain the reference to “law enforcement personnel” — though it was not necessary to retain the reference to police officers, because they are stated in the rule as a subset of law enforcement personnel and so the reference is superfluous.

Committee Vote:

The Committee voted unanimously to approve the following version of Rule 803(8) — amended from the restyled draft in order to avoid any substantive change to the Rule:

- (8) **Public Records.** A record of a public office setting out:
- (A) the office’s or agency’s activities;
 - (B) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or

(C) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation.

But this exception does not apply if the source of information or other circumstances indicate a lack of trustworthiness.

The Style Committee also approved this version of the rule.

Rule 803(9)

Rule 803(9) currently provides as follows:

(9) Records of vital statistics. Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

The restyled version of Rule 803(9), reviewed by the Committee at the meeting, provides as follows:

(9) **Public Records of Vital Statistics.** A record of a birth, death, or marriage, if reported to a public office or agency in accordance with a legal duty.

Committee Discussion:

1. Committee members noted that the term “data compilations in any form” had been deleted, but also noted that the term “record” will be defined — in the general rule on definitions — as including data compilations in any form. So the deletion is not a substantive change.

2. Professor Kimble noted that the reference to “public office or agency” was one that arose throughout the rules. The proposed definitions section would define “public office” as including “agency.” Accordingly, the Committee agreed that the words “or agency” should be deleted from the restyled rule.

Committee Vote:

The Committee voted unanimously to approve the restyled version of Rule 803(9), with the modification that the words “or agency” will be deleted.

Rule 803(10)

Rule 803(10) currently provides as follows:

(10) Absence of public record or entry. To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

The restyled version of Rule 803(10), reviewed by the Committee at the meeting, provides as follows:

(10) Absence of a Public Record or an Entry in a Public Record. Testimony — or a certification under Rule 902 — that a diligent search failed to disclose a public record, or an entry in one, if the testimony or certification is offered to prove that:

(A) the record or entry does not exist; or

(B) a matter did not occur or exist, even though a public office or agency regularly kept a record for a matter of that kind.

Committee Discussion:

1. Professor Kimble suggested that all the references to “an entry” in a public record could be deleted. The Reporter researched the matter and determined that there was no distinction between the absence of “an entry” in a public record and an absence of a public record. Put another way, the absence of an entry is itself the absence of a public record. The Committee unanimously agreed that deleting references to “an entry” would not constitute a substantive change.

2. The Committee agreed to delete the words “or agency” as the rule on definitions will define public office as including agencies.

3. The Committee agreed to change all references to “offered to prove” throughout Rule 803 to “admitted to prove.” For reasons discussed previously, admissibility requirements under the hearsay exceptions are for the judge and are not dependent on the party’s offer.

Committee Vote:

The Committee voted unanimously to approve the following version of Rule 803(10):

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

(A) the record does not exist; or

(B) a matter did not occur or exist, even though a public office regularly kept a record for a matter of that kind.

Rules 803(11), (12), (13) and (14)

Rules 803(11), (12), (13) and (14) currently provide as follows:

(11) Records of religious organizations. Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) Marriage, baptismal, and similar certificates. Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(13) Family records. Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

(14) Records of documents affecting an interest in property. The record of a document purporting to establish or affect an interest in property, as proof of the content of the original

recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.

The restyled version of Rules 803(11)-(14), reviewed by the Committee at the meeting, provides as follows:

(11) Records of Religious Organizations Concerning Personal or Family History. A statement of birth, legitimacy, ancestry, marriage, divorce, death, relationship by blood or marriage, or similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) Certificates of Marriage, Baptism, and Similar Ceremonies. A statement of fact contained in a certificate:

(A) made by a person who is authorized by a religious organization or by law to perform the act certified;

(B) attesting that the person performed a marriage or similar ceremony or administered a sacrament; and

(C) purporting to have been issued at the time of the act or within a reasonable time after it.

(13) Family Records. A statement of fact about personal or family history contained in a family record, such as a Bible, genealogy, chart, engraving on a ring, inscription on a portrait, or engraving on an urn or burial marker.

(14) Records of Documents That Affect an Interest in Property. The record of a document that purports to establish or affect an interest in property if:

(A) the record is offered to prove the content of the original recorded document, along with its signing and its delivery by each person who purports to have signed it;

(B) the record is kept in a public office; and

(C) a statute authorizes recording documents of that kind in that office.

Committee Vote:

The Committee unanimously approved the style changes to Rules 803(11)-(14).

Rule 803(15)

Rule 803(15) currently provides as follows:

(15) Statements in documents affecting an interest in property. A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

The restyled version of Rule 803(15), reviewed by the Committee at the meeting, provides as follows:

(15) Statements in Documents That Affect an Interest in Property. A statement contained in a document that purports to establish or affect an interest in property if:

- (A) the matter stated was relevant to the document’s purpose; and
- (B) the opponent does not show that later dealings with the property are inconsistent with the truth of the statement or the purport of the document.

Committee Discussion:

The existing Rule 803(15) has an “unless” clause similar to that in Rules 803(6) and 803(8). As with those earlier clauses, the Style Subcommittee changed the clause to an affirmative admissibility requirement, with the burden of showing untrustworthiness on the opponent. This resulted in a substantive change because the case law does not uniformly impose that burden on the opponent. Because the restylings in Rules 803(6) and 803(8) had to be changed, it was important, for purposes of consistency, to make a similar change to Rule 803(15).

Committee Vote:

The Committee unanimously approved the following restyled version of Rule 803(15):

(15) Statements in Documents That Affect an Interest in Property. A statement in a document that purports to establish or affect an interest in property if the matter stated was relevant to the document’s purpose — unless later dealings with the property are inconsistent with the truth of the statement or the purport of the document.

The Style Subcommittee also approved this version of Rule 803(15).

Rule 803(16)

Rules 803(16) currently provides as follows:

(16) Statements in ancient documents. Statements in a document in existence twenty years or more the authenticity of which is established.

Restyled Rule 803(16), as reviewed by the Committee at the meeting, provides as follows:

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

Committee Discussion:

Judge Hinkle sought assurance that the restyling had provided consistent treatment of the term “document.” Professor Kimble and the Reporter responded that the term “document” was not included in the definitions section, and that the restyling had left the term “document” unchanged from the existing rules. Thus there was no danger of a substantive change with respect to the use of the term “document.”

Committee Vote:

The Committee voted unanimously to approve the restyled version of Rule 803(16).

Rule 803(17)

Rule 803(17) currently provides as follows:

(17) Market reports, commercial publications. Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

The restyled version of Rule 803(17), reviewed by the Committee at the meeting, provided as follows:

(17) Market Reports and Similar Commercial Publications. Market quotations, lists, directories, or other compilations — published in any form — generally relied on by the public or by persons in particular occupations.

Committee Discussion:

Professor Kimble suggested that the reference to “published in any form” — which was intended to cover information in electronic form — should be deleted, because the new rule on definitions (discussed below) defines any written material as including electronically stored information. The Committee agreed with Professor Kimble’s suggestion.

Committee Vote:

The Committee unanimously approved the restyled version of Rule 803(17), with the modification of deleting the phrase “published in any form.”

Rule 803(18)

Rule 803(18) currently provides as follows:

(18) Learned treatises. To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

Restyled Rule 803(18), reviewed by the Committee at the meeting, provided as follows:

(18) Statements in Learned Treatises, Periodicals, or Pamphlets. A statement contained in a treatise, periodical, or pamphlet — published in any form — if the publication

is:

- (A) called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination; and
- (B) established as a reliable authority by the expert's admission or testimony, by another expert's testimony, or by judicial notice.

If admitted, the statement may be read into evidence but not received as an exhibit.

Committee Discussion:

1. The Reporter noted that the restyled version made a substantive change by deleting the limitation in the original rule that the treatise is only admissible to the extent called to the attention of the witness. Under the proposed restyling, an entire treatise could be admissible if generally called to the attention of the expert. This is contrary to the existing rule which limits admissibility to those portions of the treatise called to the attention of the expert. **The Committee unanimously agreed that the deletion of the “to the extent” language resulted in a substantive change.** After extensive discussion, the Committee determined that the proposal could be fixed by limiting admissibility to the statements in the treatise that are called to the attention of the expert.

2. As with other rules, Professor Kimble noted that the provision on publication “in any form” should be deleted as the newly proposed rule on definitions provides that any written material includes electronically stored information.

Committee Vote:

The Committee voted unanimously to adopt the following version of Rule 803(18):

(18) Statements in Learned Treatises, Periodicals, or Pamphlets. A statement in a treatise, periodical, or pamphlet if:

- (A) the statement is called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination; and
- (B) the publication is established as a reliable authority by the expert's admission or testimony, by another expert's testimony, or by judicial notice.

If admitted, the statement may be read into evidence but not received as an exhibit.

Rules 803(19)-(21)

Rules 803(19)-(22) currently provide as follows:

(19) Reputation concerning personal or family history. Reputation among members of a person's family by blood, adoption, or marriage, or among a person's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history.

(20) Reputation concerning boundaries or general history. Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or State or nation in which located.

(21) Reputation as to character. Reputation of a person's character among associates or in the community.

The restyled version of Rules 803(19)-(21), reviewed by the Committee at the meeting, provides as follows:

(19) Reputation Concerning Personal or Family History. A reputation among a person's family by blood, adoption, or marriage — or among a person's associates or in the community — concerning the person's birth, adoption, legitimacy, ancestry, marriage, divorce, death, relationship by blood, adoption, or marriage, or similar facts of personal or family history.

(20) Reputation Concerning Boundaries or General History. A reputation in a community — arising before the controversy — concerning boundaries of land in the community or customs that affect the land, or about general historical events important to that community, state, or nation.

(21) Reputation Concerning Character. A reputation among a person's associates or in the community concerning the person's character.

Committee Vote:

The Committee voted unanimously to approve the restyled version of Rules 803(19)-(21).

Rule 803(22)

Rule 803(22) currently provides as follows:

(22) Judgment of previous conviction. Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the Government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

The restyled version of Rule 803(22), as reviewed by the Committee at the meeting, provided as follows:

(22) Judgment of a Previous Conviction. Evidence of a final judgment of conviction — even one on appeal — if:

- (A) the judgment was entered after a trial or guilty plea, but not a nolo contendere plea;
- (B) the judgment was for a crime punishable by death or by imprisonment for more than a year;
- (C) the evidence is intended to prove any fact essential to the judgment; and
- (D) when offered by the government in a criminal prosecution for a purpose other than impeachment, the judgment was against the defendant.

The opponent may show that an appeal is pending.

Committee Discussion:

1. Professor Kimble and the Committee discussed ways in which the final (dangling) sentence might be moved up into the body of the rule. One problem with the restyled version was that it separated the admissibility of a conviction on appeal with the fact that the opponent can tell the jury that the conviction is on appeal. Efforts to combine both concepts in a single place — other

than a dangling sentence — did not seem workable, because the rule is set out as a series of admissibility requirements, and the two substantive points about convictions on appeal are not intended to be admissibility requirements for every proffered conviction. Professor Kimble and the Committee eventually decided to return to the original rule, and to place the provisions about appeal in a single sentence at the end of the rule.

2. Professor Saltzburg noted that the admissibility requirement that “the evidence is intended to prove any fact essential to the judgment” constituted a substantive change. Some courts have held that under Rule 803(22) the judge must find, under Rule 104(a), that the conviction proves a fact essential to the judgment. The phrase “intended to prove” is not accurate in these courts, because the requirement would simply be met by the proffering party’s declaration that it is offering the conviction with the intent to prove a fact essential to the judgment. **The Committee unanimously agreed that the use of the term “intended to prove” was a substantive change.** After much discussion, the Committee unanimously decided to substitute the phrase “the evidence is admitted to prove any fact essential to the judgment” — thus recognizing that the trial judge may have a factfinding role in determining admissibility.

3. Committee members suggested a stylistic change from “government in a criminal prosecution” to “prosecutor in a criminal case.” Professor Kimble and the Style Committee agreed with that suggestion.

Committee Vote:

The Committee voted unanimously to approve the following restyled version of Rule 803(22):

- (22) **Judgment of a Previous Conviction.** Evidence of a final judgment of conviction if:
- (A) the judgment was entered after a trial or guilty plea, but not a nolo contendere plea;
 - (B) the judgment was for a crime punishable by death or by imprisonment for more than a year;
 - (C) the evidence is admitted to prove any fact essential to the judgment; and
 - (D) when offered by the prosecutor in a criminal case for a purpose other than impeachment, the judgment was against the defendant.

The pendency of an appeal may be shown but does not affect admissibility.

Rule 803(23)

Rule 803(23) currently provides as follows:

(23) Judgment as to personal, family, or general history, or boundaries. Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

The restyled version of Rule 803(23), reviewed by the Committee at the meeting, provides as follows:

(23) Judgments Involving Personal, Family, or General History or a Boundary. A judgment that is offered to prove a matter of personal, family, or general history, or boundaries, if the matter:

- (A) was essential to the judgment; and
- (B) could be proved by evidence of reputation.

Committee Vote:

The Committee voted unanimously to approve the restyled version of Rule 803(23).

Rule 803(24)

In 1997 the original Rule 803(24) — providing a residual exception to the hearsay rule — was consolidated with the identically-worded Rule 804(b)(5) and transferred to Rule 807. In the official publication of the Federal Rules of Evidence, the following designation of Rule 803(24) is indicated:

(24) [Other exceptions.] [Transferred to Rule 807.]

Professor Kimble suggested that, as part of the restyling project, this designation should be deleted. He reasoned that the designation served no purpose and that if the Committee were ever to decide to propose a new hearsay exception under Rule 803, it would have to encounter the problem of enumeration that arose with respect to Rule 804 when a new hearsay exception was promulgated in 1997.

But Committee members argued that it was useful to retain the existing designation for Rule 803(24). First, it would indicate some history about the development of the Evidence Rules for those who study the rules. Second, such designations are also found in the restyled Criminal and Civil Rules, and so it is important to be consistent with those earlier style projects. Finally, it is unlikely that any new hearsay exception would ever be developed under Rule 803, but if that event came to pass, the Committee could deal with any enumeration problem at that time. At this point, there is no “gap” in the enumeration of the Rule 803 exceptions, because Rule 803(24) is at the end.

The Committee voted unanimously to suggest to the Style Subcommittee that the existing designation of Rule 803(24) be retained. The Style Subcommittee and Professor Kimble agreed to adopt this suggestion.

Rule 804(a)

Rule 804(a) currently provides as follows:

(a) Definition of unavailability. “Unavailability as a witness” includes situations in which the declarant—

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant’s statement; or

(2) persists in refusing to testify concerning the subject matter of the declarant’s statement despite an order of the court to do so; or

(3) testifies to a lack of memory of the subject matter of the declarant’s statement;
or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant’s attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant’s attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

The restyled version of Rule 804(a), as reviewed by the Committee at the meeting, provided as follows:

(a) Criteria for Being Unavailable. A declarant is considered to be unavailable as a witness if the declarant:

- (1) is exempted by a court ruling on the ground of having a privilege to not testify about the subject matter of the declarant's statement;
- (2) refuses to testify about the subject matter despite a court order to do so;
- (3) testifies to not remembering the subject matter;
- (4) cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness; or
- (5) is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure:
 - (A) the declarant's attendance; or
 - (B) in the case of a hearsay exception under Rule 804 (b)(2), (3), or (4) below, the declarant's attendance or testimony.

But this subdivision (a) does not apply if the statement's proponent wrongfully caused the declarant to be unavailable in order to prevent the declarant from attending or testifying.

Committee Discussion:

The restyling of the last sentence of the rule took out the reference to absence "due to the procurement or wrongdoing of the proponent." Committee members were concerned that the substituted language — "wrongfully caused" — did not accurately describe the situations in which a party, under existing law, is disentitled from introducing hearsay under Rule 804. For example, a number of courts have held that a party must engage in an affirmative act in order to be disentitled from introducing the hearsay — thus, the government is not barred from introducing hearsay when the ground of unavailability is the declaration of a privilege, and the government's only role is that it refused to immunize the witness. The refusal to act is not "procurement" within the existing rule, but it could be argued to be "wrongful causation" within the restyled version. Then on the other hand, under the existing rule a party might procure the unavailability of the declarant without acting wrongfully, and yet would be disentitled from proffering hearsay. That would not be the case under the restyled version, because it would not be "wrongful conduct."

After extensive discussion of all these concerns, the Committee unanimously concluded that the restyled version of the last sentence of Rule 804(a) would effectuate a substantive change. The Committee proposed as an alternative “procured or wrongfully caused.” The Style Subcommittee and Professor Kimble agreed with that proposal.

Committee Vote:

The Committee voted unanimously to approve the restyled version of Rule 804(a), with the modification of adding “procured or” before “wrongly caused” in the last sentence.

Rule 804(b)(1)

Rule 804(b)(1) currently provides as follows:

(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

The restyled version of Rule 804(b)(1), as reviewed by the Committee at the meeting, provided as follows:

(b) The Exceptions. The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:

(1) Former Testimony. Testimony that:

(A) was given as a witness at a trial, hearing, or deposition, whether given during the current proceeding or a different one; and

(B) is now offered against a party — or, in a civil case, a predecessor in interest — who had an opportunity and similar motive to develop it by direct, cross-, or redirect examination.

Committee Discussion

1. Some Committee members objected to using the term “the rule against hearsay” in the introduction to Rule 804(b) and in other rules, because it sounds like hearsay is always barred when that is not the case. Professor Kimble argued in response that the existing term — “the hearsay rule” — is not descriptive about what the rule does (unlike, for example, “the rule of lenity” or the “rule against perpetuities”). After discussion, the Committee observed that the objections of some of its members to the use of “the rule against hearsay” had already been considered by the Style Subcommittee. The Committee decided to let the matter rest.

2. The Reporter observed that the restyled version of (b)(1) was substantively inaccurate because, in a civil case, it provided for admissibility if the testimony is “now offered . . . against a predecessor in interest.” This is incorrect because the testimony is always offered against a party to the case. The predecessor in interest language is intended to cover situations in which a party in a *prior* case had a motive similar to that of the party in the existing case. **The Committee unanimously concluded that the restyled version was substantively inaccurate.** After discussion, the Committee determined that the error could be fixed by revising the restyled language to provide that the testimony:

is now offered against a party who had — or, in a civil case, whose predecessor in interest had — an opportunity and similar motive . . .

Committee Vote:

The Committee voted unanimously to approve the restyled version of Rule 804(b)(1), with the modification of changing “a predecessor in interest” to “whose predecessor in interest had.”

Rule 804(b)(2)

Rule 804(b)(2) currently provides as follows:

(2) Statement under belief of impending death. In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant’s death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.

The restyled version of Rule 804(b)(2), reviewed by the Committee at the meeting, provides as follows:

(2) **Statement Under the Belief of Imminent Death.** In a prosecution for homicide or in a civil case, a statement that the declarant, while believing the declarant's death to be imminent, made about its cause or circumstances.

Committee Discussion

The Committee noted that the existing rule seems to use the terms "imminent" and "impending" interchangeably. Under the style protocol it is important to provide consistent terminology, and thus the term "imminent" is used throughout. Professor Broun researched the cases and found no substantive difference between "imminent" and "impending." The Committee concluded that the restyled version did not make a substantive change to Rule 804(b)(2).

Committee Vote:

The Committee voted unanimously to approve the restyled version of Rule 804(b)(2).

Rule 804(b)(3)

Rule 804(b)(3) currently provides as follows:

(3) Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

The restyled version of Rule 804(b)(3), reviewed by the Committee at the meeting, provides as follows:

(3) **Statement Against Interest.** A statement that:

(A) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or

criminal liability; and

(B) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

Committee Discussion:

The Reporter noted that the restyled version intentionally made a substantive change to the rule — it states that the government must provide corroborating circumstances indicating trustworthiness before a declaration against interest can be admitted against an accused. The current rule by its terms requires only the accused to provide corroborating circumstances indicating trustworthiness. But this substantive change is not being made in the context of the restyling project. Rather, it is being made on a separate track in a proposed amendment that has already been released for public comment, and would be scheduled for enactment a year ahead of the restyled rules. (See the discussion of the proposed substantive amendment to Rule 804(b)(3) below.) Under the circumstances, the Reporter concluded that the most efficient procedure would be to restyle the rule under the assumption that the substantive change would already have been made before the restyled rules are adopted. The Committee agreed with this procedure, deferring consideration of the substantive amendment until later in the meeting.

Committee Vote:

The Committee voted unanimously to approve the restyled version of Rule 804(b)(3).

Rule 804(b)(4)

Rule 804(b)(4) currently provides as follows:

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

The restyled version of Rule 804(b)(4), as reviewed by the Committee at the meeting, provided as

follows:

(4) Statement of Personal or Family History. A statement about:

(A) the declarant’s own birth, adoption, legitimacy, ancestry, marriage, divorce, relationship by blood or marriage, or similar facts of personal or family history, even though the declarant had no way of acquiring personal knowledge about that fact; or

(B) another person concerning any of these facts, as well as death, if the declarant was related to the person by blood, adoption, or marriage or was so intimately associated with the person’s family that the declarant’s information is probably accurate.

Committee Discussion:

The proposed restyling would change “likely to have accurate information” to the “information is probably accurate.” **Committee members expressed concern that the change from “likely” to “probably” would be a substantive change — it would raise the threshold of admissibility.** One Committee member contended that there was no substantive difference between “likely” and “probably.”

Committee Vote:

The Committee voted, with one dissent, to approve the restyled version, with the modification that “probably accurate” would be changed to “likely to be accurate.”

Rule 804(b)(5)

In 1997 the original Rule 804(b)(5) — providing a residual exception to the hearsay rule — was consolidated with the identically-worded Rule 803 and transferred to Rule 807. In the official publication of the Federal Rules of Evidence, the following designation of Rule 804(b)(5) is indicated:

(5) [Other exceptions.] [Transferred to Rule 807.]

As with Rule 803(24), Professor Kimble suggested that, as part of the restyling project, this designation should be deleted. The difference in the argument is that there is another hearsay exception coming after Rule 804(b)(5), thus creating a gap in enumeration that, in Professor

Kimble’s view, should be remedied.

But many Committee members argued that the existence of the hearsay exception in Rule 804(b)(6) was all the more reason to keep Rule 804(b)(5) as a placeholder. Changing what is now Rule 804(b)(6) to Rule 804(b)(5) would be very disruptive to searches. A person searching under Rule 804(b)(5) for cases on forfeiture would also collect all the pre-1997 cases on residual hearsay.

After substantial discussion, the Committee recognized that the retention of Rule 804(b)(5) as a placeholder presented a question of style and not substance. It voted 7 to 2 to recommend to the Style Subcommittee that the existing enumeration of Rule 804(b) be retained. The Style Subcommittee agreed to retain the existing enumeration. Therefore, there is no proposal to change the designation of Rule 804(b)(5) in the official version of the Federal Rules of Evidence.

Rule 804(b)(6)

Rule 804(b)(6) currently provides as follows:

(6) Forfeiture by wrongdoing. A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

The restyled version of Rule 804(b)(6), reviewed by the Committee at the meeting, provides as follows:

(6) Statement Offered Against a Party Who Wrongfully Caused the Declarant’s Unavailability. A statement offered against the party that wrongfully caused — or acquiesced in wrongfully causing — the declarant to be unavailable in order to prevent the declarant from attending or testifying.

Committee Discussion:

The Reporter questioned the change from “intended to procure unavailability” to “in order to prevent the declarant from attending or testifying.” The requirement of intentionality is important, as the Supreme Court recognized in deciding the constitutional standards of forfeiture in *Giles*. The court must find not only that the party caused unavailability, but also that the act was done with the specific intent to keep the declarant from testifying. The Reporter was not sure that the words “in order to” accurately captured the intentionality requirement. But after discussion, the Committee

concluded that there was no substantive difference between “in order to” and “with the intent to.”

Committee Vote:

The Committee voted unanimously to approve the restyled version of Rule 804(b)(6).

Rule 805

Rule 805 currently provides as follows:

Rule 805. Hearsay Within Hearsay

Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.

The restyled version of Rule 805, reviewed by the Committee at the meeting, provides as follows:

Rule 805 — Hearsay Within Hearsay

Hearsay within hearsay is not excluded by the rule against hearsay if each part of the combined statements conforms with an exception to the rule.

Committee Vote:

The Committee voted unanimously to approve the restyled version of Rule 805.

Rule 806

Rule 806 currently provides as follows:

Rule 806. Attaching and Supporting Credibility of Declarant

When a hearsay statement, or a statement defined in Rule 801(d)(2)(C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if

attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

The restyled version of Rule 806, as reviewed by the Committee at the meeting, provided as follows:

Rule 806 — Attacking and Supporting the Declarant's Credibility

When a hearsay statement — or a statement described in Rule 801(d)(2)(C), (D), or (E) — has been admitted in evidence, the declarant's credibility may be attacked, and then supported, by any evidence that would be admissible for those purposes if the declarant had testified as a witness. The court may admit evidence of an inconsistent statement or conduct by the declarant, regardless of when it occurred or whether the declarant had an opportunity to explain or deny it. If the party against whom the statement was admitted calls the declarant as a witness, the party may examine the declarant on the statement as if on cross-examination.

Committee Discussion:

Committee members noted that the restyling reference to “an inconsistent statement or conduct by the declarant” is vague on whether the conduct, like the statement, must be inconsistent with the proffered hearsay statement to trigger the exceptions provided in the rule. Professor Kimble agreed that a clarifying change was necessary. After discussion, the Committee agreed on the following language:

The court may admit evidence of the declarant's inconsistent statement or conduct, regardless of when it occurred or whether the declarant had an opportunity to explain or deny it.

The Style Subcommittee and Professor Kimble agreed with this change.

Committee Vote:

The Committee voted unanimously to approve the restyled version of Rule 806, with the modification that the second sentence would be changed to provide that: “The court may admit

evidence of the declarant’s inconsistent statement or conduct, regardless of when it occurred or whether the declarant had an opportunity to explain or deny it.”

Rule 807

Rule 807 currently provides as follows:

Rule 807. Residual Exception

A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent’s intention to offer the statement and the particulars of it, including the name and address of the declarant.

The restyled version of Rule 807 provides as follows:

Rule 807 — Residual Exception

(a) **In General.** Under the following circumstances, a hearsay statement is not excluded by the rule against hearsay even if the statement is not specifically covered by a hearsay exception in Rule 803 or 804:

- (1) the statement has equivalent circumstantial guarantees of trustworthiness;
- (2) the statement is offered as evidence of a material fact;
- (3) the statement is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and
- (4) admitting the statement will best serve the purposes of these rules and the interests of justice.

(b) **Notice.** The statement is admissible only if, before the trial or hearing, the proponent gives an adverse party reasonable notice of the intent to offer the statement and

its particulars, including the declarant’s name and address, so that the party has a fair opportunity to meet it.

Committee Discussion:

1. A Committee member noted that the restyled version sets out, as independent subdivisions, the requirements of “material fact”, “more probative” and “interests of justice/purposes of the rules” — on the same level as the trustworthiness requirement. The current rule separates the trustworthiness requirement from those less important requirements. The Committee member raised the question that the restyled structure might indicate a change of emphasis from the primary focus on trustworthiness. Committee members suggested that the Style Committee take under advisement the suggestion that the rule be structured so that the trustworthiness factor is the most important requirement. The Style Committee, and Professor Kimble, agreed to take the matter under advisement.

2. The Reporter observed that the restyling placed some separation between the reference to Rule 803 and 804 and the words “equivalent circumstantial guarantees of trustworthiness.” This might raise the question of what “equivalent” means — with what is the offered hearsay statement to be compared? Committee members determined that the separation between Rules 803/804 and the term “equivalent” raised a question of style, not substance — because there is no frame of reference for an equivalence analysis other than the Rule 803 and 804 exceptions. The Committee suggested that the Style Committee take under advisement the possibility that the term “equivalent circumstantial guarantees of trustworthiness” be placed next to the reference to Rules 803 and 804. The Style Subcommittee, and Professor Kimble, agreed to consider this suggestion.

Committee Vote:

The Committee voted unanimously to approve the restyled version of Rule 807.

Rule 901(a)

Rule 901(a) currently provides as follows:

Rule 901. Requirement of Authentication or Identification

(a) General provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

The restyled version of Rule 901(a), as reviewed by the Committee at the meeting, provided as follows:

Rule 901 — Authenticating or Identifying Evidence

(a) In General. When an exhibit or other item must be authenticated or identified in order to have it admitted, the requirement is satisfied by evidence sufficient to support a finding that the item is what its proponent claims.

(Alternative) To authenticate or identify an exhibit or other item in order to have it admitted, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.

Committee Discussion:

1. Committee members uniformly expressed the opinion that the use of the term “exhibit or other item” was wrong because it did not cover all the types of evidence that are subject to the authentication requirement. The Committee had on several previous occasions favored using the term “evidence.” Professor Kimble responded that the use of the term “evidence” was problematic because the Rule uses that term in another context, i.e., “evidence sufficient to support a finding”; he contended it would be confusing to use the term “evidence” both to indicate what is being qualified and the standard of qualification. Committee members responded that the dual use of the term “evidence” occurs in the *restyled* version of Rule 104(b) — and that it would make sense to be consistent with that Rule, because Rule 901(a) is just a particularized application of the Rule 104(b) test. After substantial discussion, the Committee and Professor Kimble compromised and agreed to use the term “item of evidence.” The Style Subcommittee agreed with this resolution.

2. The Reporter observed that the restyled rule created a substantive problem because it implied that authentication of evidence might not always be required. The restyled version states that “*when*” evidence “must be authenticated” then the standard is evidence sufficient to support a finding. In contrast, the existing rule refers to the “requirement” of authentication “as a condition precedent to admissibility.” **The Committee agreed that the restyled version of Rule 901(a) would effect a substantive change.** The Committee then focused on whether the alternative proposed by Professor Kimble would solve the problem. That alternative — “To authenticate . . . in order to have it admitted” does fairly imply that authentication is a requirement that must always be met. The Committee voted unanimously to adopt the alternative language.

Committee Vote:

The Committee voted unanimously to approve the following version of Rule 901(a):

(a) In General. To authenticate or identify an item of evidence in order to have it admitted, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.

Rule 901(b)

Rule 901(b) currently provide as follows:

(b) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

- (1) Testimony of witness with knowledge. Testimony that a matter is what it is claimed to be.
- (2) Nonexpert opinion on handwriting. Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.
- (3) Comparison by trier or expert witness. Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.
- (4) Distinctive characteristics and the like. Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.
- (5) Voice identification. Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.
- (6) Telephone conversations. Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.
- (7) Public records or reports. Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.
- (8) Ancient documents or data compilation. Evidence that a document or data compilation, in any form, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be,

and (C) has been in existence 20 years or more at the time it is offered.

(9) Process or system. Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

(10) Methods provided by statute or rule. Any method of authentication or identification provided by Act of Congress or by other rules prescribed by the Supreme Court pursuant to statutory authority.

The restyled version of Rule 901(b), reviewed by the Committee at the meeting, provides as follows:

(b) **Examples.** The following are examples only — not a complete list — of evidence that satisfies the requirement:

(1) **Testimony of a Witness with Knowledge.** Testimony that an item is what it is claimed to be.

(2) **Nonexpert Opinion About Handwriting.** A nonexpert's opinion that the handwriting is genuine, based on a familiarity with it that was not acquired for the current litigation.

(3) **Comparison by an Expert Witness or the Trier of Fact.** A comparison with an authenticated specimen by an expert witness or the trier of fact.

(4) **Distinctive Characteristics and the Like.** The appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances.

(5) **Opinion About a Voice.** An opinion identifying a person's voice — whether heard firsthand or through mechanical or electronic transmission or recording — based on hearing the voice at any time under circumstances that connect it with the alleged speaker.

(6) **Evidence About a Phone Conversation.** For a phone conversation, evidence that a call was made to the number assigned at the time to:

(A) a particular person, if circumstances, including self-identification, show that the person answering was the one called; or

(B) a particular business, if the call was made to a business and the call related to business reasonably transacted over the phone.

(7) **Evidence About Public Records.** Evidence that:

(A) a record is from the public office where items of this kind are kept;
or

(B) a document was lawfully recorded or filed in a public office.

(8) Evidence About Ancient Documents or Data Compilations. For a document or data compilation, evidence that it:

(A) is in a condition that creates no suspicion about its authenticity;

(B) was in a place where, if authentic, it would likely be; and

(C) is at least 20 years old when offered.

(9) Evidence About a Process or System. Evidence describing a process or system and showing that it produces an accurate result.

(10) Methods Provided by a Statute or Rule. Any method of authentication or identification allowed by a federal statute or a rule prescribed by the Supreme Court.

Committee Discussion:

1. The Committee noted that several changes from the existing rule were made in order to conform with the new rule on definitions. For example, the reference to Supreme Court rules “pursuant to statutory authority” was deleted because the definition will encompass that term. Similarly, the reference to records, reports and data compilations in Rule 901(b)(7) was shortened to “record” because that term is defined in the definitions rule to include reports and data compilations.

2. The Style Subcommittee asked the Committee to review whether the term “lawfully recorded” in Rule 901(b)(7) accurately captures the language in the existing rule — “authorized by law to be recorded and filed and in fact recorded.” After extensive discussion of a number of hypothetical situations, the Committee concluded that the restyled language accurately captured the original.

Committee Vote:

The Committee unanimously approved the restyled version of Rule 901(b).

Rule 902, Structure

Professor Kimble proposed restructuring Rule 902 to add two lettered subdivisions, (a) and (b). Subdivision (a) would restate the introduction of the current rule, i.e., that the items discussed in the rule are self-authenticating. Subdivision (b) would then include the grounds for self-authentication as numbered subsections, and the beginning text of (b) would read “The following are self-authenticating:”

The justification for lettered subdivisions was the same as that posed for Rule 803 — to correct the asserted anomaly of a numbered rule followed immediately by a numbered subdivision. Committee members noted, however, that the proposed subdivisions in Rule 902 would serve even less a real purpose than those proposed for Rule 803: proposed subdivision (b) would simply restate the terms of proposed subdivision (b). Professor Kimble noted that in light of the fact that the structure of Rule 803 was going to be preserved (see discussion above), it was now acceptable to retain the existing structure of Rule 902. The Style Subcommittee agreed.

The Committee voted unanimously to retain the number-after-number structure of Rule 902.

Rule 902 provisions:

Rule 902 currently provides as follows:

Rule 902. Self-Authentication

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

(1) Domestic public documents under seal. A document bearing a seal purporting to be that of the United States, or of any State, district, Commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.

(2) Domestic public documents not under seal. A document purporting to bear the signature in the official capacity of an officer or employee of any entity included in paragraph (1) hereof, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.

(3) Foreign public documents. A document purporting to be executed or

attested in an official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position (A) of the executing or attesting person, or (B) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation. A final certification may be made by a secretary of an embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification.

(4) Certified copies of public records. A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) of this rule or complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority.

(5) Official publications. Books, pamphlets, or other publications purporting to be issued by public authority.

(6) Newspapers and periodicals. Printed materials purporting to be newspapers or periodicals.

(7) Trade inscriptions and the like. Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin.

(8) Acknowledged documents. Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments.

(9) Commercial paper and related documents. Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law.

(10) Presumptions under Acts of Congress. Any signature, document, or other matter declared by Act of Congress to be presumptively or prima facie genuine or authentic.

(11) Certified domestic records of regularly conducted activity. The original or a duplicate of a domestic record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by a written declaration of its custodian or other qualified person, in a manner complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority, certifying that the record—

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

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

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

A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.

(12) Certified foreign records of regularly conducted activity. In a civil case, the original or a duplicate of a foreign record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by a written declaration by its custodian or other qualified person certifying that the record—

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

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

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

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

The restyled version of Rule 902, as reviewed by the Committee at the meeting, reviewed by the Committee, provided as follows (with the proposed lettered subdivisions deleted, as discussed

above):

Rule 902 — Items That Are Self-Authenticating

The items described in this rule are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted.

(1) Domestic Public Documents That Are Signed and Sealed. A document that bears:

(A) a signature purporting to be an execution or attestation ; and

(B) a seal purporting to be that of the United States; any state, district, commonwealth, territory, or insular possession of the United States; the former Panama Canal Zone; the Trust Territory of the Pacific Islands; a political subdivision of any of these entities; or a department, agency, or officer of any entity named above.

(2) Domestic Public Documents That Are Signed But Not Sealed. A document that bears no seal, if:

(A) it bears the signature of an officer or employee of an entity named in Rule 902(1)(B); and

(B) another public officer who has a seal and official duties within that same entity certifies under seal — or its equivalent — that the signer has the official capacity and that the signature is genuine.

(3) Foreign Public Documents. A document that purports to be signed or attested by a person who is authorized by a foreign country's law to do so. The document must be accompanied by a final certification that certifies the genuineness of the signature and official position of the signer or attester — or of any foreign official whose certificate of genuineness relates to the signature or attestation or is in a chain of certificates of genuineness relating to the signature or attestation. The certification may be made by a secretary of a United States embassy or legation; by a consul general, vice consul, or consular agent of the United States; or by a diplomatic or consular official of the foreign country assigned or accredited to the United States. If all parties have been given a reasonable opportunity to investigate the document's authenticity and accuracy, the court may, for good cause, either:

(A) order that it be treated as presumptively authentic without final certification; or

(B) permit it to be evidenced by an attested summary with or without

final certification.

(4) Certified Copies of Public Records. A copy of an official record, report, data compilation — or a copy of a document that was lawfully recorded or filed in a public office or agency — if the copy is certified as correct by:

(A) the custodian or another person authorized to make the certification;
or

(B) a certificate that complies with Rule 902 (1), (2), or (3), a federal statute, or a rule prescribed by the Supreme Court.

(5) Official Publications. A book, pamphlet, or other publication purporting to be issued by a public authority.

(6) Newspapers and Periodicals. Printed material purporting to be a newspaper or periodical.

(7) Trade Inscriptions and the Like. An inscription, sign, tag, or label purporting to have been affixed in the course of business and indicating origin, ownership, or control.

(8) Acknowledged Documents. A document accompanied by a certificate of acknowledgment that is lawfully signed by a notary public or another officer who is authorized to take acknowledgements.

(9) Commercial Paper and Related Documents. Commercial paper, a signature on it, and related documents, to the extent allowed by general commercial law.

(10) Presumptions Under a Federal Statute. A signature, document, or anything else that a federal statute declares to be presumptively or prima facie genuine.

(11) Certified Domestic Records of a Regularly Conducted Activity. The original or a copy of a domestic record that meets the requirements of Rule 803(6), modified as follows: the conditions referred to in 803(6)(D) must be shown by a certification of the custodian or another qualified person that complies with a federal statute or a rule prescribed by the Supreme Court under statutory authority. Before the trial or hearing, the proponent must give an adverse party reasonable written notice of the intent to offer the record — and must make the record and certification available for inspection — so that the party has a fair opportunity to challenge them.

(12) Certified Foreign Records of a Regularly Conducted Activity. In a civil

case, the original or a copy of a foreign record that meets the requirements of Rule 902(11), modified as follows: the declaration, rather than complying with a federal statute or Supreme Court rule, must be signed in a manner that, if falsely made, would subject the maker to a criminal penalty in the country where the declaration is signed.

Committee Discussion:

1. As in Rule 901, discussed above, the Committee uniformly objected to use of the term “item” as the controlling term for authenticity. And as with Rule 901 — and for purposes of consistency — the Committee and the Style Subcommittee settled on the term “item of evidence.” Therefore, by consent, “item of evidence” replaced “item” in the introductory sentence of the Rule, as well as in the heading.

2. The Committee and the Style Subcommittee agreed that the reference in Rule 902(4) to “record, report,” etc. should be shortened to “record” in light of the previous decision to define the term “record” as including reports, etc., in the new rule on definitions.

3. As under Rule 901(b), the Style Subcommittee requested consideration of whether the term “lawfully recorded” accurately captures the existing language of Rule 902(4). After discussion, the Committee determined that the term “lawfully recorded” was accurate.

4. The Reporter questioned whether adding the term “reasonable” before “notice” in Rule 902(11) was necessary. He reasoned that the specific provisions in the notice requirement, in effect, required notice to be reasonable, and therefore adding the term was redundant. Professor Kimble responded that adding the term “reasonable” would make the Rule 902(11) notice requirement more consistent with the notice requirements in other Evidence Rules. The Committee did not object to addition of the term “reasonable.”

5. A Committee member pointed out that the notice requirement might be read to be left out of Rule 902(12), which now ties into the admissibility requirements of Rule 902(11). Restyled Rule 902(12) now requires the certificate to meet the requirements of Rule 902(11) with some modifications. But it is not clear that notice is one of the requirements referred to. The Committee voted unanimously to add the following sentence to the end of Rule 902(12):

“The proponent must also meet the notice requirements of Rule 902(11).”

The Style Subcommittee and Professor Kimble agreed with this clarification.

6. The Committee agreed with Professor Kimble’s suggestions that the references to “the declaration” in Rule 902(12) should be changed to “the certification.”

Committee Vote:

The Committee unanimously approved the restyled version of Rule 902, with the following modifications: substituting “item of evidence” for “item”; referring only to “record” in Rule 902(4); adding a sentence to Rule 902(12) to refer explicitly to the notice requirement; and substituting “the certification” for “the declaration” in Rule 902(12).

Rule 903

Rule 903 currently provides as follows:

Rule 903. Subscribing Witness’ Testimony Unnecessary

The testimony of a subscribing witness is not necessary to authenticate a writing unless required by the laws of the jurisdiction whose laws govern the validity of the writing.

The restyled version of Rule 903, reviewed by the Committee at the meeting, provides as follows:

Rule 903. Subscribing Witness’s Testimony

A subscribing witness’s testimony is necessary to authenticate a writing only if required by the law of the jurisdiction that governs its validity.

Committee Discussion

1. Professor Kimble suggested that the term “subscribing” should be changed to “attesting.” But Committee members were concerned that the change in language could result in an inadvertent substantive change, without providing any particular style advantage. Some members noted that the term “subscribing” was a more accurate description of the process. After some discussion, Professor Kimble agreed to drop his suggestion and “subscribing” was retained.

2. Professor Kimble suggested that the term “required by the law of the jurisdiction” should be changed to “required in the jurisdiction.” Committee members disagreed with this suggestion because it seemed to refer to a physical location rather than the law of a governing jurisdiction. After some discussion, Professor Kimble agreed to drop his suggestion and “required by the law of the jurisdiction” was retained.

Committee Vote:

The Committee unanimously approved the restyled version of Rule 903.

Rule 1001

Rule 1001 currently provides as follows:

Rule 1001. Definitions.

For purposes of this article the following definitions are applicable:

(1) Writings and recordings. “Writings” and “recordings” consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation.

(2) Photographs. “Photographs” include still photographs, X-ray films, video tapes, and motion pictures.

(3) Original. An “original” of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An “original” of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an “original”.

(4) Duplicate. A “duplicate” is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduces the original.

The restyled version of Rule 1001, as reviewed by the Committee at the meeting, provided as follows:

Rule 1001 – Definitions That Apply to This Article

(a) **Writing.** “Writing” means any object or medium on which letters, words, numbers, or their equivalent are set down.

(b) **Recording.** “Recording” means any object or medium on which letters, words, numbers, or their equivalent are recorded.

(c) **Photograph.** “Photograph” means an image in any form.

(d) **Original.** An “original” of a writing or recording means the writing or recording itself or any counterpart intended to have the same effect by the person who executed or issued it. For data stored in a computer or similar device, “original” means any printout — or other output readable by sight — if it accurately reflects the data. An “original” of a photograph includes the negative or a print from it.

(e) **Duplicate.** “Duplicate” means a counterpart produced by a mechanical, photographic, chemical, electronic, or other equivalent process or technique that accurately reproduces the original.

Committee Discussion:

1. The Committee engaged in a lengthy and wide-ranging discussion of how and whether to restyle the definitions section of the Best Evidence Rule. One question was how the definitions section would relate to the new definitions rule that would apply to a number of terms (like “record” and written material) that are used throughout the Evidence Rules. Committee members eventually concluded that an independent set of definitions for Article 10 remained justified. None of the terms were defined in the new definitions rule (which, for example, defines “written material” as opposed to “writing”) and most of the terms, such as “photograph”, “original”, and “duplicate” are only used in Article 10. The Committee determined, however, that Rule 1001 should definitely start with text indicating that the definitions only applied to Article 10 — a specification made in the existing rule that was dropped in the restyling. Professor Kimble and the Style Subcommittee agreed with the proposal to restore something like the original introduction to Rule 1001.

2. The Committee discussed in detail the various definitions proposed by the restyling. One of the problems in the existing definition is that “writings” and “recordings” are lumped together, and essentially defined in the same way. Professor Kimble stated that it was essential that each individual term should have its own definition. The Committee then discussed how best to define each of the terms set forth in Rule 1001. This required the Committee to take account of technological advances in photography, recording, etc., without making any substantive changes to the Rule. After much discussion, the Committee, the Style Subcommittee, and Professor Kimble agreed on definitions for the terms specified in Rule 1001. That language is set forth below.

Committee Vote:

The Committee unanimously approved restyled Rule 1001(a) in the following form:

Rule 1001 – Definitions That Apply to This Article

In this article, the following definitions apply:

(a) **Writing.** A “writing” consists of letters, words, numbers, or their equivalent set down in any form.

(b) **Recording.** A “recording” consists of letters, words, numbers, or their equivalent recorded in any manner.

(c) **Photograph.** “Photograph” means a photographic image or its equivalent stored in any form.

(d) **Original.** An “original” of a writing or recording means the writing or recording itself or any counterpart intended to have the same effect by the person who executed or issued it. For electronically stored information, “original” means any printout — or other output readable by sight — if it accurately reflects the information. An “original” of a photograph includes the negative or a print from it.

(e) **Duplicate.** “Duplicate” means a counterpart produced by a mechanical, photographic, chemical, electronic, or other equivalent process or technique that accurately reproduces the original.

Rule 1002

Rule 1002 currently provides as follows:

Rule 1002. Requirement of Original

To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by Act of Congress.

Restyled Rule 1002, reviewed by the Committee, provides as follows:

Rule 1002 – Requirement of the Original

An original writing, recording, or photograph is required in order to prove its content unless these rules or a federal statute provides otherwise.

Committee Vote:

The Committee unanimously approved the restyled version of Rule 1002.

Rule 1003

Rule 1003 currently provides as follows:

Rule 1003. Admissibility of Duplicates

A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.

The restyled version of Rule 1003, reviewed by the Committee at the meeting, provides as follows:

Rule 1003 – Admissibility of Duplicates

A duplicate is admissible to the same extent as the original unless a genuine question is raised about the original's authenticity or the circumstances make it unfair to admit the duplicate.

Committee Vote:

The Committee unanimously approved the restyled version of Rule 1003.

Rule 1004

Rule 1004 currently provides as follows:

Rule 1004. Admissibility of Other Evidence of Contents

The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if—

(1) Originals lost or destroyed. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or

(2) Original not obtainable. No original can be obtained by any available judicial process or procedure; or

(3) Original in possession of opponent. At a time when an original was under the control of the party against whom offered, that party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and that party does not produce the original at the hearing; or

(4) Collateral matters. The writing, recording, or photograph is not closely related to a controlling issue.

The restyled version of Rule 1004, reviewed by the Committee at the meeting, provides as follows:

Rule 1004 — Admissibility of Other Evidence of Content

An original is not required and other evidence of the content of a writing, recording, or photograph is admissible if:

- (a) all the originals are lost or destroyed, and not by the proponent acting in bad faith;
- (b) an original cannot be obtained by any available judicial process;
- (c) the party against whom the original would be offered had control of the original; was at that time put on notice, by pleadings or otherwise, that the original would be a subject of proof at the trial or hearing; and fails to produce it at the trial or hearing; or
- (d) the writing, recording, or photograph is not closely related to a controlling issue.

Committee Vote:

The Committee unanimously approved the restyled version of Rule 1004.

Rule 1005

Rule 1005 currently provides as follows:

Rule 1005. Public Records

The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with rule 902 or testified to be correct by a witness who has compared it with the original. If a copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.

The restyled version of Rule 1005, reviewed by the Committee at the meeting, provides as follows:

Rule 1005. Copies of Public Records to Prove Content

The proponent may use a copy to prove the content of an official record — or of a document that was lawfully recorded or filed in a public office — if these conditions are met: the record or document is otherwise admissible; and the copy is certified as correct in accordance with Rule 902(4) or is testified to be correct by a witness who has compared it with the original. If no such copy can be obtained by reasonable diligence, then the proponent may use other evidence to prove the content.

Committee Discussion:

As under Rule 901(b) and 902, the Style Subcommittee requested consideration of whether the term “lawfully recorded” accurately captures the existing language of Rule 1005. After discussion, the Committee determined that the term “lawfully recorded” was accurate.

Rule 1006

Rule 1006 currently provides as follows:

Rule 1006. Summaries

The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court.

The restyled version of Rule 1006, as reviewed by the Committee at the meeting, provided as follows:

Rule 1006 – Summaries to Prove Content

The proponent may use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court. The proponent must make the originals or duplicates available for examination or copying, or both, by other parties at a reasonable time or place. And the court may order the proponent to produce them.

Committee Discussion:

Committee members observed that the last sentence of the restyled provision reads more like a rule of discovery than a rule of evidence. The point of the rule is that the underlying information must be produced *in court*. **Therefore the last sentence of the restyled provision would effect a substantive change.** The Committee unanimously agreed that the words “in court” should be added to the last sentence of the restyled rule.

Committee Vote:

The Committee unanimously approved the restyled Rule 1006, with the modification that the words “in court” be added at the end of the last sentence in the rule.

Rule 1007

Rule 1007 currently provides as follows:

Rule 1007. Testimony or Written Admission of Party

Contents of writings, recordings, or photographs may be proved by the testimony or deposition of the party against whom offered or by that party’s written admission, without accounting for the nonproduction of the original.

The restyled version of Rule 1007, as reviewed by the Committee at the meeting, provides as follows:

Rule 1007 — Testimony or Admission of a Party to Prove Content

The proponent may use the testimony, deposition, or written admission of the party against whom a writing, recording, or photograph is offered to prove its content. The proponent need not account for the original.

Committee Vote:

The Committee unanimously approved the restyled version of Rule 1007.

Rule 1008

Rule 1008 currently provides as follows:

Rule 1008. Functions of Court and Jury

When the admissibility of other evidence of contents of writings, recordings, or photographs under these rules depends upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is ordinarily for the court to determine in accordance with the provisions of rule 104. However, when an issue is raised (a) whether the asserted writing ever existed, or (b) whether another writing, recording, or photograph produced at the trial is the original, or (c) whether other evidence of contents correctly reflects the contents, the issue is for the trier of fact to determine as in the case of other issues of fact.

The restyled version of Rule 1008, reviewed by the Committee at the meeting, provides as follows:

Rule 1008 – Functions of the Court and Jury

Ordinarily, the court determines whether the proponent has fulfilled the factual conditions for admitting other evidence of the content of a writing, recording, or photograph under Rule 1004 or 1005. But in a jury trial, the jury determines — in accordance with Rule 104(b) — any issue about whether:

- (a) an asserted writing, recording, or photograph ever existed;
- (b) another one produced at the trial or hearing is the original; or
- (c) other evidence of content accurately reflects the content.

Committee Vote:

The Committee unanimously approved the restyled version of Rule 1008.

Rule 1101

Rule 1101 currently provides as follows:

Rule 1101. Applicability of Rules

(a) Courts and judges. These rules apply to the United States district courts, the District Court of Guam, the District Court of the Virgin Islands, the District Court for the Northern Mariana Islands, the United States courts of appeals, the United States Claims Court, and to United States bankruptcy judges and United States magistrate judges, in the actions, cases, and proceedings and to the extent hereinafter set forth. The terms “judge” and “court” in these rules include United States bankruptcy judges and United States magistrate judges.

(b) Proceedings generally.—These rules apply generally to civil actions and proceedings, including admiralty and maritime cases, to criminal cases and proceedings, to contempt proceedings except those in which the court may act summarily, and to proceedings and cases under title 11, United States Code.

(c) Rule of privilege.—The rule with respect to privileges applies at all stages of all actions, cases, and proceedings.

(d) Rules inapplicable.—The rules (other than with respect to privileges) do not apply in the following situations:

(1) Preliminary questions of fact.—The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under rule 104.

(2) Grand jury.—Proceedings before grand juries.

(3) Miscellaneous proceedings.—Proceedings for extradition or rendition;

preliminary examinations in criminal cases; sentencing, or granting or revoking probation; issuance of warrants for arrest, criminal summonses, and search warrants; and proceedings with respect to release on bail or otherwise.

(e) Rules applicable in part. In the following proceedings these rules apply to the extent that matters of evidence are not provided for in the statutes which govern procedure therein or in other rules prescribed by the Supreme Court pursuant to statutory authority: the trial of misdemeanors and other petty offenses before United States magistrate judges; review of agency actions when the facts are subject to trial de novo under section 706(2)(F) of title 5, United States Code; review of orders of the Secretary of Agriculture under section 2 of the Act entitled “An Act to authorize association of producers of agricultural products” approved February 18, 1922 (7 U.S.C. 292), and under sections 6 and 7(c) of the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. 499f, 499g(c)); naturalization and revocation of naturalization under sections 310–318 of the Immigration and Nationality Act (8 U.S.C. 1421–1429); prize proceedings in admiralty under sections 7651–7681 of title 10, United States Code; review of orders of the Secretary of the Interior under section 2 of the Act entitled “An Act authorizing associations of producers of aquatic products” approved June 25, 1934 (15 U.S.C. 522); review of orders of petroleum control boards under section 5 of the Act entitled “An Act to regulate interstate and foreign commerce in petroleum and its products by prohibiting the shipment in such commerce of petroleum and its products produced in violation of State law, and for other purposes”, approved February 22, 1935 (15 U.S.C. 715d); actions for fines, penalties, or forfeitures under part V of title IV of the Tariff Act of 1930 (19 U.S.C. 1581–1624), or under the AntiSmuggling Act (19 U.S.C. 1701–1711); criminal libel for condemnation, exclusion of imports, or other proceedings under the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301–392); disputes between seamen under sections 4079, 4080, and 4081 of the Revised Statutes (22 U.S.C. 256–258); habeas corpus under sections 2241–2254 of title 28, United States Code; motions to vacate, set aside or correct sentence under section 2255 of title 28, United States Code; actions for penalties for refusal to transport destitute seamen under section 4578 of the Revised Statutes (46 U.S.C. 679); actions against the United States under the Act entitled “An Act authorizing suits against the United States in admiralty for damage caused by and salvage service rendered to public vessels belonging to the United States, and for other purposes”, approved March 3, 1925 (46 U.S.C. 781–790), as implemented by section 7730 of title 10, United States Code.

The restyled version of Rule 1101, as reviewed by the Committee at the meeting, provided as follows:

Rule 1101 – Applicability of the Rules

(a) **To Courts and Judges.** These rules apply to proceedings before:

- United States district courts;
- United States bankruptcy and magistrate judges;
- United States courts of appeals;
- the United States Court of Federal Claims; and
- the district courts of Guam, the Virgin Islands, and the Northern Mariana Islands.

(b) **To Proceedings.** These rules apply in:

- civil cases and proceedings, including admiralty and maritime cases;
- criminal cases and proceedings;
- contempt proceedings, except those in which the court may act summarily; and
- cases and proceedings under 11 U.S.C.

(c) **Rules on Privilege.** The rules on privilege apply to all stages of a case or proceeding.

(d) **Exceptions.** These rules — except for those on privilege — do not apply to the following:

- (1) the court’s determination, under Rule 104(a) on a preliminary question of fact governing admissibility;
- (2) grand-jury proceedings; and
- (3) miscellaneous proceedings such as:
 - extradition or rendition;
 - issuing an arrest warrant, criminal summons, or search warrant;
 - a preliminary examination in a criminal case;
 - sentencing;
 - granting or revoking probation or supervised release; and
 - considering whether to release on bail or otherwise.

Committee Discussion:

1. Before the meeting, Professor Broun did extensive research on the scope of Rule 1101, particularly on whether some courts should be added to or excluded from Rule 1101(a). Professor Broun concluded that the Territorial Courts should remain included on the list, and that it was unnecessary to include the Court of International Trade on the list (because the Evidence Rules are made applicable to that court by an independent statute, and including that court might result in an inadvertent negative inference about other courts in which the Evidence Rules apply by independent statute). The Committee agreed with Professor Broun’s conclusions.

2. The Committee decided that it was appropriate to add “supervised release” to the

reference to proceedings on granting or revoking probation in Rule 1101(d) — this would accord with the existing practice.

3. At the Reporter’s suggestion, the restyled version deleted subdivision (e), the laundry list of statutes that alter in some way the applicability of the evidence rules in specific proceedings. The rationales for deleting subdivision (e) are: 1. The list is underinclusive, and in fact could never be accurate because statutory development is dynamic; and 2. The list is unnecessary because the Evidence Rules already allow for statutes to control over the rules, as seen in Rules 301, 502, 501, 802, etc. One Committee member raised the prospect that deleting Rule 1101(e) might be thought to supersede the specified statutory provisions, but the Reporter responded that this would not be the case because of the various Evidence Rules provisions that bow to statutory authority. Another member argued that there should be some place in the Evidence Rules in which a practitioner is warned that the rules are not exclusive, and that reference must often be made to independent statutes that might govern evidentiary admissibility. While no rule could accurately cover all the possibly applicable statutes, Committee members generally agreed that some general provision referring to independent statutory authority was warranted. Ultimately, the Committee agreed that the best solution was to delete the laundry list of statutes in Rule 1101(e), but to provide a single sentence for the subdivision that would read as follows:

“A federal statute or a rule prescribed by the Supreme Court may provide for admitting or excluding evidence independently from these rules.”

Committee Vote:

The Committee unanimously approved the restyled version of Rule 1101, with the modification that the following sentence would be, in its entirety, subdivision (e):

(e) Other Statutes and Rules. A federal statute or a rule prescribed by the Supreme Court may provide for admitting or excluding evidence independently from these rules.

Rule on Definitions

The Style Subcommittee and Professor Kimble proposed a rule on definitions, in order to 1: alleviate the need for constant repetition throughout the rules; and 2. assure that electronic information would be covered by the rules without the need to repeat that point in every rule involving “written” information. During the meeting, the proposed rule on definitions was expanded to include a definition of “record” that would cover analogous terms such as “report” — that provision was transferred, by unanimous vote of the Committee from its original proposed placement as a new subdivision (b) to Rule 803 (see the discussion on the structure of Rule 803 above).

The Style Subcommittee proposed to place the rule on definitions as a new Rule 1102, which would have required changing the numbers of existing Rules 1102 and 1103. The Committee engaged in an extensive discussion of the optimal placement of a new rule on definitions. After that discussion, Committee members unanimously agreed that it would be problematic to place the definitions rule anywhere in Article 11, as it would be unlikely to be found by some, if not many, practitioners. Some members thought that the best placement would be a new Rule 107, but Professor Kimble argued that if a definitions rule is intended to be applicable throughout the rules, then it would be inconsistent with style conventions to put it anywhere other than at the very beginning or the very end of the whole body of rules. Committee members then turned to another solution: amending Rule 101 to include the definitions as a new subdivision (b). Members noted that the Criminal Rules added a definitions section in the restyling of Criminal Rule 1 — thus it was appropriate and consistent with restyling conventions to place the definitions rule in the scope provision of Rule 101.

Finally the Committee turned to the language of the specific definitions. One of the subdivisions proposed to define written material to include electronic information in the following manner:

“a reference to any kind of written material includes the electronic form of the material.”

Judge Rosenthal observed that the Civil Rules use the term “electronically stored information”, and that term is commonly used by courts and lawyers. She suggested — and the Committee unanimously agreed — that the definition of written material should refer to “electronically stored information.”

The Committee voted unanimously to approve Evidence Rule 101, as amended, in the following form:

Rule 101 — Scope; Definitions

(a) **Scope.** These rules apply to proceedings before United States courts. The specific courts and proceedings to which the rules apply, along with exceptions, are set out in Rule 1101.

(b) **Definitions.** In these rules:

- (1) “civil case” means a civil action or proceeding;
- (2) “criminal case” includes a criminal proceeding;
- (3) “public office” includes a public agency;

- (4) “record” includes a memorandum, report, or data compilation in any form;
- (5) a “rule prescribed by the Supreme Court” means a rule adopted by the Supreme Court under statutory authority; and
- (6) a reference to any kind of written material includes electronically stored information.

Rule 1102

Rule 1102 currently provides as follows:

Rule 1102. Amendments

Amendments to the Federal Rules of Evidence may be made as provided in section 2072 of title 28 of the United States Code.

The restyled version of Rule 1102, reviewed by the Committee at the meeting, provides as follows:

Rule 1102 — Amendments

These rules may be amended as provided in 28 U.S.C. § 2072.

Committee Vote:

The Committee unanimously approved the restyled version of Rule 1102.

Rule 1103

Rule 1103 currently provides as follows:

Rule 1103. Title

These rules may be known and cited as the Federal Rules of Evidence.

The restyled version of Rule 1103, reviewed by the Committee at the meeting, provides as follows:

Rule 1103 – Title

These rules may be cited as the Federal Rules of Evidence.

Committee Vote:

The Committee unanimously approved the restyled version of Rule 1103

C. Rules 101-706

The restyled Rules 101-706 were approved for release for public comment at previous meetings. In preparation for this meeting, Professor Kimble reviewed these rules to check for consistency of terminology through all the restyled rules, and to raise any lingering style questions. Professor Kimble proposed some minor changes to some of the previously approved rules. Other than changes in the nature of typos and correcting minor inconsistencies, the Committee considered, and voted on, the following proposals:

1. Rule 101: as discussed immediately above, the Committee unanimously agreed to amend Rule 101 to add a subdivision on definitions.

2. Rule 403: Professor Kimble asked to revisit the rule to determine whether there was some way to effectively categorize the various factors that are listed in the rule, e.g., prejudice, confusion, delay, etc., with some referred to as “dangers” and others as “considerations.” *Professor Kimble proposed — and after discussion the Committee unanimously approved, the following restyling of Rule 403:*

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

3. Rule 404(b): Professor Kimble proposed adding to the heading, which under the existing restyling reads, in part, “; Notice.” Professor Kimble suggested adding “in a Criminal Case” after “Notice.” But Committee members determined that adding the reference to a criminal case might lead to a misimpression that Rule 404(b) is only applicable in criminal cases, whereas in fact the rule is applicable to all cases and it is only the notice provision that is limited to criminal cases. *The Committee voted unanimously not to change the existing restyling of Rule 404.*

4. Rule 405: Professor Kimble proposed some minor changes that would make Rule 405 a bit more consistent with Rule 608. One question was whether to delete the term “relevant” in Rule 405 on the ground that all evidence must be relevant to be admissible. But the Committee was cautious about taking out the term “relevant” because it might send some unintended signal. Professor Kimble responded that if “relevant” is going to be retained in Rule 405(a), then it should be added to Rule 405(b) for purposes of consistency, as both subdivisions are referring (though admittedly in different contexts) to specific act evidence. The Committee agreed with the proposal to add “relevant” to Rule 405(b). *After discussion, the Committee unanimously approved the following restyling of Rule 405:*

Rule 405 — Methods of Proving Character

(a) **By Reputation or Opinion.** When evidence of a person’s character or character trait is admissible, it may be proved by testimony about the person’s reputation or by testimony in the form of an opinion. On cross-examination, the court may allow an inquiry into relevant specific instances of the person’s conduct.

(b) **By Specific Instances of Conduct.** When a person’s character or character trait is an essential element of a charge, claim, or defense, the character or trait may also be proved by relevant specific instances of the person’s conduct.

5. Rule 406: Professor Kimble suggested that Rule 406 be slightly changed to provide more consistency with the other restyled “relevance rules”, e.g., Rules 407-409. *After discussion, the Committee unanimously approved the following restyling of Rule 406:*

Rule 406 — Habit; Routine Practice

Evidence of a person’s habit or an organization’s routine practice may be admitted to prove that on a particular occasion the person or organization acted in accordance with the habit or routine practice. The court may admit this evidence regardless of whether it is corroborated or whether there was an eyewitness.

6. Rule 411: Professor Kimble proposed a change to the “exceptions” clause to the Rule that would provide more consistency with Rule 407. *After discussion, the Committee approved the following restyling of Rule 411:*

Rule 411 — Liability Insurance

Evidence that a person did or did not have liability insurance is not admissible to prove that the person acted negligently or otherwise wrongfully. But the court may admit this evidence for another purpose, such as proving a witness’s bias or prejudice or — if disputed — proving agency, ownership, or control.

7. Rule 412: Professor Kimble proposed changes to the notice provision of Rule 412 that

would make it more consistent with the notice provisions of Rules 413-15. But the Committee unanimously rejected the proposal. Committee members noted that the notice provision in Rule 412 is designed to protect different interests than those protected by the notice provisions in Rules 413-15. Any change in the notice provisions, in terms of timing or triggering, would be substantive in any case. Therefore the proposal to change the notice provision of Rule 412 was rejected.

8. Rules 501 and 601: Professor Kimble proposed changing the last sentence of these restyled rules: the sentence covering whether state law of privilege/competency applies when state law provides the rule of decision. These sentences were adopted by the Standing Committee at its last meeting; members of the Standing Committee were concerned that the initial restyling might be read to indicate that state law on privilege/competency governs *federal* claims as well as state claims when the claims are brought together in federal court — a result that is inconsistent with most of the case law and therefore substantive. The language for the second sentence, as adopted by the Standing Committee, is as follows:

But in a civil case, with respect to a claim or defense for which state law supplies the rule of decision, state law governs the claim of privilege.

The Evidence Rules Committee unanimously agreed that it would not consider any change to this language, because 1) it had been adopted by a vote of the Standing Committee; and 2) it successfully avoided the possibility of a substantive change from the existing rule.

9. Rule 502: Professor Kimble proposed changes to Rule 502, which was enacted by Congress in September, 2008. The two changes were: 1) changing the subdivisions by making the introductory language a new subdivision (a) and relettering the rest of the subdivisions; and 2) amending the subdivision on subject matter waiver by changing “ought in fairness to be considered” to “should in fairness be considered” — in order to track the restyling that had occurred in Rule 106, from which Rule 502 took the “ought in fairness” language.

The Committee was unalterably opposed to any word or structure changes to Rule 502. Many members of the Committee (and the Standing Committee) had spent long hours resisting any congressional change to the rule on the ground that it had been restyled in accordance with the style conventions, and that to alter it in any way would make it inconsistent with the other rules. Committee members determined that any attempt to change the rule now would undermine the arguments that members of both the Committee and the Standing Committee had made to Congress.

Professor Kimble responded that Rule 502 was now inconsistent with the restyled Rule 106. The Committee unanimously responded that the solution to the inconsistency was to amend the restyled version of Rule 106, so as to restore the original “ought in fairness” language. *After more discussion, the Committee unanimously voted to reject any word changes to Rule 502, and further voted unanimously to change the restyled version of Rule 106 as follows:*

If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part — or any other writing or recorded statement — that in fairness ought to be considered at the same time.

10. Rule 608(a): Professor Kimble proposed changes to Rule 608(a) intended to provide more consistency with Rule 405. *After discussion, the Committee approved a restyled Rule 608(a) in the following form:*

(a) Reputation or Opinion Evidence. A witness’s credibility may be attacked or supported by testimony about the witness’s reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character. But evidence of truthful character is admissible only after the witness’s character for truthfulness has been attacked.

11. Rule 609(b): Professor Kimble proposed changes to Rule 609(b) that would break out and unpack the complicated admissibility requirements in a more user-friendly way. *After discussion, the Committee approved a restyled Rule 609(b) in the following form:*

(b) Limit on Using the Evidence After 10 Years. This subdivision (b) applies if more than 10 years have passed since the witness’s conviction or release from confinement for the conviction, whichever is later. Evidence of the conviction is admissible only if:

(1) its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect; and

(2) the proponent gives an adverse party reasonable written notice of the intent to use it so that the party has a fair opportunity to contest its use.

D. Committee Notes to Restyled Rules

1. Basic Committee Note

The Committee resolved to prepare Committee Notes that would be consistent with previous restyling efforts. Accordingly, the Committee approved a basic Committee Note providing a disclaimer that the changes were only stylistic and no substantive changes were intended. *That note, which would be added to the large majority of the restyled rules, was unanimously approved in the following form:*

Committee Note

The language of Rule [] has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

2. Committee Note to Rule 101:

In addition — and again consistently with other restyling efforts — the Committee approved a Committee Note to Rule 101 that describes the functions and goals of the restyling effort. *The Committee unanimously approved a Committee Note to restyled Rule 101 in the following form:*

Committee Note

The language of Rule 101 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

The Style Project

The Evidence Rules are the fourth set of national procedural rules to be restyled. The restyled Rules of Appellate Procedure took effect in 1998. The restyled rules of Criminal Procedure took effect in 2002. The restyled Rules of Civil Procedure took effect in 2007. The restyled Rules of Evidence apply the same general drafting guidelines and principles used in restyling the Appellate, Criminal and Civil Rules.

1. General Guidelines

Guidance in drafting, usage, and style was provided by Bryan Garner, *Guidelines for Drafting and Editing Court Rules*, Administrative Office of the United States Courts (1969) and Bryan Garner, *Dictionary of Modern Legal Usage* (2d ed. 1995). See also Joseph Kimble, *Guiding Principles for Restyling the Civil Rules*, in *Preliminary Draft of Proposed Style Revision of the Federal Rules of Civil Procedure*, at x (Feb. 2005) (available at http://www.uscourts.gov/rules/Prelim_draft_proposed_pt1.pdf).

2. Formatting Changes

Many of the changes in the restyled Evidence Rules result from using format to achieve clearer presentations. The rules are broken down into constituent parts, using progressively indented subparagraphs with headings and substituting vertical for horizontal lists. “Hanging indents” are used throughout. These formatting changes make the structure of the rules graphic and make the restyled rules easier to read and understand even when the words are not changed. Rule 103 illustrates the benefits of formatting changes.

3. Changes to Reduce Inconsistent, Ambiguous, Redundant, Repetitive, or Archaic Words

The restyled rules reduce the use of inconsistent terms that say the same thing in different ways. Because different words are presumed to have different meanings, such inconsistencies can result in confusion. The restyled rules reduce inconsistencies by using the same words to express the same meaning. For example, consistent expression is achieved without affecting meaning by the changes from “accused” in many rules to “defendant in a criminal case” in all rules.

The restyled rules minimize the use of inherently ambiguous words. For example, the word “shall” can mean “must,” “may,” or something else, depending on context. The potential for confusion is exacerbated by the fact the word “shall” is no longer generally used in spoken or clearly written English. The restyled rules replace “shall” with “must,” “may,” or “should,” depending on which one the context and established interpretation make correct in each rule.

The restyled rules minimize the use of redundant “intensifiers”. These are expressions that attempt to add emphasis, but instead state the obvious and create negative implications for other rules. The absence of intensifiers in the restyled rule does not change their substantive meaning. See, e.g., Rule 103 (changing “interests of justice” to “justice”).

The restyled rules also remove words and concepts that are outdated or redundant.

4. Rule Numbers

The restyled rules keep the same numbers to minimize the effect on research. Subdivisions have been rearranged within some rules to achieve greater clarity and simplicity.

5. No Substantive Change

The Committee made special efforts to reject any purported style improvement that might result in a substantive change in the application of a rule. The Committee considered a change to be “substantive” if any of the following conditions were met:

- a. Under the existing practice in any circuit, the change could lead to a different result on a question of admissibility (e.g., a change that requires a court to provide either a less or more stringent standard in evaluating the admissibility of particular evidence);
- b. Under the existing practice in any circuit, it could lead to a change in the procedure by which an admissibility decision is made (e.g., a change in the time in which an objection must be made, or a change in whether a court must hold a hearing on an admissibility question);
- c. It alters the structure of a rule in a way that creates tension with the approach that courts and litigants have thought about, and argued about, questions of admissibility (e.g., merging Rules 104(a) and 104(b) into a single subdivision); or
- d. It changes a “sacred phrase” — phrases that have become so familiar in practice that to alter them would be unduly disruptive. Examples in the Evidence Rules include “unfair prejudice” and “truth of the matter asserted.”

3. More Detailed Notes for Some Restyled Rules

After discussion, the Committee determined that a few of the restyled Evidence Rules warranted a more fulsome statement to indicate the intent of the amendment and to assure the Bench and Bar that no substantive change is being made. The Committee adopted the working principle that if a fair number of members of the Bench and Bar might wonder about the scope of the change, it could warrant a more expansive explanation in the Committee Note. *After discussion, the Committee approved the following Committee Notes (recognizing that further development of Committee Notes might be necessary after public comment):*

Rules 407, 408 and 411

Explanation for Special Treatment:

These rules had always been rules of exclusion. They had never provided a ground of admissibility. The rules stated that certain evidence was inadmissible if offered for certain purposes, but that the preclusion *did not apply* if the evidence were offered for other purposes. The restyling has turned them into positive rules of admissibility. They now state that the court *may admit* the evidence if offered for a permissible purpose. It is possible that in the public comment period there will be some concern that the change in tone and structure substantive (though the Committee has taken a vote and found the changes to be stylistic only).

Approved Committee Note:

The Rule previously provided that evidence was not excluded if offered for a purpose not prohibited by the rule. To improve the language of the Rule, it now provides that the court may admit evidence if offered for a permissible purpose. There is no intent to change the process for admitting evidence covered by the Rule. It remains the case that if offered for an impermissible purpose, it must be excluded, and if offered for a purpose not barred by the Rule, its admissibility remains governed by the general principles of Rules 402, 403, 801, etc.

Rule 608(b)

Explanation for Special Treatment

Rule 608 allows specific acts to be inquired into “on cross-examination.” But because of Rule 607, impeachment with specific acts may also be permitted on direct examination. The courts have permitted such impeachment on direct in appropriate cases despite the language of Rule 608(b). The restyling makes no change to the language “on cross-examination” on the ground that there is no reason to make a change because courts are already applying the rule properly. A reasonable lawyer might wonder whether the Committee, by keeping the language, intends that it apply the way it is written. (The Civil Rules Committee tried to add a Note if retained language was inconsistent with the practice.)

Approved Committee Note:

The Committee is aware that the Rule’s limitation of bad act impeachment to “cross-examination” is trumped by Rule 607, which allows a party to impeach witnesses on direct examination. Courts have not relied on the term “on cross-examination” to limit impeachment that would otherwise be permissible under Rules 607 and 608. The Committee therefore concluded that no change to the language of the Rule was necessary in the context of a restyling project.

Rules 701, 703, 704 and 705

Explanation for Special Treatment:

These restyled rules cut out all references to an “inference.” The Committee determined that the change was stylistic only, but as the term “inference” is often used by lawyers, it is possible that some could think that the change is more important than intended.

Approved Committee Note:

The Committee deleted all reference to an “inference” on the grounds that the deletion made the Rule flow better and easier to read, and because any “inference” is covered by the broader term “opinion.” Courts have not made substantive decisions on the basis of any distinction between an opinion and an inference. No change in current practice is intended.

Rule 801(d)(2)

Explanation for Special Treatment:

The restyled Rule deletes all reference to the term “admission.” As that has been a basic – if often misunderstood — term for the hearsay statement of a party, it is an important shift that may raise questions in the public comment.

Approved Committee Note:

Statements falling under this hearsay exemption are no longer referred to as “admissions” in the title to the Rule. The term “admissions” is confusing because not all statements covered by exemption are admissions in the colloquial sense— a statement can be admissible under the exemption even it “admitted” nothing and was not against the party’s interest when made. The term also raises confusion in comparison with the Rule 804(b)(3) exception for declarations against interest. No change in application of the exemption is intended.

Rule 804(b)(3)

Explanation for Special Treatment:

The Rule provides for a substantive change from the existing rule, in that it extends the corroborating circumstances requirement to declarations against interest offered by the government. But all the Rule does is to track the substantive change that is planned for the rule a year before the restyling is to take effect. The Committee Note can explain the process.

Approved Committee Note:

The amendment provides that the corroborating circumstances requirement applies not only to declarations against penal interest offered by the defendant in a criminal case, but also to such statements offered by the government. The language in the original rule does not so provide, but a proposed amendment to Rule 804(b)(3) — released for public comment in 2008 — explicitly extends the corroborating circumstances requirement to statements offered by the government.

II. Proposed Amendment to Evidence Rule 804(b)(3)

A. Introduction

The proposed amendment to Rule 804(b)(3) would require the government to provide corroborating circumstances indicating trustworthiness before a declaration against penal interest could be admitted in a criminal case. In its current form Rule 804(b)(3) requires an accused to provide corroborating circumstances clearly indicating the trustworthiness of a declaration against penal interest for the hearsay to be admissible; but by its terms the Rule imposes no similar requirement on the prosecution. The need for the amendment arose after the Supreme Court's decision in *Whorton v. Bockting*, which held that the Confrontation Clause provides no protection against unreliable hearsay if that hearsay is nontestimonial. If the prosecution has to show only that a declarant made a statement that tended to disserve his interest — i.e., all that is required under the terms of the existing rule — then it might well be that unreliable hearsay could be admitted against an accused.

At the meeting, the Committee considered the relatively few public comments that had been received on the Rule. Most of the comments were in the nature of style suggestions that are already being accommodated by the restyling project (e.g., specifying that the corroborating circumstances requirement applies only to statement offered under this exception and not more broadly). Some suggestions had been made about previous proposals to amend Rule 804(b)(3) and had been previously rejected by the Committee — such as a suggestion to add language that would abrogate the Supreme Court's decision in *Williamson v. United States*, and a suggestion to eliminate the corroborating circumstances requirement as applied to the accused.

B. Text of Proposed Amendment

As it had on a number of previous occasions, the Committee (including the Department of Justice representative) unanimously agreed with the substantive result mandated by the amendment, i.e., that the government will have to provide corroborating circumstances before a declaration against penal interest can be admitted by the accused. The Committee's discussion then shifted to how to respond to the stylistic suggestion proposed in the public comment, given that those stylistic suggestions had already been answered in the proposed restyled Rule 804(b)(3). **After substantial debate, the Committee unanimously resolved that the most efficient procedure was to propose that Rule 804(b)(3) be sent to the Judicial Conference in the form in which it had been restyled as part of the restyling project.** That restyled rule contained the substantive amendment that had already gone through the public comment, and it was common practice to implement style changes proposed by the Style Subcommittee after a proposed amendment was issued for public comment.

The Committee voted unanimously to recommend to the Standing Committee that the proposed amendment to Rule 804(b)(3), as restyled, be sent to the Judicial Conference with the recommendation that it be approved and referred to the Supreme Court.

What follows is the proposed amendment, as approved by the Committee, in blackline form:

(3) *Statement Against Interest.* A statement ~~which~~ that:

(A) a reasonable person in the declarant's position would have made only if the person believed it to be true because when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. ; and

(B) A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless— is supported by corroborating circumstances that clearly indicate the its trustworthiness of the statement, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

What follows is the proposed amendment in “clean” form:

(3) *Statement Against Interest.* A statement that:

(A) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and

(B) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

C. Committee Note

The Committee Note as issued for public comment contained a short discussion of the case law on confrontation. **After discussion, the Committee unanimously determined that the citations to case law should be deleted.** The case law is dynamic, and the Committee note is static. Moreover, the point of the passage in the Committee Note is to indicate that the Committee did not intend to treat constitutional issues. It was enough to state that without referring to case law.

Continuing the discussion of the Committee Note, the Reporter observed that one public comment suggested that the Note address the fact that the credibility of the witness who reports the hearsay in court is irrelevant to the admissibility of the hearsay statement itself. The Reporter noted that some courts had incorrectly excluded hearsay offered under Rule 804(b)(3) on the ground that the in-court witness was untrustworthy — this is a classic error in hearsay analysis, as the trustworthiness of the in-court witness can be assessed by the jury. Finally, the Reporter noted that a similar entry in the Committee Note in a previous iteration of Rule 804(b)(3) had been approved by the Standing Committee.

After discussion, the Committee unanimously approved the following Committee Note to the proposed amendment to Rule 804(b)(3):

Committee Note

The second sentence of Rule 804(b)(3) has been amended to provide that the corroborating circumstances requirement applies to all declarations against penal interest offered in criminal cases. A number of courts have applied the corroborating circumstances requirement to declarations against penal interest offered by the prosecution, even though the text of the Rule did not so provide. *See, e.g., United States v. Alvarez*, 584 F.2d 694, 701 (5th Cir. 1978) (“by transplanting the language governing exculpatory statements onto the analysis for admitting inculpatory hearsay, a unitary standard is derived which offers the most workable basis for applying Rule 804(b)(3)”); *United States v. Shukri*, 207 F.3d 412 (7th Cir. 2000) (requiring corroborating circumstances for against-penal-interest statements offered by the government). A unitary approach to declarations against penal interest helps to assure both the prosecution and the accused that the Rule will not be abused and that only reliable hearsay statements will be admitted under the exception.

The Committee found no need to address the relationship between Rule 804(b)(3) and the Confrontation Clause, because the requirements of this exception assure that declarations admissible under it will not be testimonial.

The amendment does not address the use of the corroborating circumstances for declarations against penal interest offered in civil cases.

In assessing whether corroborating circumstances exist, some courts have focused on the credibility of the witness who relates the hearsay statement in court. But the credibility of the witness who relates the statement is not a proper factor for the court to consider in assessing corroborating circumstances. To base admission or exclusion of a hearsay statement on the witness’s credibility would usurp the jury’s role of determining the credibility of testifying witnesses.

III. Next Meeting

The Fall 2009 meeting of the Committee is scheduled for October in Charleston, S.C.

Respectfully submitted,

Daniel J. Capra
Reporter