ADVISORY COMMITTEE
ON
EVIDENCE RULES

San Francisco, California
January 15, 2005

ADVISORY COMMITTEE ON EVIDENCE RULES

December 2004

Chair:

Honorable Jerry E. Smith
United States Circuit Judge
United States Court of Appeals
12621 Bob Casey United States Courthouse
515 Rusk Avenue
Houston, TX 77002-2698

Members:

Honorable Ronald L. Buckwalter
United States District Judge
United States District Court
14614 James A. Byrne
United States Courthouse
601 Market Street
Philadelphia, PA 19106-1714

Honorable Robert L. Hinkle
United States District Judge
United States District Court
United States Courthouse
111 North Adams Street
Tallahassee, FL 32301-7717

Honorable Andrew D. Hurwitz
Associate Justice of the
Supreme Court of Arizona
Suite 431
1501 West Washington
Phoenix, AZ 85007

Patricia Lee Refo, Esquire
Snell & Wilmer L.L.P.
One Arizona Center
Phoenix, AZ 85004-2202

William W. Taylor, III, Esquire
Zuckerman Spaeder LLP
1201 Connecticut Avenue, N.W.
Suite 1200
Washington, DC 20036-2638

Thomas W. Hillier II
Federal Public Defender
1601 Fifth Avenue, #700
Seattle, WA 98101

John S. Davis
Associate Deputy Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, N.W., Room 4119
Washington, DC 20530

Liaison Members:

Honorable Thomas W. Thrash, Jr.
United States District Judge
United States District Court
2188 Richard B. Russell Federal Building
and United States Courthouse
75 Spring Street, S.W.
Atlanta, GA 30303-3361

Honorable Christopher M. Klein
United States Bankruptcy Judge
United States Bankruptcy Court
3-200 United States Courthouse
501 I Street
Sacramento, CA 95814-2322

Honorable Thomas B. Russell
United States District Judge
United States District Court
307 Federal Building
501 Broadway
Paducah, KY 42001

Honorable David G. Trager
United States District Judge
United States District Court
225 Cadman Plaza, East
Room 224
Brooklyn, NY 11201

ADVISORY COMMITTEE ON EVIDENCE RULES (CONTD.)

Reporter:

Professor Daniel J. Capra
Fordham University School of Law
140 West 62nd Street
New York, NY 10023

Advisors and Consultants:

Professor Kenneth S. Broun
University of North Carolina
School of Law
CB #3380, Van Hecke-Wettach Hall
Chapel Hill, NC 27599

Secretary:

Peter G. McCabe
Secretary, Committee on Rules of
Practice and Procedure
Washington, DC 20544

JUDICIAL CONFERENCE RULES COMMITTEES

Chairs

Honorable David F. Levi
Chief Judge, United States District Court
United States Courthouse
501 I Street, 14th Floor
Sacramento, CA 95814

Honorable Samuel A. Alito, Jr.
United States Circuit Judge
357 United States Post Office & Courthouse
50 Walnut Street
Newark, NJ 07101

Honorable Thomas S. Zilly
United States District Judge
United States District Court
United States Courthouse
700 Stewart Street, Suite 15229
Seattle, WA 98101

Honorable Lee H. Rosenthal
United States District Judge
United States District Court
11535 Bob Casey U.S. Courthouse
515 Rusk Avenue
Houston, TX 77002-2600

Honorable Susan C. Bucklew
United States District Judge
United States District Court
United States Courthouse
801 North Florida Avenue, Suite 1430
Tampa, FL 33602

Honorable Jerry E. Smith
United States Circuit Judge
United States Court of Appeals
12621 Bob Casey U.S. Courthouse
515 Rusk Avenue
Houston, TX 77002-2698

Reporters

Prof. Daniel R. Coquillette
Boston College Law School
885 Centre Street
Newton Centre, MA 02159

Prof. Patrick J. Schiltz
University of St. Thomas
School of Law
1000 La Salle Avenue, MSL 400
Minneapolis, MN 55403-2015

Prof. Jeffrey W. Morris
University of Dayton
School of Law
300 College Park
Dayton, OH 45469-2772

Prof. Edward H. Cooper
University of Michigan
Law School
312 Hutchins Hall
Ann Arbor, MI 48109-1215

Prof. David A. Schlueter
St. Mary's University
School of Law
One Camino Santa Maria
San Antonio, TX 78228-8602

Prof. Daniel J. Capra
Fordham University
School of Law
140 West 62nd Street
New York, NY 10023

ADVISORY COMMITTEE ON EVIDENCE RULES

			Start Date	End Date
Jerry E. Smith Chair	C	Fifth Circuit	Member: 2002 Chair: 2002	---- 2005
Ronald L. Buckwalter	D	Pennsylvania (Eastern)	2000	2006
John S. Davis*	DOJ	Washington, DC	2001	Open
Thomas W. Hillier II	FPD	Washington (Western)	2000	2006
Robert L. Hinkle	D	Florida (Northern)	2002	2005
Patricia Lee Refo	ESQ	Arizona	2000	2006
Thomas B. Russell**	D	Kentucky (Western)	2000	2006
William W. Taylor III	ESQ	Washington, DC	2004	2007
David G. Trager**	D	New York (Eastern)	2000	2006
Daniel J. Capra Reporter	ACAD	New York	1996	Open

Principal Staff: John K. Rabiej (202) 502-1820

* Ex-officio

** Ex-officio, non-voting members' terms coincide with terms on Civil & Criminal Rules

ADVISORY COMMITTEE ON EVIDENCE RULES

AGENDA FOR COMMITTEE MEETING
San Francisco, California
January 15, 2005

I. Opening Remarks of the Chair

Including welcome to new members; approval of the minutes of the April 2004 meeting; and a report on the June 2004 and January 2005 meetings of the Standing Committee. The Draft minutes of the April 2004 meeting are included in this agenda book.

II. Consideration of Evidence Rules

A. Comments Received on Evidence Rules Currently Out for Public Comment

The proposed amendments to Evidence Rules 404(a), 408, 606(b) and 609 are included in this agenda book. Also included are the written public comments on these rules received as of December 14, 2004. The Committee may wish to discuss these comments, though there is no need to make a final decision as to any of the proposed amendments at this meeting.

B. Consideration of Possible Amendment to Evidence Rule 1101

The Supreme Court's decisions in *Blakely v. Washington, United States v. Booker* and *United States v. Fanfan* may require or justify an amendment to Evidence Rule 1101. That amendment would regulate evidence offered to prove facts at a sentencing proceeding, when the factual determination is to be made by a jury. The Reporter has prepared a memorandum that discusses the need for an amendment to Rule 1101 and provides draft models for a possible amendment. That memorandum is included in this agenda book.

C. Consideration of Public Comment Suggesting an Amendment to Evidence Rule 803(8)

The Center for Regulatory Effectiveness has submitted a proposal to amend Evidence Rule 803(8), the hearsay exception for public reports. The supporting memorandum submitted by the Center, and a Reporter's memorandum concerning the proposal, are both included in this agenda book.

D. *Crawford v. Washington* and the Hearsay Exceptions in the Federal Rules of Evidence

The Reporter has prepared a memorandum setting forth the federal case law interpreting the scope and meaning of the Supreme Court's decision in *Crawford v. Washington.* That memorandum is included in the agenda book.

III. Privileges

The agenda book includes Ken Broun's draft of the "survey rule" on the attorney-client privilege; commentary on the survey rule; discussion of the privilege as applied to government attorneys; and discussion of the scope of the crime-fraud exception.

IV. New Business

A. E-Government Act Privacy Rule

Section 205 of the E-Government Act requires the Judicial Conference to propose rules that will protect against disclosure of personal identifiers that are found in court filings. The E-Government Subcommittee of the Standing Committee has prepared a template of a proposed rule that is currently being considered by the other Advisory Committees. While the E-Government Act does not require a change to the Evidence Rules, the E-Government Subcommittee would welcome

any comments that the Evidence Rules Committee may have on the proposed privacy rule. The template is included in the agenda book.

Advisory Committee on Evidence Rules

Minutes of the Meeting of April 29th and 30th, 2004

Washington, D.C.

The Advisory Committee on the Federal Rules of Evidence (the "Committee") met on April 29th and 30th 2004 in Marina Del Rey, California.

The following members of the Committee were present:

Hon. Jerry E. Smith, Chair
Hon. Robert L. Hinkel
Hon. Jeffrey L. Amestoy
Thomas W. Hillier, Esq.
David S. Maring, Esq.
Patricia Refo, Esq.
John S. Davis, Esq., Department of Justice

Also present were:

Hon. David F. Levi, Chair of the Standing Committee on Rules of Practice and Procedure
Hon. Thomas W. Thrash, Jr., Liaison from the Standing Committee on Rules of Practice and Procedure
Hon. Christopher M. Klein, Liaison from the Bankruptcy Rules Committee
Hon. Paul Kelly, Liaison from the Civil Rules Committee
Robert Fiske, Esq., Liaison from the Criminal Rules Committee
Hon. C. Arlen Beam, Chair of the Drafting Committee for the Uniform Rules of Evidence
Professor Leo Whinery, Reporter to the Drafting Committee for the Uniform Rules of Evidence
Peter G. McCabe, Esq., Secretary, Standing Committee on Rules of Practice and Procedure
John K. Rabiej, Esq., Chief, Rules Committee Support Office
James Ishida, Esq., Rules Committee Support Office
Jennifer Marsh, Esq., Federal Judicial Center
Professor Daniel J. Capra, Reporter to the Evidence Rules Committee
Professor Kenneth S. Broun, Consultant to the Evidence Rules Committee
Adam J. Szubin, Department of Justice

Opening Business

Judge Smith extended a welcome to those who were attending an Evidence Rules Committee meeting for the first time: John Davis, the new Justice Department representative, Judge Kelly, who was substituting for Judge Kyle as Liaison from the Civil Rules Committee, and Robert Fiske, who was substituting for Judge Trager as Liaison from the Criminal Rules Committee. Judge Smith asked for approval of the draft minutes of the Fall 2003 Committee meeting. The minutes were approved unanimously. Judge Smith then gave a short report on the June 2003 Standing Committee meeting, noting that the Evidence Rules Committee had no action items for the agenda at that meeting.

On behalf of the Committee, Judge Smith expressed thanks and gratitude to Chief Justice Amestoy and to David Maring, whose terms on the Committee will expire before the next meeting.

Long-Range Planning — Consideration of Possible Amendments to Certain Evidence Rules

At its April 2001 meeting, the Committee directed the Reporter to review scholarship, case law, and other bodies of evidence law to determine whether there are any evidence rules that might be in need of amendment as part of the Committee's long-range planning. At the April 2002 meeting, the Committee reviewed a number of potential changes and directed the Reporter to prepare a report on a number of rules, so that the Committee could take an in-depth look at whether those rules require amendment.

At the October 2002 meeting, the Committee began to consider the Reporter's memoranda on some of the rules that have been found worthy of in-depth consideration. The Committee agreed that the problematic rules should be considered over the course of four Committee meetings, and that if any rules are found in need of amendment, the proposals would be delayed in order to package them as a single set of amendments to the Evidence Rules. This would mean that the package of amendments, if any, would go to the Standing Committee at its June 2004 meeting, with a recommendation that the proposals be released for public comment. With that timeline in mind, the Committee considered reports on several possibly problematic evidence rules at its meetings in 2003. At the Spring 2004 meeting, those rules were reviewed once again; the goal of the Committee was to determine whether to approve amendments to any of those rules for referral to the Standing Committee.

1. Rule 404(a)

At its Fall 2002 meeting, the Committee tentatively agreed on language that would amend Evidence Rule 404(a) to prohibit the circumstantial use of character evidence in civil cases. The Committee determined that an amendment is necessary because the circuits have long been split over whether character evidence can be offered to prove conduct in a civil case. Such a circuit split can cause disruption and disuniform results in the federal courts. Moreover, the question of the admissibility of character evidence to prove conduct arises frequently in section 1983 cases, so an amendment to the Rule would have a helpful impact on a fairly large number of cases. The Committee also concluded that as a policy matter, character evidence should not be admitted to prove conduct in a civil case. The circumstantial use of character evidence is fraught with peril in *any* case, because it could lead to a trial of personality and could cause the jury to decide the case on improper grounds. The risks of character evidence historically have been considered worth the costs where a criminal defendant seeks to show his good character or the pertinent bad character of the victim. This so-called "rule of mercy" is thought necessary to provide a counterweight to the resources of the government, and is a recognition of the possibility that the accused, whose liberty is at stake, may have little to defend with other than his good name. But none of these considerations is operative in civil litigation. In civil cases, the substantial problems raised by character evidence were considered by the Committee to outweigh the dubious benefit that character evidence might provide.

The Committee once again discussed the merits of the proposed amendment at the Spring 2004 meeting. A liaison suggested that character evidence could be important to a civil defendant charged with serious misconduct; but Committee members responded that the costs of allowing character evidence outweighed the benefits in civil cases. Specifically, the use of character evidence could result in a trial based on personality rather than the facts.

The Committee considered how the proposed amendment would affect habeas cases. Because habeas cases are civil cases, the amendment would prohibit the circumstantial use of character evidence by a habeas petitioner. Members pointed out that this is already the case under the current majority rule—the majority of courts currently prohibit the circumstantial use of character evidence in all civil cases. Moreover, the Evidence Rules do not break out habeas cases for special evidentiary treatment, and it would be anomalous to do so in this one Rule. The Committee resolved to undertake a long-term project that would assess the use of the Evidence Rules in habeas cases.

A Committee member suggested that the proposed Committee Note be revised slightly to clarify that the ban on circumstantial use of character evidence will apply to all civil cases, even where the defendant's conduct is closely related to criminal charges. The Committee agreed that such a clarification would be useful.

A motion was made and seconded to approve the proposed amendment to Evidence Rule 404(a), together with the Committee Note, and to recommend to the Standing Committee that the proposal be released for public comment. The motion was approved by a unanimous vote.

The proposed amendment to Rule 404 provides as follows:

Rule 404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes

(a) Character evidence generally.—Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) Character of accused.— ~~Evidence~~ In a criminal case, evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution;

(2) Character of alleged victim.— ~~Evidence~~ In a criminal case, and subject to the limitations of Rule 412, evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor;

* * *

The Committee Note to the proposed amendment to Rule 404(a) provides as follows:

Committee Note

The Rule has been amended to clarify that in a civil case evidence of a person's character is never admissible to prove that the person acted in conformity with the character trait. The amendment resolves the dispute in the case law over whether the exceptions in subdivisions (a)(1) and (2) permit the circumstantial use of character evidence in civil cases.

Compare Carson v. Polley, 689 F.2d 562, 576 (5th Cir. 1982) ("when a central issue in a case is close to one of a criminal nature, the exceptions to the Rule 404(a) ban on character evidence may be invoked"), *with SEC v. Towers Financial Corp.*, 966 F.Supp. 203 (S.D.N.Y. 1997) (relying on the terms "accused" and "prosecution" in Rule 404(a) to conclude that the exceptions in subdivisions (a)(1) and (2) are inapplicable in civil cases). The amendment is consistent with the original intent of the Rule, which was to prohibit the circumstantial use of character evidence in civil cases, even where closely related to criminal charges. *See Ginter v. Northwestern Mut. Life Ins. Co.*, 576 F.Supp. 627, 629-30 (D. Ky.1984) ("It seems beyond peradventure of doubt that the drafters of F.R.Evi. 404(a) explicitly intended that all character evidence, except where 'character is at issue' was to be excluded" in civil cases).

The circumstantial use of character evidence is generally discouraged because it carries serious risks of prejudice, confusion and delay. *See Michelson v. United States,* 335 U.S. 469, 476 (1948) ("The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice."). In criminal cases, the so-called "mercy rule" permits a criminal defendant to introduce evidence of pertinent character traits of the defendant and the victim. But that is because the accused, whose liberty is at stake, may need "a counterweight against the strong investigative and prosecutorial resources of the government." C. Mueller & L. Kirkpatrick, *Evidence: Practice Under the Rules*, pp. 264-5 (2d ed. 1999). See also Richard Uviller, *Evidence of Character to Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom*, 130 U.Pa.L.Rev. 845, 855 (1982) (the rule prohibiting circumstantial use of character evidence "was relaxed to allow the criminal defendant with so much at stake and so little available in the way of conventional proof to have special dispensation to tell the factfinder just what sort of person he really is"). Those concerns do not apply to parties in civil cases.

The amendment also clarifies that evidence otherwise admissible under Rule 404(a)(2) may nonetheless be excluded in a criminal case involving sexual misconduct. In such a case, the admissibility of evidence of the victim's sexual behavior and predisposition is governed by the more stringent provisions of Rule 412.

2. Rule 408

The Reporter's memorandum on Rule 408, prepared for the Fall 2002 meeting, noted that the courts have been long-divided on three important questions concerning the scope of the Rule:

1) Some courts hold that evidence of compromise is admissible against the settling party in subsequent criminal litigation while others hold that compromise evidence is excluded in subsequent criminal litigation when offered as an admission of guilt.

2) Some courts hold that statements in compromise can be admitted to impeach by way of contradiction or prior inconsistent statement. Other courts disagree, noting that if statements in compromise could be admitted for contradiction or prior inconsistent statement, this would chill settlement negotiations, in violation of the policy behind the Rule.

3) Some courts hold that offers in compromise can be admitted in favor of the party who made the offer; these courts reason that the policy of the rule, to encourage settlements, is not at stake where the party who makes the statement or offer is the one who wants to admit it at trial. Other courts hold that settlement statements and offers are never admissible to prove the validity or the amount of the claim, regardless of who offers the evidence. These courts reason that the text of the Rule does not provide an exception based on identity of the proffering party, and that admitting compromise evidence would raise the risk that lawyers would have to testify about the settlement negotiations, thus risking disqualification.

At the Fall 2002 meeting, the Committee agreed to present, as part of its package, an amendment that would 1) limit the impeachment exception to use for bias, and 2) exclude compromise evidence even if offered by the party who made an offer of settlement. The remaining issue–whether compromise evidence should be admissible in criminal cases–was the subject of extensive discussion at the 2003 meetings and again at the Spring 2004 meeting. At all of these meetings, the Justice Department representative expressed concern that some statements made in civil compromise (e.g., to tax investigators) could be critical evidence needed in a criminal case to prove that the defendant had committed fraud. If Rule 408 were amended to exclude such statements in criminal cases, then this probative and important evidence would be lost to the government. The DOJ representative recognized the concern that the use of civil compromise evidence in criminal cases would deter civil settlements. But he contended that the Civil Division of the DOJ had not noted any deterrent to civil compromise from such a rule in the circuits holding that civil compromise evidence is indeed admissible in criminal cases.

Discussion of the Rule at the 2003 meetings indicated Committee dissatisfaction with Rule 408 as originally structured. As it stands, Rule 408 is structured in four sentences. The first sentence states that an offer or acceptance in compromise "is not admissible to prove liability for or invalidity of the claim or its amount." The second sentence provides the same preclusion for statements made in compromise negotiations–an awkward construction because a separate sentence is used to apply

the same rule of exclusion applied in the first sentence. The third sentence says that the rule "does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations." The rationale of this sentence, added by Congress, is to prevent parties from immunizing pre-existing documents from discovery simply by bringing them to the negotiating table. The addition of this sentence at this point in the Rule, however, creates a structural problem because the fourth sentence of the rule contains a list of permissible purposes for compromise evidence, including proof of bias. As such, the third sentence provides a kind of break in the flow of the Rule. Moreover, the fourth sentence is arguably unnecessary, because none of the permissible purposes involves using compromise evidence to prove the validity or amount of the claim. Under the Rule, the only impermissible purpose for compromise evidence is when it is offered to prove the validity or amount of a claim.

For the Fall 2003 meeting, the Reporter prepared a restructured Rule 408 for the Committee's consideration. Committee members expressed the opinion that the restructured Rule was easier to read and made it much easier to accommodate an amendment (previously agreed upon by the Committee) that would prohibit the use of compromise statements for impeachment by way of prior inconsistent statement or contradiction.

In the discussion of a restructured Rule 408, the Committee considered whether to retain the language of the existing Rule that evidence "otherwise discoverable" is not excluded merely because it was presented in the course of compromise negotiations. After extensive debate, the Committee agreed with courts, commentators, and rules drafters in several states, and concluded that the "otherwise discoverable" sentence is superfluous. It was added to the Rule to emphasize that pre-existing records were not immunized simply because they were presented to the adversary in the course of compromise negotiations. But such a pretextual use of compromise negotiations has never been permitted by the courts. The Committee therefore agreed, to drop the "otherwise discoverable" sentence from the text of the revised Rule 408, with an explanation for such a change to be placed in the Committee Note. The Committee also considered whether it was necessary to improve the language that triggers the protection of the amendment: the Rule applies to compromise negotiations as to a "matter which was in dispute." The Reporter prepared a description of the cases and commentary on this question and the Committee determined that it would not be appropriate to change this language, as the courts were not in conflict as to its application.

This left the question of the admissibility of compromise evidence in criminal cases. At the Spring 2004 meeting the DOJ representative reiterated the Department's position that Rule 408 should be completely inapplicable in criminal cases. But other Committee members argued for a distinction between statements made in settlement negotiations and the offer or acceptance of the settlement itself. It was noted — from the personal experience of several lawyers — that a defendant may decide to settle a civil case even though it strenuously denies wrongdoing. These Committee members argued that in such cases the settlement should not be admissible in criminal cases because the settlement is more a recognition of reality than an admission of criminality. Moreover, if the settlement itself could be admitted as evidence of guilt, defendants may choose not to settle, and this could delay needed compensation to those allegedly injured by the defendant's activities.

Committee members noted that the DOJ's concerns about admissibility of compromise evidence were almost if not completely limited to statements of fault made in compromise negotiations; such direct statements of criminality are obviously relevant to subsequent criminal liability, but the same does not apply to the settlement agreement itself. These Committee members recognized that even if Rule 408 were inapplicable to settlements, a particular settlement might nonetheless be excluded in a criminal case under Rule 403. But these members concluded that any protection under Rule 403 was too unpredictable for civil defendants to rely upon.

In light of the discussion, the Reporter revised the working draft, which had provided that Rule 408 was completely inapplicable in criminal cases. The new draft distinguished between offers and acceptances of settlement (inadmissible in criminal cases) and statements made in settlement negotiations (admissible in subsequent criminal litigation, subject of course to Rule 403). The DOJ representative opposed this draft, although he recognized that most of the Department's concerns went to the admissibility of statements rather than offers and acceptances. The Department representative contended that courts would have difficulty distinguishing between statements made in negotiation and the ultimate offer or acceptance. In many cases, the statement alleged to be admissible might be intertwined with the offer or acceptance. Thus, the Department representative contended that the proposed amendment would give rise to litigation as to its meaning. In contrast, the public defender on the Committee opposed the draft because it did not go far enough. He favored an amendment that would bar all civil compromise evidence from subsequent criminal litigation. He argued that civil defendants are often poorly represented, and as such they may unwittingly provide evidence of their guilt in the course of civil compromise negotiations. In his view, the proposed amendment would be a trap for the unwary insofar as it allowed statements made in compromise negotiations to be admissible in subsequent criminal cases.

Committee members also discussed some questions about the scope of the Rule. One question was whether the Rule would prevent proof of compromise evidence in a criminal case where the allegation is that the compromise itself was an act of extortion or other illegality. The Reporter responded that the current Rule would not exclude that evidence; courts have held that Rule 408 does not bar proof of wrongdoing in the settlement process because the compromise evidence is not offered to prove the invalidity of the underlying claim, but is rather offered as proof of a criminal act.

Committee members noted that many of the hard questions of Rule 408's applicability involved whether compromise evidence is offered for a purpose other than to prove the validity or amount of the civil claim. If compromise evidence can be offered in criminal cases to prove that the compromise itself was illegal, or to prove that the defendant by settling was made aware of the wrongfulness of his conduct, on the ground that the purpose for this kind of evidence was to prove something other than the validity or amount of the underlying claim, then much of the Department's concerns over Rule 408 protection would be answered. Committee members noted that it would be problematic to change the language in the text of the Rule concerning the "validity", "invalidity", or "amount" of the claim, as this language has been subject to extensive case law and it is by no means certain that an amendment would provide language that was any more clear than the current

text. The Committee therefore directed the Reporter to add a paragraph to the Committee Note to clarify that there was no intent to change the existing law on whether compromise evidence is offered for a purpose other than to prove the validity, invalidity, or amount of the claim.

A motion was made and seconded to approve the proposed amendment to Evidence Rule 408, together with the Committee Note, and to recommend to the Standing Committee that the proposal be released for public comment. The motion was approved by a 5-2 vote.

The proposed amendment to Rule 408 provides as follows:

Rule 408. Compromise and Offers to Compromise

(a) General rule. -- ~~Evidence of~~ The following is not admissible on behalf of any party, when offered as evidence of liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction:

(1) furnishing or offering or promising to furnish~~,~~ —or ~~(2)~~ accepting or offering or promising to accept~~,~~ —a valuable consideration in compromising or attempting to compromise ~~a~~ the claim ~~which was disputed as to either validity or amount~~; and ~~, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of~~

(2) in a civil case, conduct or statements made in compromise negotiations ~~is likewise not admissible~~ regarding the claim.

~~This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations.~~

(b) Other purposes. -- This rule ~~also~~ does not require exclusion ~~when~~ if the evidence is offered for ~~another purpose, such as~~ purposes not prohibited by subdivision (a). Examples of permissible purposes include proving a witness's bias or prejudice ~~of a witness,~~ ; ~~negativing~~ negating a contention of undue delay~~,~~ ~~;or~~ and proving an effort to obstruct a criminal investigation or prosecution.

Committee Note

Rule 408 has been amended to settle some questions in the courts about the scope of the Rule, and to make it easier to read. First, the amendment clarifies that Rule 408 does not protect against the use of statements and conduct during civil settlement negotiations when offered in a criminal case. *See, e.g., United States v. Prewitt*, 34 F.3d 436, 439 (7th Cir. 1994) (statements made in civil settlement negotiations are not barred in subsequent criminal prosecutions, given the "public interest in the prosecution of crime"). Statements made in civil compromise negotiations may be excluded in criminal cases where the circumstances

so warrant under Rule 403. But there is no absolute exclusion imposed by Rule 408.

The amendment distinguishes statements and conduct in compromise negotiations (such as a direct admission of fault) from an offer or acceptance of a compromise of a civil claim. An offer or acceptance of a compromise of a civil claim is excluded under the Rule if offered against a criminal defendant as an admission of fault. In that case, the predicate for the evidence would be that the defendant, by compromising, has admitted the validity and amount of the civil claim, and that this admission has sufficient probative value to be considered as proof of guilt. But unlike a direct statement of fault, an offer or acceptance of a compromise is not very probative of the defendant's guilt. Moreover, admitting such an offer or acceptance could deter defendants from settling a civil claim, for fear of evidentiary use in a subsequent criminal action. *See, e.g.*, Fishman, *Jones on Evidence, Civil and Criminal*, § 22:16 at 199, n.83 (7th ed. 2000) ("A target of a potential criminal investigation may be unwilling to settle civil claims against him if by doing so he increases the risk of prosecution and conviction.").

The amendment retains the language of the original rule that bars compromise evidence only when offered as evidence of the "validity", "invalidity", or "amount" of the disputed claim. The intent is to retain the extensive case law finding Rule 408 inapplicable when compromise evidence is offered for a purpose other than to prove the validity, invalidity, or amount of a disputed claim. *See, e.g., Athey v. Farmers Ins. Exchange,* 234 F.3d 357 (8th Cir. 2000) (evidence of settlement offer by insurer was properly admitted to prove insurer's bad faith); *Coakley & Williams v. Structural Concrete Equip.,* 973 F.2d 349 (4th Cir. 1992) (evidence of settlement is not precluded by Rule 408 where offered to prove a party's intent with respect to the scope of a release); *Cates v. Morgan Portable Bldg. Corp.,* 708 F.2d 683 (7th Cir. 1985) (Rule 408 does not bar evidence of a settlement when offered to prove a breach of the settlement agreement, as the purpose of the evidence is to prove the fact of settlement as opposed to the validity or amount of the underlying claim); *Uforma/Shelby Bus. Forms, Inc. v. NLRB,* 111 F.3d 1284 (6th Cir. 1997) (threats made in settlement negotiations were admissible; Rule 408 is inapplicable when the claim is based upon a wrong that is committed during the course of settlement negotiations). Nor does the amendment affect the case law providing that Rule 408 is inapplicable when evidence of the compromise is offered to prove notice. *See, e.g., United States v. Austin,* 54 F.3d 394 (7th Cir. 1995) (no error to admit evidence of the defendant's settlement with the FTC, because it was offered to prove that the defendant was on notice that subsequent similar conduct was wrongful); *Spell v. McDaniel,* 824 F.2d 1380 (4th Cir. 1987) (in a civil rights action alleging that an officer used excessive force, a prior settlement by the City of another brutality claim was properly admitted to prove that the City was on notice of aggressive behavior by police officers).

The amendment prohibits the use of statements made in settlement negotiations when offered to impeach by prior inconsistent statement or through contradiction. Such broad impeachment would tend to swallow the exclusionary rule and would impair the public

policy of promoting settlements. *See McCormick on Evidence* at 186 (5th ed. 1999) ("Use of statements made in compromise negotiations to impeach the testimony of a party, which is not specifically treated in Rule 408, is fraught with danger of misuse of the statements to prove liability, threatens frank interchange of information during negotiations, and generally should not be permitted."). *See also EEOC v. Gear Petroleum, Inc.*, 948 F.2d 1542 (10th Cir.1991) (letter sent as part of settlement negotiation cannot be used to impeach defense witnesses by way of contradiction or prior inconsistent statement; such broad impeachment would undermine the policy of encouraging uninhibited settlement negotiations).

The amendment makes clear that Rule 408 excludes compromise evidence even when a party seeks to admit its own settlement offer or statements made in settlement negotiations. If a party were to reveal its own statement or offer, this could itself reveal the fact that the adversary entered into settlement negotiations. The protections of Rule 408 cannot be waived unilaterally because the Rule, by definition, protects both parties from having the fact of negotiation disclosed to the jury. Moreover, proof of statements and offers made in settlement would often have to be made through the testimony of attorneys, leading to the risks and costs of disqualification. *See generally Pierce v. F.R. Tripler & Co.*, 955 F.2d 820, 828 (2d Cir. 1992) (settlement offers are excluded under Rule 408 even if it is the offeror who seeks to admit them; noting that the "widespread admissibility of the substance of settlement offers could bring with it a rash of motions for disqualification of a party's chosen counsel who would likely become a witness at trial").

The sentence of the Rule referring to evidence "otherwise discoverable" has been deleted as superfluous. *See, e.g.,* Advisory Committee Note to Maine Rule of Evidence 408 (refusing to include the sentence in the Maine version of Rule 408 and noting that the sentence "seems to state what the law would be if it were omitted"); Advisory Committee Note to Wyoming Rule of Evidence 408 (refusing to include the sentence in Wyoming Rule 408 on the ground that it was "superfluous"). The intent of the sentence was to prevent a party from trying to immunize admissible information, such as a pre-existing document, through the pretense of disclosing it during compromise negotiations. *See Ramada Development Co. v. Rauch,* 644 F.2d 1097 (5th Cir. 1981). But even without the sentence, the Rule cannot be read to protect pre-existing information simply because it was presented to the adversary in compromise negotiations.

3. Rule 410

At the Spring 2004 meeting the Committee continued its review of a possible amendment to Rule 410 that would protect statements and offers made by prosecuting attorneys, to the same extent as the Rule currently protects statements and offers made by defendants and their counsel.

The policy behind such an amendment would be to encourage a free flow of discussion during guilty plea negotiations.

A draft proposal was prepared by the Reporter for the April 2003 meeting that added "against the government" to the opening sentence of the Rule, at the same place in which the Rule provides that offers and statements in plea negotiations are not admissible "against the defendant." At that meeting the Committee determined that this would not be a satisfactory drafting solution. If the Rule were amended only to provide that offers and statements in guilty plea negotiations were not admissible "against the government," this might provide too broad an exclusion. It would exclude, for example, statements made *by the defendant* during plea negotiations that could be offered "against the government," for example, to prove that the defendant had made a prior consistent statement, or to prove that the defendant believed in his own innocence, or was not trying to obstruct an investigation. Thus, the Committee resolved that any change to Rule 410 should specify that the government's protection would be limited to statements and offers *made by prosecutors* during guilty plea negotiations.

At its Fall 2003 meeting the Committee considered a draft of an amendment to Rule 410 that would protect statements and offers made by prosecutors during guilty plea negotiations. Committee members discussed whether the government should be protected from statements and offers made by the prosecutor in plea negotiations even where the evidence is offered by a different defendant. All Committee members, including the DOJ representative, recognized that a defendant should be able to inquire into a deal struck or to be struck with a former codefendant who is a cooperating witness at the time of the trial–and such inquiry may be pertinent to the bias or prejudice of the cooperating witness even if a deal has not been formally reached or even offered. The working draft of the amendment was revised to provide that statements and offers of prosecutors would not be barred if offered to show the bias or prejudice of a government witness.

At the Spring 2004 meeting, a number of questions and concerns were raised about the merits of the draft amendment to Rule 410. The most important objection was that the amendment did not appear necessary, because no reported case has ever held that a statement or offer made by a prosecutor in a plea negotiation can be admitted against the government as an admission of the weakness of the government's case. Indeed, every reported case has held such evidence inadmissible when offered as a government-admission. It is true that some courts have used questionable authority to reach this result; for example, some courts have held that statements and offers made by prosecutors in guilty plea negotiations are excluded under Rule 408, even though that Rule applies only to statements and offers made to compromise a civil claim. Yet notwithstanding the questionable reasoning, the fact remains that there is no reported case that has failed to protect against admission of prosecution statements and offers in guilty plea negotiations. Accordingly, there is no conflict among the courts that would be rectified by an amendment; and a conflict in the courts has always been considered by the Committee to be a highly desirable justification for an amendment to the Evidence Rules.

Committee members also observed that the draft amendment could lead to some problematic

results. For example, what if a defendant contended that he was a victim of prosecutorial misconduct or selective prosecution, and the prosecutor's statements during a plea negotiation provided relevant evidence of bad intent? Under the draft amendment, this important evidence would be excluded. And yet to provide an exception for such circumstances might result in an exception that would swallow the protective rule. That is, there would be a danger of the exception's applying whenever the defendant made a contention of "misconduct" on the part of the government.

Another problem case is where the defendant wants to testify that he rejected a guilty plea because he is innocent. This testimony would appear to be excluded by the proposed amendment because it would constitute evidence of the government's offer. It could be argued that the relevant evidence would be the defendant's rejection of the offer and not the offer itself, but that would seem to be an insubstantial distinction.

Given the problems involved in applying a rule that explicitly protects prosecution statements and offers, and the fact that the courts are reaching fair and uniform results under the current rules, including Rule 403, members of the Committee questioned whether the benefits of an amendment to Rule 410 would outweigh the costs. The Committee ultimately concluded that Rule 410 was not "broken," and therefore that the costs of a "fix" are not justified.

A motion was made and seconded to defer any proposed amendment to Rule 410. This motion was passed by a unanimous vote.

4. Rule 606(b)

At its April 2002 meeting, the Committee directed the Reporter to prepare a report on a possible amendment to Rule 606(b) that would clarify whether and to what extent juror testimony can be admitted to prove some disparity between the verdict rendered and the verdict intended by the jurors. At its Spring 2003 meeting, the Committee agreed in principle on a proposed amendment to Rule 606(b) that would be part of a possible package of amendments to be referred to the Standing Committee in 2004.

The Committee reviewed the working draft of the proposed amendment at its Fall 2003 meeting. Once again, all Committee members recognized the need for an amendment to Rule 606(b). There are two basic reasons for an amendment to the Rule: 1. All courts have found an exception to the Rule permitting jury testimony on certain errors in the verdict, even though there is no language permitting such an exception in the text of the Rule; and, more importantly, 2. The courts are in dispute about the breadth of that exception. Some courts allow juror proof whenever the verdict has an effect that is different from the result that the jury intended to reach, while other courts follow a narrower exception permitting juror proof only where the verdict reported is different from

that which the jury actually reached because of some clerical error. The former exception is broader because it would permit juror proof whenever the jury misunderstood (or ignored) the court's instructions. For example, if the judge told the jury to report a damage award without reducing it by the plaintiff's proportion of fault, and the jury disregarded that instruction, the verdict reported would be a result different from what the jury actually intended, thus fitting the broader exception. But it would not be different from the verdict actually reached, and so juror proof would not be permitted under the narrow exception for clerical errors.

After extensive discussion at previous meetings, the Committee tentatively determined that an amendment to Rule 606(b) is warranted to rectify the long-standing conflict in the courts, and that the amendment should codify the narrower exception of clerical error. An exception that would permit proof of juror statements whenever the jury misunderstood or ignored the court's instruction would have the potential of intruding into juror deliberations and upsetting the finality of verdicts in a large and undefined number of cases. The broad exception would be in tension with the policies of the Rule. In contrast, an exception permitting proof only if the verdict reported is different from that actually reached by the jury would not intrude on the privacy of jury deliberations, as the inquiry only concerns what the jury decided, not why it decided as it did.

At the Fall 2003 meeting, some Committee members suggested that the scope of the exception to Rule 60(b) should be comparable to the exception permitting a judge to correct a clerical mistake in a judgment under Civil Rule 60(a). But at the Spring 2004 meeting a member pointed out that the exceptions are not analogous. If the jury misunderstands the law and returns a verdict, it cannot be corrected as a clerical mistake. But if the clerk misunderstands the verdict and enters it incorrectly, that error could be corrected as a clerical mistake. In light of this comment, the Committee decided to refrain from including any reference to Civil Rule 60(a) in the Committee Note to the proposed amendment to Evidence Rule 606(b).

The Committee once again discussed whether the exception for juror proof should be made broader to permit correction of verdicts if the intent of the jury was clearly different from that indicated in the verdict reported. But Committee members noted that anything broader than an exception for "clerical mistake" would lead to a slippery slope, allowing evidence of jury deliberations whenever there is arguably a flaw in the decisionmaking process.

Finally, Committee members noted that it would be useful to emphasize that Rule 606(b) does not bar the court from polling the jury and from taking steps to remedy any error that seems obvious when the jury is polled. A paragraph to that effect was added to the proposed Committee Note.

A motion was made and seconded to approve the proposed amendment to Evidence Rule 606(b), together with the Committee Note, and to recommend to the Standing Committee that the proposal be released for public comment. The motion was approved by a 6-1 vote.

The proposed amendment to Rule 606(b) provides as follows:

Rule 606. Competency of Juror as Witness

(a) *At the trial.* — A member of the jury may not testify as a witness before that jury in the trial of the case in which the juror is sitting as a juror. If the juror is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

(b) *Inquiry into validity of verdict or indictment.* — Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewi~~th except that~~ But a juror may testify ~~on the question~~ about (1) whether extraneous prejudicial information was improperly brought to the jury's attention, (2) ~~or~~ whether any outside influence was improperly brought to bear upon any juror, or (3) whether the verdict reported is the result of a clerical mistake. ~~Nor may a~~ A juror's affidavit or evidence of any statement by the juror ~~concerning~~ may not be received on a matter about which the juror would be precluded from testifying ~~be received for these purposes~~.

The Committee Note to the proposed amendment to Rule 606(b) provides as follows:

Committee Note

Rule 606(b) has been amended to provide that juror testimony may be used to prove that the verdict reported was the result of a clerical mistake. The amendment responds to a divergence between the text of the Rule and the case law that has established an exception for proof of clerical errors. *See, e.g., Plummer v. Springfield Term. Ry.*, 5 F.3d 1, 3 (1st Cir. 1993) ("A number of circuits hold, and we agree, that juror testimony regarding an alleged clerical error, such as announcing a verdict different than that agreed upon, does not challenge the validity of the verdict or the deliberation of mental processes, and therefore is not subject to Rule 606(b)."); *Teevee Toons, Inc., v. MP3.Com, Inc.*, 148 F.Supp.2d 276, 278 (S.D.N.Y. 2001) (noting that Rule 606(b) has been silent regarding inquiries designed to confirm the accuracy of a verdict).

In adopting the exception for proof of clerical mistakes, the amendment specifically rejects the broader exception, adopted by some courts, permitting the use of juror testimony to prove that the jurors were operating under a misunderstanding about the consequences of the result that they agreed upon. *See, e.g., Attridge v. Cencorp Div. of Dover Techs. Int'l, Inc.*, 836 F.2d 113, 116 (2d Cir. 1987); *Eastridge Development Co., v. Halpert Associates, Inc.*, 853 F.2d 772 (10th Cir. 1988). The broader exception is rejected because an inquiry into

whether the jury misunderstood or misapplied an instruction goes to the jurors' mental processes underlying the verdict, rather than the verdict's accuracy in capturing what the jurors had agreed upon. *See, e.g., Karl v. Burlington Northern R.R.,* 880 F.2d 68, 74 (8th Cir. 1989) (error to receive juror testimony on whether verdict was the result of jurors' misunderstanding of instructions: "The jurors did not state that the figure written by the foreman was different from that which they agreed upon, but indicated that the figure the foreman wrote down was intended to be a net figure, not a gross figure. Receiving such statements violates Rule 606(b) because the testimony relates to how the jury interpreted the court's instructions, and concerns the jurors' 'mental processes,' which is forbidden by the rule."); *Robles v. Exxon Corp.,*862 F.2d 1201, 1208 (5th Cir. 1989) ("the alleged error here goes to the substance of what the jury was asked to decide, necessarily implicating the jury's mental processes insofar as it questions the jury's understanding of the court's instructions and application of those instructions to the facts of the case"). Thus, the "clerical mistake" exception to the Rule is limited to cases such as "where the jury foreperson wrote down, in response to an interrogatory, a number different from that agreed upon by the jury, or mistakenly stated that the defendant was 'guilty' when the jury had actually agreed that the defendant was not guilty." *Id.*

It should be noted that the possibility of clerical error will be reduced substantially by polling the jury. Rule 606(b) does not, of course, prevent this precaution. *See* 8 C. Wigmore, *Evidence,* § 2350 at 691 (McNaughten ed. 1961) (noting that the reasons for the rule barring juror testimony, "namely, the dangers of uncertainty and of tampering with the jurors to procure testimony, disappear in large part if such investigation as may be desired is *made by the judge* and takes place *before the jurors' discharge* and separation") (emphasis in original). Errors that come to light after polling the jury "may be corrected on the spot, or the jury may be sent out to continue deliberations, or, if necessary, a new trial may be ordered." C. Mueller & L. Kirkpatrick, *Evidence Under the Rules* at 671 (2d ed. 1999) (citing *Sincox v. United States,* 571 F.2d 876, 878-79 (5th Cir. 1978)).

5. Rule 609

Rule 609(a)(2) provides for automatic impeachment of all witnesses with prior convictions that "involved dishonesty or false statement." Rule 609(a)(1) provides a nuanced balancing test for impeaching witnesses whose felony convictions do not fall within the definition of Rule 609(a)(2). At its Spring 2002 meeting the Evidence Rules Committee directed the Reporter to prepare a memorandum to advise the Committee on whether it is necessary to amend Evidence Rule 609(a)(2). An investigation into this Rule indicates that the courts are in a long-standing conflict over how to

determine whether a certain conviction involves dishonesty or false statement within Rule 609(a)(2). The basic conflict is that some courts determine "dishonesty or false statement" solely by looking at the elements of the conviction for which the witness was found guilty. If none of the elements requires proof of falsity or deceit beyond a reasonable doubt, then the conviction must be admitted under Rule 609(a)(1) or not at all. Most courts, however, look behind the conviction to determine whether the witness committed an act of dishonesty or false statement before or after committing the crime. Under this view, for example, a witness convicted of murder would have committed a crime involving dishonesty or false statement if he lied about the crime, either before or after committing it.

At its Fall 2003 meeting the Committee tentatively agreed that Rule 609(a)(2) should be amended to resolve the dispute in the courts over how to determine whether a conviction involves dishonesty or false statement. The Committee determined that an amendment would resolve an important issue on which the circuits are clearly divided. The Committee was at that time unanimously in favor of an "elements" definition of crimes involving dishonesty or false statement. Committee members noted that requiring the judge to look behind the conviction to the underlying facts could (and often does) impose a burden on trial judges. Moreover, the inquiry is indefinite because it is often impossible to determine, solely from a guilty verdict, what facts of dishonesty or false statement the jury might have found. Most importantly, whatever additional probative value there might be in a crime committed deceitfully, it is lost on the jury assessing the witness's credibility when the elements of the crime do not in fact require proof of dishonesty or false statement. This is because when the conviction is introduced to impeach the witness, the jury is told only about the general nature of the conviction, not about its underlying facts.

Committee members noted that the "elements" approach to defining crimes that fall within Rule 609(a)(2) is litigant-neutral, in that it would apply to all witnesses in all cases. It was also noted that if a crime not involving false statement as an element (e.g., murder or drug dealing) were inadmissible under Rule 609(a)(2), it might still be admitted under the balancing test of Rule 609(a)(1); moreover, if such a crime *were* committed in a deceitful manner, the underlying facts of deceit might still be inquired into under Rule 608. Thus, the costs of an "elements" approach would appear to be low.

At the Spring 2004 meeting the Committee revisited the draft of an amendment to Rule 609(a)(2), under which a court would determine whether a conviction involved dishonesty or false statement solely by looking at the elements of the crime. The Department of Justice opposed this draft. The DOJ representative recognized that the change was litigant-neutral in that it would protect both prosecution and defense witnesses. Indeed the representative observed that Rule 609(a)(2) is invoked more frequently against the prosecution than it is against the defense. The DOJ representative also emphasized that the Department was not in favor of an open-ended rule that would require the court to divine from the record whether the witness committed some deceitful act in the course of a crime. But the Department was concerned that certain crimes that should be included as *crimina falsi* would not fit under a strict "elements" test. The prime example is obstruction of justice. It may be plain from the charging instrument that the witness committed

obstruction by falsifying documents, and it may be evident from the circumstances that this fact was determined beyond a reasonable doubt. And yet deceit is not an absolutely necessary element of the crime of obstruction of justice; that crime could be committed by threatening a witness, for example.

The Department recognized that Rule 609(a)(2) is not the only avenue for admitting a conviction committed through deceit even though the elements do not require proof of receipt. Such a conviction could be offered under the Rule 609(a)(1) balancing test. But the Department's response was that Rule 609(a)(1) would not apply if the conviction is a misdemeanor; and moreover the balancing test of Rule 609(a)(1) might lead to a judge excluding the conviction even though it should really have been admitted under Rule 609(a)(2). The Department also recognized that the deceitful conduct could itself be admissible as a bad act under Rule 608(b). But the Department's response was that Rule 608(b) would not permit extrinsic evidence if the witness denied the deceitful conduct.

The Department also noted that an "elements" test would be dependent on the vagaries of charging and pleading. For example, if a person lies on a government form as part of a plan to obstruct justice, this misconduct could be charged under any number of offenses; some would have an element of false statement, some would not. The Department representative argued that it made no sense for the same conduct to receive different treatment under Rule 609(a)(2) depending solely on how that conduct is charged.

Committee members considered and discussed in detail the Department's objection to an amendment that would provide an "elements" test for determining which convictions fall under Rule 609(a)(2). Initially the Committee voted, over the Department representative's dissent, to adhere to the elements test. Committee members were concerned that anything other than an elements test would return to the poor state of affairs that currently exists in most courts, i.e., an indefinite and time-consuming "min-trial" to determine whether the witness committed some deceitful fact some time in the course of a crime. After extensive discussion, however, the Committee as a whole determined that there was no real conflict within the Committee about the goals of an amendment. Those goals are: 1) to resolve a long-standing dispute among the circuits over the proper methodology for determining when a crime is automatically admitted under Rule 609(a)(2); 2) to avoid a mini-trial into the facts supporting a conviction; and 3) to limit Rule 609(a)(2) to those crimes that are especially probative of the witness's character for untruthfulness.

The Committee resolved to allow the Reporter and the Department of Justice representatives to work on compromise language that would accomplish the goals on which everyone agreed. This work was done overnight and submitted for the Committee's review on the second day of the meeting. The compromise would permit automatic impeachment when an element of the crime required proof of deceit; but it would go somewhat further and permit automatic impeachment if an underlying act of deceit could be "readily determined" from such information as the charging instrument. Some Committee members expressed concern that the language might be too vague and might permit the mini-trial that the Committee sought to avoid. But other members pointed out that the burden is on the proffering party to show the underlying facts that readily indicate deceit, and that the term "readily available" provides the court with authority to terminate an inquiry it finds too

indefinite or burdensome. Committee members also noted that the new draft deletes the indefinite term that identified the crime as one that "involved" dishonesty or false statement. Under the new draft, the crime actually must be a crime of dishonesty or false statement; it cannot be admitted under Rule 609(a)(2) merely because there was some act of deceit in committing the crime.

Committee members eventually agreed that the new draft captured the goals of the Committee in proposing an amendment to Rule 609(a)(2): it would rectify a conflict, prevent a mini-trial, and permit automatic admissibility for only those crimes that are especially probative of the witness's character for untruthfulness.

A motion was made and seconded to approve the proposed amendment to Evidence Rule 609(a)(2), together with the Committee Note, and to recommend to the Standing Committee that the proposal be released for public comment. The motion was approved by a unanimous vote.

The proposed amendment to Rule 609(a)(2) provides as follows:

Rule 609. Impeachment by Evidence of Conviction of Crime

(a) General rule.—For the purpose of attacking the ~~credibility~~ character for truthfulness of a witness,

(1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and

(2) evidence that any witness has been convicted of a crime that readily can be determined to have been a crime of dishonesty or false statement shall be admitted ~~if it involved dishonesty or false statement~~, regardless of the punishment.

* * *

The Committee Note to the Proposed Amendment to Rule 609(a)(2) provides as follows:

Committee Note

The amendment provides that Rule 609(a)(2) mandates the admission of evidence of a conviction only when the criminal act was itself an act of dishonesty or false statement. Evidence of all other crimes is inadmissible under this subsection, irrespective of whether the witness exhibited dishonesty or made a false statement in the process of their commission. Thus, evidence that a witness committed a violent crime, such as murder, is not admissible under Rule 609(a)(2), even if the witness acted deceitfully in the course of committing the crime.

This amendment is meant to give effect to the legislative intent to limit the convictions that are automatically admissible under subsection (a)(2). The Conference Committee provided that by "dishonesty and false statement" it meant "crimes such as perjury, subornation of perjury, false statement, criminal fraud, embezzlement, or false pretense, or any other offense in the nature of *crimen falsi*, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the [witness's] propensity to testify truthfully." Historically, offenses classified as *crimina falsi* have included only those crimes in which the ultimate criminal act was itself an act of deceit. *See* Green, *Deceit and the Classification of Crimes: Federal Rule of Evidence 609(a)(2) and the Origins of* Crimen Falsi, 90 J. Crim. L. & Criminology 1087 (2000).

Evidence of crimes in the nature of *crimina falsi* must be admitted under Rule 609(a)(2), regardless of how such crimes are specifically charged. For example, evidence that a witness was convicted of making a false claim to a federal agent is admissible under this subsection regardless of whether the crime was charged under a section that expressly references deceit (e.g., 18 U.S.C. § 1001, Material Misrepresentation to the Federal Government) or a section that does not (e.g., 18 U.S.C. § 1503, Obstruction of Justice).

The amendment also requires that the proponent have ready proof of the nature of the conviction. Ordinarily, the elements of the crime will indicate whether it is one of dishonesty or false statement. Where the deceitful nature of the crime is not apparent from the statute and the face of the judgment – as, for example, where the conviction simply records a finding of guilt for a statutory offense that does not reference deceit expressly – a proponent may offer information such as an indictment, a statement of admitted facts, or jury instructions to show that the witness was necessarily convicted of a crime of dishonesty or false statement. *Cf. Taylor v. United States*, 495 U.S. 575, 602 (1990) (providing that a trial court may look to a charging instrument or jury instructions to ascertain the nature of a prior offense where the statute is insufficiently clear on its face). But the amendment does not contemplate a "mini-trial" in which the court plumbs the record of the previous proceeding to determine whether the crime was in the nature of *crimen falsi.*

The amendment also substitutes the term "character for truthfulness" for the term "credibility" in the first sentence of the Rule. The limitations of Rule 609 are not

applicable if a conviction is admitted for a purpose other than to prove the witness's character for untruthfulness. *See, e.g., United States v. Lopez*, 979 F.2d 1024 (5th Cir. 1992) (Rule 609 was not applicable where the conviction was offered for purposes of contradiction). The use of the term "credibility" in subsection (d) is retained, however, as that subdivision is intended to govern the use of a juvenile adjudication for any type of impeachment.

6. Rule 706

Judge Gettleman has requested that the Committee consider an amendment to Rule 706 that would make stylistic changes and that also would dispense with the requirement of an order to show cause before an expert is appointed. Commentators have raised other problems in the administration of the Rule. At the Fall 2003 meeting, the Committee directed the Reporter to prepare a memorandum on Rule 706, so that the Committee could determine whether an amendment to the Rule should be included as part of the package to be sent to the Standing Committee.

The Committee reviewed and discussed the Reporter's memorandum on Rule 706. The Committee observed that Rule 706 does not address some important issues concerning the appointment of expert witnesses. Among the open issues are: standards for appointment, method for selection, ex parte contacts, jury instructions, and allocation of the expert witness's fee. The Committee ultimately concluded, however, that an amendment to Rule 706 was not necessary at this time. There is very little case law on Rule 706, and the case law that exists does not indicate that there is a conflict in interpreting the Rule. The courts do not appear to be having problems in resolving the questions left open by the existing Rule. Finally, while Judge Gettleman's stylistic suggestions would provide an improvement, the Committee concluded that this improvement was not enough to justify the costs of an amendment to the Evidence Rules.

A motion was made and seconded to take no further action on an amendment to Rule 706. That motion was approved by a unanimous vote.

7. Rule 803(3)

At its Fall 2003 meeting the Evidence Rules Committee directed the Reporter to prepare a

report on Rule 803(3)—the hearsay exception for a declarant's statement of his or her state of mind—so that the Committee could determine the necessity of an amendment to that Rule. The possible need for amendment of Rule 803(3) arises from a dispute in the courts about whether the hearsay exception covers statements of a declarant's state of mind when offered to prove the conduct of another person.

The Reporter's memorandum noted that the Supreme Court's decision in *Crawford v. Washington*, handed down after the Fall 2003 meeting, rendered any amendment to a hearsay exception inappropriate at this time. The Court in *Crawford* radically revised its Confrontation Clause jurisprudence. This has a direct bearing on the scope of Rule 803(3), because the use of the state of mind exception to prove the conduct of a non-declarant occurs almost exclusively in criminal cases, where the statement is offered to prove the conduct of the accused. This means that any amendment of Rule 803(3) that would apply to criminal cases is almost surely premature and unwise so shortly after *Crawford*.

The Committee agreed unanimously with the Reporter's conclusion. The Court in *Crawford* left open a number of questions about the relationship between hearsay exceptions and the Confrontation Clause. It held that the admission of "testimonial" hearsay violates the Confrontation Clause even if the hearsay is reliable — but it did not provide a definition of the term "testimonial." It intimated that if hearsay is not "testimonial" it might escape constitutional regulation entirely; but it did not so hold. Consequently, the full import of *Crawford* and of the constitutionality of the Federal Rules hearsay exceptions must await development by the courts, probably over a number of years. Under these circumstances, the Committee believes that it would be inappropriate to propose any amendment to a hearsay exception that would have a substantial effect in criminal cases.

The Committee directed the Reporter to keep it apprised of the case law as it develops after *Crawford*.

8. Rule 803(8)

At its Fall 2003 meeting the Evidence Rules Committee directed the Reporter to prepare a report on Rule 803(8)—the hearsay exception for public reports—so that the Committee could determine the necessity of an amendment to that Rule. The possible need for amendment of Rule 803(8) arises from several anomalies in the Rule as well as a dispute in the courts about the scope of the Rule. The Reporter's memorandum noted (as with Rule 803(3)) that any amendment to a hearsay exception is probably premature in light of the Supreme Court's recent decision in *Crawford v. Washington*. The problems that the courts have had with the public records exception arise almost exclusively when a public record is offered against a criminal defendant. This is the very situation addressed by the Court in *Crawford*. The Committee resolved unanimously to defer consideration of any amendment to Rule 803(8).

9. Rule 804(b)(3)

In 2003 the Evidence Rules Committee proposed an amendment to Evidence Rule 804(b)(3). The amendment provided that statements against penal interest offered by the prosecution in criminal cases would not be admissible unless the government could show that the statements carried "particularized guarantees of trustworthiness." The intent of the amendment was to assure that statements offered by the prosecution under Rule 804(b)(3) would comply with constitutional safeguards imposed by the Confrontation Clause. The amendment was approved by the Judicial Conference and referred to the Supreme Court.

The amendment to Rule 804(b)(3) essentially codified the Supreme Court's Confrontation Clause jurisprudence, which required a showing of "particularized guarantees of trustworthiness" for hearsay admitted under an exception that was not "firmly rooted." But while the amendment was pending in the Supreme Court, that Court granted certiorari and decided *Crawford v. Washington*. *Crawford* essentially rejected the Supreme Court's prior jurisprudence, which had held that the Confrontation Clause demands that hearsay offered against an accused must be reliable. The *Crawford* Court replaced the reliability-based standard with a test dependent on whether the proffered hearsay is "testimonial."

Shortly after the Supreme Court decided *Crawford*, it considered the proposed amendment to Rule 804(b)(3). The Court decided to send the amendment back to the Standing Committee for reconsideration in light of *Crawford*. This action was not surprising, because the very reason for the amendment was to bring the Rule into line with the Confrontation Clause. Now that the governing standards for the Confrontation Clause have been changed, the proposed amendment did not meet its intended goal. It embraced constitutional standards that are no longer applicable.

For reasons discussed earlier in the meeting in the discussion of other hearsay exceptions, the Committee determined that it was prudent to hold off on any consideration of an amendment to a hearsay exception until the courts are given some time to figure out the meaning and all the implications of *Crawford*. Any attempt to bring Rule 804(b)(3) into line with *Crawford* standards at this point would be unwise given the fact that those standards have not yet been clarified.

PROJECT ON PRIVILEGES

At its Fall 2002 meeting, the Evidence Rules Committee decided that it would not propose any amendments to the Evidence Rules on matters of privilege. The Committee determined, however, that — under the auspices of its consultant on privileges, Professor Broun — it could perform a valuable service to the bench and bar by giving guidance on what the federal common law

of privilege currently provides. This could be accomplished by a publication outside the rulemaking process, such as has been previously done with respect to outdated Advisory Committee Notes and caselaw divergence from the Federal Rules of Evidence. Thus, the Committee agreed to continue with the privileges project and determined that the goal of the project would be to provide, in the form of a draft rule and commentary, a "survey" of the existing federal common law of privilege. This essentially would be a descriptive, non-evaluative presentation of the existing federal law, not a "best principles" attempt to write how the rules of privilege "ought" to look. Rather, the survey would be intended to help courts and lawyers determine what the federal law of privilege actually is and where it might be going. The Committee determined that the survey of each privilege will be structured as follows:

1. The first section for each rule would be a draft "survey" rule that would set out the existing federal law of the particular privilege. Where there is a significant split of authority in the federal courts, the draft would include alternative clauses or provisions.

2. The second section for each rule would be a commentary on existing federal law. This section would provide case law support for each aspect of the survey rule and an explanation of the alternatives, as well as a description of any aberrational caselaw. This commentary section is intended to be detailed but not encyclopedic. It would include representative cases on key points rather than every case, and important law review articles on the privilege, but not every article.

3. The third section would be a discussion of reasonably anticipated choices that the federal courts, or Congress if it elected to codify privileges, might take into consideration. For example, it would include the possibility of different approaches to the attorney-client privilege in the corporate context and the possibility of a general physician-patient privilege. This section, like the project itself, will be descriptive rather than evaluative.

The materials on the psychotherapist-patient privilege were presented at the Fall 2003 meeting and were tentatively approved by the Committee.

At the Spring 2004 meeting Professor Broun presented, for the Committee's information and review, a draft of the survey rule and commentary on the attorney-client privilege. Committee members commended Professor Broun on his excellent work, and provided some comments and suggestions. Professor Broun noted that he would continue his work on the "future developments" section for the attorney-client privilege, and this work would be completed for the next meeting. The Reporter noted that he would work on the materials on waiver and would provide some work product on that rule for the Committee to review at the next meeting.

New Business

1. Civil Rules Restyling

The Evidence Rules Committee considered whether it should provide any suggestions to the Civil Rules Committee concerning the restylization of two Civil Rules that have a bearing on the admissibility of evidence. Those rules are Rules 32 and 44. The Reporter provided the Committee with a memorandum on the subject.

One possible suggestion is to provide a uniform reference to the Federal Rules of Evidence whenever the Civil Rules refer to rules of admissibility. As it is currently restyled, Rule 32 refers both to the "rules of evidence" and to the "Federal Rules of Evidence." The Reporter noted that he had already provided a memorandum at the request of the Civil Rules Committee, suggesting that the references be made uniformly to the "Federal Rules of Evidence." The Civil Rules Committee is concerned, however, that the reference to "the rules of evidence" might intentionally be broader than the Federal Rules. It might encompass state rules, common law rules, and statutory rules of evidence. But the Reporter noted that the Federal Rules themselves incorporate these extrinsic rules of evidence. See, e.g., Rules 302, 402, 501, 801, and 1101. On the other hand, the Civil Rules Committee understandably wishes to be certain that a uniform reference will not create a change in any result. The Committee asked Professor Broun to research the matter to determine whether a uniform reference to the Federal Rules of Evidence could lead to a change of result in any case.

In all other respects, the Committee concluded that the restylized Rules 32 and 44 are excellent and would make those rules much easier to understand and more user-friendly.

The Reporter's memorandum on Rules 32 and 44 also noted that the Civil Rules Committee might be interested in a broader project that would better integrate the Civil Rules and the Evidence Rules. The Evidence Rules Committee has consistently concluded that rules of admissibility should be placed in the Evidence Rules. The Evidence Rules are where courts and litigators will look for the applicable rules of evidence. Yet there are a few Civil Rules (most importantly Rules 32 and 44) that specifically govern the admissibility of evidence at trial.

One possibility to be explored is whether these Civil Rules can be amended to provide that admissibility of deposition testimony (Rule 32) and public records (Rule 44) is governed by the Federal Rules of Evidence. This was the solution adopted by the Criminal Rules Committee when it amended Criminal Rule 11, which overlapped the provisions of Evidence Rule 410. Any similar change to the Civil Rules has been determined to be beyond the scope of the style project. The Evidence Rules Committee expressed its interest in a joint project with the Civil Rules Committee to provide a better integration between the Civil and Evidence Rules. But it was also noted that such a project would have an effect on the Bankruptcy Rules and the Criminal Rules as well. So while the project would be a useful one, it might be better placed under the auspices of the Standing Committee.

2. Civil Rules Inadvertent Waiver Proposal

The liaison from the Civil Rules Committee reported that his Committee was proposing a rule concerning waiver of privilege by disclosure during the course of discovery. The proposed rule would govern the procedure for making a claim that disclosure was inadvertent. The rule does not purport to set forth substantive standards for when a waiver should or must be found. The Civil Rules Committee justifiably was concerned that a rule setting forth legal standards for determining waiver would be a rule of privilege requiring direct enactment by Congress. Such a rule would also, of course, be a rule of evidence, and would therefore be of interest to the Evidence Rules Committee.

The Civil Rules Committee has indicated its interest in working with the Evidence Rules Committee on a rule concerning inadvertent disclosure of privileged material. The Evidence Rules Committee unanimously agreed that a joint project on this important subject is in order. It was noted that the goal of the project might be a suggestion to Congress rather than a proposed rule through the rulemaking process.

The meeting was adjourned Friday, April 30th.

Respectfully submitted,

Daniel J. Capra
Reporter

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of June 17-18, 2004
Washington, D.C.
Draft Minutes

TABLE OF CONTENTS

ATTENDANCE

The mid-year meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Washington, D.C. on Thursday and Friday, June 17-18, 2004. All the members were present:

Judge David F. Levi, Chair
David J. Beck, Esquire
David M. Bernick, Esquire
Charles J. Cooper, Esquire
Judge Sidney A. Fitzwater
Judge Harris L Hartz
Dean Mary Kay Kane
Judge Mark R. Kravitz
Associate Attorney General Robert D. McCallum
Patrick F. McCartan, Esquire
Judge J. Garvan Murtha
Judge Thomas W. Thrash, Jr.
Justice Charles Talley Wells

Providing support to the committee were: Professor Daniel R. Coquillette, reporter to the committee; Peter G. McCabe, secretary to the committee and Assistant Director of the Administrative Office of the U.S. Courts; John K. Rabiej, chief of the Rules Committee Support Office of the Administrative Office; James N. Ishida and Robert P. Deyling, senior attorneys in the Office of Judges Programs of the Administrative Office; Professor Steven Gensler, Supreme Court Fellow with the Administrative Office; Brooke D. Coleman, law clerk to Judge Levi; Joe Cecil of the Research Division of the Federal Judicial Center; and Joseph F. Spaniol, Jr. and Professor Geoffrey C. Hazard, Jr., consultants to the committee.

Representing the advisory committees were:

Advisory Committee on Appellate Rules —
Judge Samuel A. Alito, Jr., Chair
Professor Patrick J. Schiltz, Reporter
Advisory Committee on Bankruptcy Rules —
Judge A. Thomas Small, Chair
Professor Jeffrey W. Morris, Reporter
Advisory Committee on Civil Rules —
Judge Lee H. Rosenthal, Chair
Professor Edward H. Cooper, Reporter
Advisory Committee on Criminal Rules —
Judge Edward E. Carnes, Chair
Professor David A. Schlueter, Reporter
Advisory Committee on Evidence Rules —
Judge Jerry E. Smith, Chair
Professor Daniel J. Capra, Reporter

Also taking part in the meeting on behalf of the Department of Justice was John S. Davis, Associate Deputy Attorney General.

INTRODUCTORY REMARKS

Judge Levi reported that no major amendments to the rules were scheduled to take effect on December 1, 2004. He noted that the Supreme Court had recommitted the proposed amendment to FED. R. EVID. 804(b)(3) — governing the hearsay exception for statements against penal interest — in light of its recent decision in *Crawford v. Washington.* In *Crawford,* the Court substantially revised its Confrontation Clause jurisprudence, thus making the proposed rule amendment inappropriate. He added that the Advisory Committee on Evidence Rules had decided to defer consideration of any

hearsay exception amendments until adequate case law develops to determine the meaning and implications of the *Crawford* case.

Judge Levi pointed out that the federal courts were facing a severe budget crisis that could result in substantial layoffs and furloughs of court staff. He explained that it was important for the committee to consider its rules decisions in the light of their impact on the resources of the courts. He noted that amendments have been proposed to the bankruptcy rules that could save the courts more than a million dollars in postage and handling costs by facilitating electronic notices and use of the national Bankruptcy Noticing Center. He explained that the committee would be asked to expedite the rulemaking process to achieve the anticipated savings earlier.

Judge Levi said that the project to restyle the civil rules was achieving excellent progress. The Style Subcommittee, he noted, had now reached the landmark of having completed a first draft of all 86 rules.

Judge Levi reported that the E-Government Subcommittee had met the day before the committee meeting to refine the guidance that it would provide the advisory committees in drafting rules amendments to implement the E-Government Act of 2002. The statute requires that rules be promulgated under the Rules Enabling Act to protect privacy and security concerns implicated by posting court case files on the Internet.

Judge Levi noted that the Court Administration and Case Management Committee had been working diligently on privacy and security issues for three years and had offered constructive comments on the latest proposed guidance to the advisory committee. He added that the E-Government Subcommittee had made a great deal of progress at its meeting in addressing a number of difficult policy and practical questions raised when court documents that had been practically obscure in the past are now posted on the Internet. He observed that there will likely have to be some differences in detail among the amendments proposed by the advisory committees. The bankruptcy rules, he noted, will be the most affected by privacy concerns because of the heavy use of social security numbers in bankruptcy cases.

Judge Levi reported that he attends most of the meetings of the advisory committees. Each committee, he observed, has a different personality, reflecting in part the style of its chair and reporter and the role of the Department of Justice. He emphasized that the rules process is blessed with great chairs and reporters, and the work product of the committees is truly outstanding.

Judge Levi noted that the Chief Justice had extended Judge Alito's term as chair of the Advisory Committee on Appellate Rules for an additional year. He also reported that Judge Susan Bucklew had been selected to replace Judge Carnes as chair of the Advisory Committee on Criminal Rules and Judge Thomas Zilly had been selected to replace Judge

Small as chair of the Advisory Committee on Bankruptcy Rules. He said that Judge Carnes and Judge Small had been outstanding and successful committee chairs, and they would be sorely missed. He also reported that the Standing Committee would greatly miss the important contributions of two of its distinguished lawyer members whose terms are about to expire — Charles Cooper and Patrick McCartan. Finally, Judge Levi emphasized that one of the highlights of his legal career had been to work closely with Professor Cooper as reporter to the Advisory Committee on Civil Rules.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee voted without objection to approve the minutes of the last meeting, held on January 15-16, 2004.

REPORT OF THE ADMINISTRATIVE OFFICE

Mr. Rabiej reported that the Administrative Office was monitoring 34 bills introduced in the 108th Congress that would affect the federal rules.

He noted that legislation was still pending, proposed by the bail bond industry, that would directly amend the Federal Rules of Criminal Procedure and limit the authority of a judge to forfeit a bond. He said that the bill had been reported out by the House Judiciary Committee, but was opposed by the Judicial Conference. The legislation, he said, had not reached the House floor, thanks to efforts by the Administrative Office and the Department of Justice. He added that: (1) there had been recent communications with representatives of the bail bond industry, but the industry had not changed its essential position; and (2) there has been no action on the bill in the Senate.

Mr. Rabiej noted that legislation sponsored jointly by the Judicial Conference and the Department of Justice should be be enacted shortly to amend the E-Government Act. Under the present law, a party has the right to file an unredacted version of a document under seal with the court. In accordance with the revised E-Government Act, the public file would contain only a redacted version of the document or a reference list identifying redacted information accessible only to the parties and the court. He added that the E-Government Subcommittee and the advisory committees are now implementing the rulemaking requirements of the Act.

Mr. Rabiej reported that the Class Action Fairness Act was expected to be brought to the Senate floor for debate sometime in June.

He noted that comprehensive crime victims' rights legislation had passed the Senate in April 2004 on a 96-1 vote. It would give criminal victims a broad array of rights in such areas as protection against the accused, notice of proceedings, being heard at court proceedings, conferring with prosecutors, and receiving restitution. He added that the legislation was expected to pass the House of Representatives, but the chair of the House Judiciary Committee appeared to be holding up the legislation for tactical reasons.

Mr. Rabiej said that the crime victims legislation will have an impact on the criminal rules. He explained that the Advisory Committee on Criminal Rules had a separate proposal ready for final approval that would amend FED. R. CRIM. P. 32 to extend the right of allocution to victims of all crimes, not just victims of violence or sexual abuse.

Mr. Rabiej reported that two more bills had been introduced in the preceeding week that appeared to be moving quickly through the legislative process. First, he said, a hearing would be held within a week on H.R. 4547, a bill designed to protect children from drug violence. He noted that it would directly amend FED. R. CRIM. P. 11 to impose additional conditions on a court before it may accept a plea agreement. The second new bill (H.R. 4571), designed to limit "frivolous filings," would directly amend FED. R. CIV. P. 11 by mandating that a judge impose sanctions for a violation of the rule.

REPORT OF THE FEDERAL JUDICIAL CENTER

Mr. Cecil pointed out that the agenda book for the committee meeting contained a status report on the educational and research projects of the Federal Judicial Center. (Agenda Item 4)

He reported that the Center was completing work on developing a new weighted caseload formula for the district courts. He explained that the study had been completed without requiring judges to keep detailed diaries of their daily activities.

Mr. Cecil noted that the Center had also completed a report comparing class actions in the federal and state courts. Among other things, the report addresses why attorneys bring cases in one court system rather than the other and finds few differences between federal and state judges and cases. Finally, he pointed to a new Center report on sealed court settlements. One of the findings of the report is that only 1 of every 227 civil cases in the federal courts contains a sealed settlement.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Alito and Professor Schiltz presented the report of the advisory committee, as set forth in Judge Alito's memorandum and attachments of May 14, 2004. (Agenda Item 6)

Amendments for Final Approval

FED. R. APP. P. 4(a)(6)

Judge Alito said that the proposed amendments to Rule 4(a)(6) (reopening the time to file an appeal) provides an avenue of relief for parties who fail to file a timely appeal because they have not received notice of the entry of judgment against them. The amendment allows a court to reopen the time to appeal if certain conditions are met. First, the court must find that the party did not receive notice of the judgment within 21 days after entry. Second, the party must move to reopen the time to appeal within 7 days after receiving notice of the entry of judgment. And third, the party must move to reopen within 180 after entry of the judgment.

Judge Alito pointed out that use of the word "notice," appearing twice in the rule, has been unclear. Most courts have interpreted the existing rule as requiring that the type of notice required to trigger the 7-day period to reopen be written notice. Others, though, have included other types of communications. The proposed amendment, he said, offers a clear solution by specifying that notice must be the formal clerk's office notice required under FED. R. CIV. P. 77(d).

The committee without objection approved the proposed amendments for final approval by voice vote.

FED. R. APP. P. 26(a)(4) and 45(a)(2)

Judge Alito stated that the proposed amendments to Rule 26 (computing time) and 45 (when court is open) would replace the incorrect phrase "President' Day" with "Washington's Birthday," the official, statutory name of the holiday.

The committee without objection approved the proposed amendments for final approval by voice vote.

FED. R. APP. P. 27(d)(1)(E)

Judge Alito explained that Rule 32 (form of briefs) sets out typeface and type-style requirements. But Rule 27, which specifies the requirements for motions, does not. The proposed amendment would add a new Subdivision (E) to Rule 27(d)(1) to make it clear

that the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) apply to motions papers.

Judge Alito said that the proposed amendment had received support during the public comment period, although one comment suggested increasing the number of words allowed in motions. He said that there was also some sentiment to express the length limits in terms of words, rather than pages. But, he explained, clerks of court favor a page limit because it is much easier to verify.

The committee without objection approved the proposed amendment for final approval by voice vote.

FED. R. APP. P. 28(c) & (h), 28.1, 32(a)(7)(C), and 34(d)

Judge Alito reported that the current rules say very little about briefing in cases involving cross-appeals. As a result, local rules fill in the gaps with procedural guidance. The advisory committee, he said, recommended moving the few provisions in the current national rules addressing cross-appeals into a new Rule 28.1 and adding several new provisions to fill the gaps in the existing rules. The new Rule 28.1 (cross-appeals) would parallel Rule 28 (briefs). In addition, conforming amendments would be made to Rule 28(c) (briefs), 32(a)(7)(C) (certificate of compliance), and 34(d) (oral argument).

The provisions of the new rule, he said, follow the local rules of every circuit save one. They would authorize four briefs and specify their lengths and colors. (1) The appellant's principal brief would be limited to 14,000 words. (2) The appellee's combined response brief and cross-appeal principal brief would be limited to 16,500 words. (3) The appellant's response and reply brief would be limited to 14,000 words. (4) Finally, the appellees's reply brief would be limited to 7,000 words.

Judge Alito said that the lawyers who had commented on the proposal uniformly had recommended higher word limits, while the judges who had commented wanted fewer words. Professor Schiltz added that the local rules of the circuits generally prescribe word limits of 14,000, 14,000, 14,000, and 7,000 for the four briefs. The advisory committee, he said, had decided to increase the second brief to 16,500 words because it serves two functions — responding to the appellant's principal brief and initiating the principal brief in the cross-appeal.

Several members said that the advisory committee's proposal to authorize an additional 2,500 words for the second brief was a sound compromise that should accommodate most cases and result in fewer motions by attorneys seeking word extensions.

The committee without objection approved the proposed amendments for final approval by voice vote.

FED. R. APP. P. 32.1

Judge Alito reported that the the proposed new Rule 32.1 (citing judicial dispositions) had attracted more than 500 public comments.

He noted that the proposed rule enjoyed the support of the major bar associations. It would equalize the treatment of unpublished opinions with other types of non-precedential materials presented to the courts of appeals. The rule, he emphasized, would merely prevent a court of appeals from prohibiting the citation of unpublished opinions. It would not require a court to give unpublished opinions any weight or precedential value, or even to pay any attention to them. It would just allow the parties to cite them. He said that prohibiting the citation of court opinions undermines confidence in the courts of appeals and the judiciary. It implies that there is something second-class about unpublished opinions. The practice, he said, is very difficult to explain to lay people and most practitioners.

On the other hand, he pointed out, opponents of the rule claim that it will have an adverse impact on judges because they will have to spend more of their limited time on crafting unpublished opinions. This, it is claimed, would both detract from the quality of judges' published opinions and lead to the issuance of more one-sentence orders. He noted, too, that opponents of the rule assert that it will inevitably require lawyers to take the time to read unpublished opinions and increase expenses for their clients.

Judge Alito emphasized that the advisory committee had taken the adverse comments very seriously, but it had concluded that there is simply no empirical support for them. He noted that a number of the federal circuits currently permit citation of unpublished opinions. The committee, he said, had not received any comments from judges on the courts allowing citation that the practice has increased their work. Moreover, he added, the trend at both the federal and state levels is moving away from non-citation rules.

Judge Alito said that, as a result of the public comments, the advisory committee had deleted from the proposed rule a clause that would have prohibited a court of appeals from prohibiting or restricting citation of unpublished opinions "unless that prohibition or restriction is generally imposed upon the citation of all judicial opinions, orders, judgments, or other written dispostions."

Judge Levi observed that the sheer size of the body of comments was daunting, even though many of the comments seemed to copy each other. He congratulated Professor Schiltz for a superb job in summarizing the comments.

One of the members suggested that the key issue was not citation, but the status of unpublished opinions. He pointed out that the committee note refers to unpublished opinions as "official actions" of the court. But, he noted, they are commonly crafted by law clerks and only endorsed by judges. They do not receive the same scrutiny as published opinions and clearly do not represent the views of the full court. The proposed rule, he said, would elevate unpublished opinions into actions of the court and give them a status that they do not presently have. He recommended that the proposal be deferred and the circuits be given time to issue their own rules addressing the contents and effect of unpublished opinions. He added that this approach would promote transparency, for the circuits would articulate what they are doing with regard to unpublished opinions.

One lawyer-member suggested that local non-citation rules pose a serious perception problem for the courts of appeals. He said that it is difficult to explain to a client that a court has decided a similar case in the recent past, but the case cannot be cited to the same court. He added that, regardless of precedential value, an unpublished opinion is in fact an official disposition by a government body.

Two members pointed out that the proposed rule had given rise to concern among state-court leadership as to the use by the federal courts of unpublished state-court opinions. For example, a federal court applying the doctrine in *Erie R.R. Co. v. Tompkins* might cite an unpublished state-court opinion as establishing binding state law in a way that the opinion was not intended to be used. Judge Alito responded that the advisory committee's deliberations had focused on citing a federal circuit court's own decisions, not on citing state-court opinions. Moreover, he said, the rule does not address what weight is to be given to unpublished opinions. He added, though, that he would not object to amending the rule to limit its application specifically to federal opinions.

One participant pointed out that unpublished opinions are widely available today, and the circuits are free to give them precedence or not, as they see fit. He argued that lawyers should be free to call a court's attention to cases decided by their colleagues that have similar facts and issues. Other panels of the court, he said, should be made aware of what one panel has done with a similar pattern of facts, particularly in sentencing guideline cases. He added that it would be beneficial for courts to look at their unpublished opinions as part of their efforts to achieve consistency and reliability in circuit case law.

One member observed that there are very strong arguments on both sides of the issue, but on balance he favored allowing the courts of appeals to continue their non-

citation policies. He said that the adverse consequences predicted by opponents of the rule might well come to pass. He emphasized the vital need for courts to have a two-tiered opinion system because some cases simply do not deserve the same time and attention as others. He also said that he was not convinced that it is appropriate to compare unpublished opinions of a court of appeals with other types of nonprecedential materials cited to the court. Unpublished opinions, he said, inevitably carry far more weight with the lawyers and the court because they have been signed off on by three judges of the deciding court.

One member noted that he had been struck by how strongly a number of judges feel about the issue. He said that the arguments on both sides appear to be empirical in nature, but they are essentially not provable at this point. He stressed the need for empirical research and suggested that the committee not be put in the position of accepting one side of the argument and rejecting the other without further data. He argued that appropriate research would focus on the practices and results in those circuits that allow citation of unpublished opinions. He conjectured that it should be possible to obtain good empirical data because several circuits now allow citation.

Judge Levi said that he agreed and had spoken with the Federal Judicial Center about what shape an empirical study might take. He emphasized that the proposed rule was very controversial. And in dealing with controversial matters, he said, the rules committees have consistently sought strong empirical support for proposed amendments. In this case, he noted, nine circuits now allow citation of unpublished opinions, and four do not. Researchers, for example, could examine the courts that allow citation to see whether disposition times have lengthened or the number of judgment orders has increased. In addition, judges and lawyers might be surveyed to examine the practical impact of citation policy on their work. Lawyers might be surveyed to examine whether citation policy affects the costs of legal practice. Attention might also be directed to the four circuits that prohibit citation to see whether there are any special conditions in those circuits that make them different.

Judge Levi added that it would be advisable to seek Judicial Conference approval of the proposed new rule at this time without supporting empirical data. Obtaining the data would better inform the committee and take much of the passion out of the debate. If the data turn out to support the proposed rule, he said, the committee would be in a much better position to secure Conference approval.

Several participants endorsed Judge Levi's approach, citing the great sensitivity of the issue among circuit judges, the need for a period of reflection, and the value of gathering whatever empirical data can be produced. One member added that there were powerful arguments in favor of the proposed amendment, but it would be a mistake institutionally to go forward with a rule that has generated so much opposition. He said

that, as a matter of basic policy, the committee should proceed with a controversial proposal only if: (1) there is a compelling need for the rule; and (2) the committee is convinced that the opposition is clearly wrong. Other participants endorsed this analysis, emphasizing the need for empirical information and institutional restraint. They added that a year's delay for study would not cause any harm and may even lead some opponents to reassess their positions.

Judge Alito agreed that a study would be helpful, especially since opposition to the rule was based largely on empirical observations. Mr. Cecil added that the Research Division of the Federal Judicial Center was prepared to conduct the research. He cautioned, however, that the results of the study may not in fact solve the committee's problems. The key issue, he said, is how judges perform their work in chambers. That, he said, is a matter of utmost sensitivity.

Judge Kravitz moved to have the committee take no action on the proposed new Rule 32.1 and return it to the advisory committee, with the expectation that the advisory committee will work with the Federal Judicial Center to conduct appropriate empirical studies. The studies, for example, would explore the practical experience in the circuits that have adopted local rules allowing citation of unpublished opinions. The advisory committee would then have the discretion to make a fresh decision on the matter and return to the standing committee with a proposal, or not.

One member asked that the record reflect that the committee's discussion of the matter and its returning the rule to the advisory committee did not reflect a judgment by the Standing Committee on the merits of the proposal. Rather, he said, the committee's concerns were directed purely to instutional values and the rulemaking process. Judge Kravitz agreed to the clarification.

One member added that the advisory committee should take advantage of the delay to explore the impact of the rule on citing unpublished state-court opinions.

The committee without objection approved Judge Kravitz's motion by voice vote. Therefore, it decided to take no action on the proposed new Rule 32.1, return it to the advisory committee, and recommend that appropriate empirical study be undertaken.

FED. R. APP. P. 35(a)

Judge Alito reported that Rule 35(a) (en banc determination) and 28 U.S.C. § 46(c) both specify that "a majority of the circuit judges who are in regular active service" may order that an appeal or other proceeding be heard or reheard en banc. Although the standard applies to all the courts of appeals, he said, the circuits are divided in

interpreting the provision when one or more active judges are disqualified in a particular case. Seven circuits follow the "absolute majority" approach, counting disqualified judges in the base to calculate a majority. Six circuits follow the "case majority" approach, requiring a majority only of the active judges who are not recused.

Judge Alito emphasized that the advisory committee believes that whatever the rule means, it should mean the same all across the country. There is no principled basis, he said, for having different interpretations of the same rule. The primary objective of the proposed amendment, thus, was to promote national uniformity. The advisory committee, he said, believed that the better interpretation is the case majority approach because it is most consistent with what Congress must have intended in enacting the statute. He noted that 28 U.S.C. § 46(c) uses the phrase "circuit judges . . . in regular active service" twice. In the second sentence, the phrase clearly does not include disqualified judges, since disqualified judges obviously cannot participate in a case heard en banc. The proposed amendment to Rule 35(a), he added, was not meant to alter or affect the quorum requirement of 28 U.S.C. § 46(d).

The committee without objection approved the proposed amendment for final approval by voice vote.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Small and Professor Morris presented the report of the advisory committee, as set forth in Judge Small's memorandum and attachments of May 17, 2004. (Agenda Item 7)

Amendments for Final Approval

FED. R. BANKR. P. 1007

Judge Small reported that the proposed amendment to Rule 1007 (lists, schedules, and statements) would require a debtor to file a mailing matrix with the court, a practice now required universally by local court rules. The matrix must include the names and addresses of all entities listed on Schedules D-H, including holders of executory contracts and unexpired leases.

The committee without objection approved the proposed amendment for final approval by voice vote.

FED. R. BANKR. P: 3004 and 3005

Judge Small explained that the proposed amendments to Rules 3004 (filing of claims by a debtor or trustee) and 3005 (filing of a claim, acceptance, or rejection by codebtor) deal with the situation where an entity other than the creditor files a proof of claim. The amendments to Rule 3004 make it clear that the third party may not file a proof of claim until the exclusive time has expired for the creditor to file its own proof of claim. In addition, FED. R. BANKR. P. 3005 would no longer permit the creditor to file a proof of claim to supersede the claim filed by the debtor or trustee. Instead, the creditor could amend the proof of claim filed by the debtor or trustee. The changes would make the rules consistent with § 501(c) of the Bankruptcy Code.

The committee without objection approved the proposed amendments for final approval by voice vote.

FED. R. BANKR. P. 4008

Judge Small reported that Rule 4008 (reaffirmation agreement) would be amended to establish a deadline of 30 days after entry of the order of discharge to file a reaffirmation agreement with the court. He said that some public comments had recommended a shorter period, and the advisory committee had considered a deadline of 10 days following discharge. But, he explained, the shorter time limit would not be practical because it takes several days for the the noticing center to process and distribute discharge notices.

The committee without objection approved the proposed amendment for final approval by voice vote.

FED. R. BANKR. P. 7004

Judge Small reported that the proposed amendment to Rule 7004 (process and service) would authorize the clerk of court to sign, seal, and issue a summons electronically. He noted that the rule does not address the service requirements for a summons, which are set out elsewhere in Rule 7004.

The committee without objection approved the proposed amendment for final approval by voice vote.

FED. R. BANKR. P. 9006

Judge Small stated that Rule 9006 (time) would be amended to remove any doubt that the additional three-day period given a responding party to act when service is made

on the party by specified means — by mail, by leaving it with the clerk, by electronic means, or by other means consented to by the party served — are added after a rule's prescribed period to act expires.

The committee considered and approved the proposed amendment to Rule 9006 in conjunction with a proposed parallel amendment to FED. R. CIV. P. 6(e).

The committee without objection approved the proposed amendment for final approval by voice vote.

OFFICIAL FORMS 6-G, 16-D, and 17

Judge Small reported that the proposed amendments to the forms had not been published because they were technical in nature. The change to Form 6-G is required to conform the form to the proposed amendment to Rule 1007, and the revisions to Forms 16-D and 17 reflect the abrogation of Official Form 16-C in 2003. He asked that: (1) the changes to Form 16-D and 17 take effect on December 1, 2004; and (2) the change to Form 6-G take effect on December 1, 2005, to coincide with the effective date of the proposed amendments to Rule 1007.

The committee without objection approved the proposed amendments to the forms for final approval by voice vote.

Amendments for Publication

FED. R. BANKR. P. 1009, 4002, and OFFICIAL FORM 6-I

Judge Small pointed out that the proposed amendments to Rule 1009 (amendments to schedules and statements), Rule 4002 (debtor's duties), and Form 6-I (schedule of debtors' current income) had been proposed by the Executive Office for United States Trustees. He noted that the amendment to Rule 4002 was controversial.

The U.S. trustee organization had asked the committee for a rule that would require debtors to bring a substantial number of documents with them to the meeting of creditors under § 341 of the Code. The proposal, he said, had attracted the attention and strong opposition of the debtors' bar. The advisory committee had received more than 80 letters from attorneys opposing the proposal, even though the committee had not approved or published it.

Judge Small noted that the advisory committee's consumer subcommittee had met in Washington to consider the proposal, and it had invited several knowledgeable trustees and attorneys to participate, along with representatives of the U.S. trustee organization. At the meeting, the subcommittee decided that the most of the proposed changes were not needed.

The full committee, however, decided to adopt a compromise amendment to Rule 4002 that would require debtors to bring with them to the § 341 meeting a government-issued picture identification, evidence of their social security number, evidence of their current income (such as a pay stub), their most recent federal income tax return, and statements for each of their depository accounts. That, he said, was the proposal that the advisory committee sought authority to publish.

Judge Small said that the proposed amendment to Rule 1009 specifies that if the debtor files an incorrect social security number, he or she must correct it and notify all those who received notice of the incorrect number.

The proposed change to Form 6-I would extend to Chapter 7 cases the requirement that a debtor divulge a non-filing spouse's income. The form's mandate to divulge currently applies only to Chapter 12 and 13 cases.

The committee without objection approved the proposed rule amendments for publication by voice vote. It also approved without objection the proposed amendment to the Official Form by voice vote.

FED. R. BANKR. P. 7004

Judge Small explained that under the current Rule 7004 (process and service), the debtor's attorney must be served only if the summons and complaint are served on the debtor by mail. The proposed amendment would make it clear that the debtor's attorney must be served with a copy of any summons and complaint against the debtor, regardless of the manner of service on the debtor. The rule would also allow the attorney to request that service be made electronically.

The committee without objection approved the proposed amendments for publication by voice vote.

FED. R. BANKR. P. 2002(g) and 9001

Judge Small reported that the changes to Rule 2002 (notices) and 9001 (general definitions) were designed in large part to facilitate noticing national creditors. The proposed amendment to Rule 2002(g) would allow creditors to make arrangements with a

"notice provider" to have notices sent to them at a preferred address or addresses. Notices would normally be sent electronically, but the rule also covers the sending of paper notices to central addresses. The amendment to Rule 9001 would define a "notice provider" as any entity approved by the Administrative Office to give notice to creditors at a preferred address or addresses under the proposed amendment to Rule 2002(g).

Judge Small explained that the amendments could result in significant financial benefits to the judiciary and taxpayers because more creditors would sign up for electronic service of court notices. In light of the potential cost savings, the advisory committee had decided to pursue "fast track" promulgation of these two amendments — as well as the amendment to Rule 9036 approved by the Standing Committee in January 2004, which specifies that notice by electronic means is complete on transmission.

Under the fast track proposal, the rules would become effective on December 1, 2005, rather than December 1, 2006. They would be published for public comment in August 2004. Comments would be due by mid-February 2005. The advisory committee and Standing Committee could approve them by mail ballot and submit them to the Judicial Conference for approval at its March 2005 session. They would then be sent immediately to the Supreme Court, which could act on them before May 1, 2005. Mr. Rabiej added that the Court would be given copies of the amendments well in advance of the March 2005 Conference session to give the justices time to review them carefully.

Judge Small said that the advisory committee had carefully considered the rules at three meetings, and he did not anticipate any controversy over them. Professor Morris added that even though the primary thrust of the rules was to facilitate electronic notice, there would also be savings in processing paper notices under the rules because notice providers will be able to bundle notices to creditors and save postage costs.

The committee without objection approved the proposed amendments for publication by voice vote.

The committee also approved expediting approval of the amendments, together with the proposed amendment to Rule 9036 approved by the Standing Committee in January 2004.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Rosenthal and Professor Cooper presented the report of the advisory committee, as set forth in Judge Rosenthal's memorandum and attachments of May 17, 2004. (Agenda Item 8)

Amendments for Final Approval

FED. R. CIV. P. 6(e)

Judge Rosenthal reported that the proposed change to Rule 6(e) (additional time allowed following certain kinds of service) had been referred by the Advisory Committee on Appellate Rules, which was considering parallel changes to FED. R. APP. P. 26(c). Under the existing Rule 6(e), there is some uncertainty in calculating the three additional days given a party to act when service is made on the party by mail, leaving it with the clerk of court, electronic means, or other means consented to by the party served.

The proposed clarifying amendment would specify that the three days are added after the prescribed period otherwise expires under Rule 6(a). Intermediate Saturdays, Sundays, and holidays would be included in counting the additional three days, but the last day cannot be a Saturday, Sunday, or holiday. Judge Rosenthal added that the committee note sets forth a number of practical examples calculating the time period.

One member asked why the advisory committee had not used the term "calendar days," as used in the appellate rules. Judge Rosenthal responded that the committee had considered that option, but had decided not to use "calendar days" because it is not found anywhere else in the civil rules.

The committee without objection approved the proposed amendment for final approval by voice vote.

FED. R. CIV. P. 27(a)(2)

Judge Rosenthal said that the proposed change in Rule 27 (deposition before action or pending appeal) would merely correct an outdated reference in the rule to former Rule 4(d), which deals with serving a copy of the petition and a notice stating the time and place of a deposition hearing. The corrected reference makes clear that all forms of service under Rule 4 can be used to serve a petition to perpetuate testimony.

The committee without objection approved the proposed amendment for final approval by voice vote.

FED. R. CIV. P. 45(a)

Judge Rosenthal reported that the proposed amendment to Rule 45 (subpoena) would close a small gap in the rule by requiring that a deposition subpoena state the method for recording testimony.

The committee without objection approved the proposed amendment for final approval by voice vote.

SUPPLEMENTAL RULE B(1)(a)

Judge Rosenthal stated that the proposed amendment to Supplemental Rule B (attachment and garnishment) would bring the rule into conformity with case law. The amendment specifies that the time for determining whether a defendant is "found" in a district is the time the verified complaint praying for attachment and the affidavit required by Rule B(1)(b) are filed.

The committee without objection approved the proposed amendment for final approval by voice vote.

SUPPLEMENTAL RULE C(6)(b)

Judge Rosenthal reported that the proposed amendment to Supplemental Rule C(6) (responsive pleadings and interrogatories) would correct an oversight made during the course of the 2000 amendments to the rule. It would delete the rule's reference to a time 10 days after completed publication under Rule C(4). That rule requires publication of notice only if the property is not released within 10 days after execution of process. Execution of process will always be earlier than publication.

The committee without objection approved the proposed amendment for final approval by voice vote.

Amendments for Publication

SUPPLEMENTAL RULE G

Professor Cooper explained that civil forfeiture proceedings have long been governed by the Supplementary Rules for Certain Admiralty and Maritime Claims because of tradition, the in rem nature of forfeiture proceedings, and many forfeiture statutes expressly invoking the supplemental rules. But, he said, the relationship had come under considerable strain because of an explosion in the number of civil forfeiture proceedings. In particular, court interpretations of the supplemental rules by the courts in forfeiture cases have been cited by the admiralty bar as creating problems for maritime practice.

Professor Cooper noted that the supplemental rules had been amended in 2000 to draw some distinctions between forfeiture and admiralty practice. At about the same time, Congress enacted the Civil Asset Forfeiture Reform Act, which required a number

of other changes in the rules as they apply to civil forfeiture proceedings. Soon after enactment of the legislation, the Department of Justice approached the Advisory Committee on Civil Rules, suggesting that it was time to consolidate all the civil forfeiture procedures into a single supplemental rule that would be consistent with the new statute.

Professor Cooper said that the advisory committee had appointed a subcommittee that produced a proposed new Rule G after several conference calls, a meeting in December 2003, and substantial input from the Department of Justice and the National Association of Criminal Defense Lawyers. The new rule, he said, was ready for publication, together with conforming amendments to SUPPLEMENTAL RULES A, C, and E and FED. R. CIV. P. 26(a)(1)(E).

Professor Cooper pointed out that the advisory committee had devoted a great deal of attention to a proposal by the Department of Justice to define in the rule what "standing" is needed to assert a claim to property once the government initiates a civil forfeiture action. The Department had proposed that the rule limit standing to a person qualifying as an "owner" within the statutory definition of the innocent-owner defense. The committee, however, concluded that defining standing to file a claim should be left to developing case law, not the rules. Instead, proposed Rule G(8) only sets forth the procedural framework for determining a claimant's standing and deciding a claimant's motion to dismiss.

In the same vein, Professor Cooper reported that the advisory committee had not included a provision in the new rule barring the use FED. R. CRIM. P. 41(g) to accomplish the return of property outside Rule G. This issue, too, would be left to case law development.

Professor Cooper proceeded to describe the provisions of the new rule. He noted that subdivision (1) specifies that Rule G governs in rem forfeiture actions arising from federal statutes. It also states that Supplemental Rules C and E and the Federal Rules of Civil Procedure apply to the extent that Rule G does not address an issue.

Subdivision (2) would replace the particularized pleading in the existing rule with a statement of sufficiently detailed facts to support a reasonable belief that the government will be able to meets its burden of proof at a trial.

Subdivision (3), dealing with arrest warrants, would provide that only the court, on a finding of probable cause, may issue a warrant to arrest property not in the government's possession or not subject to a judicial restraining order. The existing rule allows issuance of a summons and warrant by the clerk without a probable-cause finding. In addition, the proposed rule would require the warrant and any supplemental service to

be served as soon as practicable, unless the court orders a different time. Professor Cooper noted that the National Association of Criminal Defense Lawyers had expressed concern that the change would encourage courts to permit more filings under seal. But, he added, the rule does not address when it is appropriate to file under seal. It merely reflects the consequences for execution when sealing or a stay is ordered.

Professor Cooper noted that subdivision (4), the basic notice requirement, reflects the traditional practice of publishing notice of an in rem action. For the first time, the rule would recognize publication on an official government-created Internet forfeiture site to provide a single, easily identified means of notice. He pointed out that there is no such site now, but if the government were to establish one, it would provide more effective notice than newspaper publication.

In addition, proposed paragraph (4)(b) would require the government to send individual notice of the action and a copy of the complaint to any person who reasonably appears to be a potential claimant, based on the facts known to the government. Although the National Association of Defense Lawyers had asked for formal service of the summons in the manner required by FED. R. CIV. P. 4, the proposed rule does not require that level of service. Rather, due process requirements are satisfied by practical means reasonably calculated to accomplish actual notice.

The proposed rule also specifies that the notice must be sent by means reasonably calculated to reach the potential claimant. Notice may be sent to the attorney if the potential claimant has an attorney, and that this may be the most effective notice in many cases. Notice to an incarcerated person must be sent to the place of incarceration. The rule, however, does not attempt to deal with the due process problems implicated by *Dusenbery v. United States,* 534 U.S. 161 (2002), where a particular prison has deficient procedures for delivering notice to prisoners.

The proposed paragraph also sets out deadlines for filing claims and motions. Professor Cooper pointed out that the provision dealing with filing an answer or motion under FED. R. CIV. P. 12 had generated advisory committee discussion. Contrary to an ordinary civil action, where Rule 12 suspends the time to answer, the proposed rule requires that an answer or motion be filed no later than 20 days after a claim is filed.

Professor Cooper pointed out that under subdivision (5), a claim must identify the claimant and state the claimant's interest in the property. If the claim is filed by a person asserting an interest in the property as a bailee, it must identify the bailor.

Subdivision (6) would allow the government to serve special interrogatories under FED. R. CIV. P. 33 limited to the claimant's identity and relationship to the property. The purpose, he said, is to elicit information promptly so the government can move to dismiss

for lack of standing. The government need not respond to a claimant's motion to dismiss until 20 days after the claimant has answered the interrogatories.

Professor Cooper noted that subdivision (7) would allow property to be sold on an interlocutory basis. The court could order the property sold, for example, if it were perishable or at risk of diminution of value. Likewise, it could be ordered sold if the expense of keeping the property is excessive, or if the court finds other good cause.

Professor Cooper pointed out that subdivision (8) govern motions. He noted that paragraph (8)(A) states that a party with standing to contest the lawfulness of the seizure of property may move to suppress use of the property as evidence. He explained that the advisory committee had deleted a reference in the proposed rule to constitutional standing under the Fourth Amendment. Likewise, a party who establishes standing to contest forfeiture may move to dismiss the action under FED. R. CIV. P. 12(b). At any time before trial, the government may also move to dismiss because the claimant lacks standing. Professor Cooper pointed out that the court must decide the government's motion before any motion by the claimant to dismiss the action. The claimant has the burden of establishing standing based on a preponderance of the evidence.

Professor Cooper stated that paragraph (8)(d) deals with a petition to release property under the Civil Asset Forfeiture Reform Act. The venue provision in the rule had been inserted at the request of the Department of Justice. It is derived from the statute and serves as a guide to practitioners. It makes clear that the status of a civil forfeiture action is a "civil action" eligible for transfer under 28 U.S.C. § 1404. Finally, Professor Cooper noted that the rule contains a provision allowing a claimant to seek to mitigate a forfeiture under the Excessive Fines Clause of the Eighth Amendment.

Judge Rosenthal reported that the Style Subcommittee had reviewed the proposed rule and had suggested a few improvements in language. She asked for and received permission to adopt the Style Subcommittee suggestions without having to return to the Standing Committee before publication.

Judge Rosenthal added that the advisory committee anticipated that a significant number of comments would be received during the publication period, but from a narrow section of the bar. Judge Levi and Professor Cooper pointed out that the committee had benefitted greatly as a result of excellent suggestions and input from the Department of Justice and the National Association of Criminal Defense Lawyers.

The committee without objection approved the proposed new rule for publication by voice vote.

SUPPLEMENTAL RULES A, C, and E and FED. R. CIV. P. 26(a)(1)(E)

Professor Cooper reported that the proposed changes to Supplemental Rules A, C, and E and FED. R. CIV. P. 26(a)(1)(E) were conforming amendments to account for the consolidation of civil forfeiture provisions into the new Rule G. He noted that the amendment to Rule 26(a)(1)(E) (initial disclosures) would add civil forfeiture actions to the list of cases exempted from the initial disclosure requirements.

The committee without objection approved the proposed amendments for publication by voice vote.

FED. R. CIV. P. 50(b)

Judge Rosenthal reported that the proposed amendments to Rule 50(b) would remove a trap that occurs when a party moves for judgment as a matter of law under Rule 50(a) before the close of all the evidence and then fails to renew the motion at the close of all the evidence. The revised rule, she said, would delete the requirement that a renewal motion be made at the close of all the evidence. It responds to court decisions that have begun to move away from a strict interpretation of the current rule requiring a motion for judgment as a matter of law at the literal close of all the evidence. Professor Cooper added that the amendments are fully consistent with the Seventh Amendment.

In addition, the rule would be amended to add a time limit of 10 days after discharge of the jury for a party to make a post-trial motion when a trial ends without a verdict or with a verdict that does not dispose of all issues suitable for resolution by verdict.

The committee without objection approved the proposed amendments for publication by voice vote.

ELECTRONIC DISCOVERY
FED. R. CIV. P. 16, 26, 33, 34, 37, and 45 and FORM 35

Judge Rosenthal reported that the package of "electronic discovery" amendments was the product of a lengthy and thorough examination by the advisory committee into whether the current rules are adequate to regulate discovery of electronically stored information. She pointed out that the committee had enjoyed invaluable cooperation and input from the bar on the project, and it had conducted three productive conferences with lawyers, judges, and law professors on electronic discovery. She thanked Professor Capra and Fordham Law School for hosting the most recent conference, held in New York in February 2004. She also thanked Kenneth Withers of the Federal Judicial Center for his major assistance and wise counsel.

Judge Rosenthal explained that the advisory committee had initiated the electronic discovery project with a good deal of skepticism regarding the need for rule changes. But as the project progressed and lawyers articulated their experiences, she said, the committee moved to a consensus that the existing discovery rules do not fit current practice as well as they should. The committee, she emphasized, had reached the conclusion that the national rules needed to be amended and the amendments were needed now.

Judge Rosenthal pointed out that the materials in the committee's agenda book demonstrate that there are many real differences between electronic discovery and other types of discovery. For one thing, computer-stored information is dynamic and often changes without active human intervention. Unlike paper information, moreover, computer information may be incomprehensible without the machine and software that created it.

She said that the bar had informed the committee that discovery had become more difficult, burdensome, and costly because the current rules — even though they are very flexible — are simply not specific enough with regard to electronic discovery. She pointed out that some federal district courts now have local rules in place governing electronic discovery, and pertinent case law is beginning to develop. In addition, state court systems have issued or are considering rules to deal with electronic discovery. She concluded that if the advisory committee were to wait too long to propose amendments to the national rules, it would run the risk of having local rules proliferate and wide variations develop in federal practice.

Judge Rosenthal summarized the advisory committee's key proposals, pointing out that they would: (1) require parties and the court early in a case to discuss issues relating to electronicaly stored information and privilege waiver; (2) clarify and modernize the definition of discoverable electronic information; (3) address the form in which electronically stored information must be produced; and (4) provide a procedure for handling inadvertent privilege waivers.

She explained that the committee had heard repeatedly from lawyers that privilege review of discovery materials is very time consuming and expensive. Electronically stored information, moreover, presents special problems because privileged information, though not readily visible, may be embedded in electronic documents or found in metadata. She emphasized that the proposed amendments respect the Rules Enabling Act and avoid dealing with the substance of privilege law. Rather, they only set forth a procedure for retrieving inadvertently produced privileged information.

FED. R. CIV. P. 26(f) and FORM 35

Professor Cooper said that the proposed amendments to FED. R. CIV. P. 26(f) (conference of the parties) were non-controversial. They would require the parties at the 26(f) conference to discuss any issues relating to preserving discoverable information and to include in their discovery plan: (1) any issues relating to disclosure or discovery of electronically stored information, including the form in which it should be produced; and (2) whether, on agreement of the parties, the court should enter an order protecting the right to assert privilege after production of privileged information. He noted that the latter item was a response to concerns expressed to the committee by members of the bar regarding the enormous burden imposed by having to screen voluminous documents for privilege.

He said that it was generally accepted that the discovery process moves much more quickly and efficiently when the parties in a case agree on how to deal with privilege issues. He said that the proposed amendment contemplates that the parties will enter an agreement. The court order will enhance the status of the agreement and may well affect future waiver litigation. In addition, Form 35 would be amended to include a new section dealing with disclosure of electronic information and privilege protection.

FED. R. CIV. P. 16(b)

Professor Cooper reported that the proposed amendments to FED. R. CIV. P. 16(b) (scheduling and planning) would alert the court to the need, early in the litigation, to address the handling of discovery of electronically stored information and to consider adopting the parties' agreement for protection against privilege waiver.

FED. R. CIV. P. 26(b)(5)

Professor Cooper explained that the proposed amendment to FED. R. CIV. P. 26(b)(5) (claims of privilege or protection of trial preparation materials) specifies that when a party produces information without intending to waive a claim of privilege, it may, within a reasonable time, notify any party receiving the information that it claims a privilege. The receiving party must then promptly return or destroy the specified information and any copies. Professor Cooper added that the committee note specifies that the amendment does not address the controversial question of whether there has in fact been a privilege waiver. It merely provides a procedure for addressing privilege issues.

One member said that the proposed waiver provision would not make a real difference in practice. Parties, he said, will still have to review all documents in order to avoid the danger that a state court may find a waiver of privilege. He urged the

committee to publish a much more ambitious proposal that would address the waiver issue itself. He suggested that this would be a great opportunity for the committee to make a major improvement in practice.

Judge Rosenthal responded that the advisory committee was very sympathetic to that approach, but it had opted for a more cautious amendment because of concerns over the limits of the Rules Enabling Act. The statute specifies that any rule "creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress." (28 U.S.C. § 2074) Another participant added that privilege issues implicate fundamental questions of federalism that rules committees should approach with hesitancy.

Other participants countered, though, that a bolder waiver proposal to protect parties against inadvertent waiver of privilege would in fact be consistent with the Rules Enabling Act. They asserted that a federal rules provision could specify that an inadvertent turnover of privileged material through the federal discovery process does not constitute a waiver of privilege. The provision, they said, would be procedural in nature, not substantive. It would not address the scope of the privilege itself. Instead, it would merely address the procedural consequences arising as a result of the mandatory federal discovery process. In other words, if a court requires a party to produce materials through the federal discovery rules, those rules can prescribe the character of the privilege waiver without modifying the content of the privilege itself.

One member pointed out that the advisory committee's proposed amendment may put a court in an awkward position because its order may not effectively bind third parties or prevail in a later proceeding before another court. He noted that there is a split in state law as to whether third parties are bound.

One member pointed out, though, that the proposed amendment would still be a valuable change because — despite uncertainty as to the scope of the privilege protection — parties are in a much better position with a court order than without one. Judge Rosenthal added that the pertinent committee note addresses the issue in general terms by stating that a court order adopting the parties' agreement "advances enforcement of the agreement betweeen the parties and adds protection againt nonparty assertions that privilege has been waived."

Another member noted that the proposed new Rule 26(b)(5)(B) states that a party receiving privileged information must promptly return or destroy it upon being notified by the producing party that it intends to assert a claim of privilege. He suggested that the rule might be amended to require the receiving party to certify that they have in fact destroyed the information in question.

FED. R. CIV. P. 26(b)

Judge Rosenthal reported that the proposed new Rule 26(b)(2)(C) (discovery scope and limits) would establish a two-tiered approach to electronic discovery. A producing party would automatically have to turn over requested information that is "reasonably accessible." Even if it makes a showing that the information sought is not "reasonably accessible," the requesting party may then ask the court to order discovery of the information "for good cause." She pointed out that this approach is similar to the two-tiered approach embodied in the 2000 amendments to Rule 26(b)(1), under which parties may obtain discovery automatically as to matters "relevant to the claim or defense of any party," but they may ask the court for good cause to order discovery of any matter "relevant to the subject matter involved in the action."

One member pointed out that there is no provision in the proposed amendments explicitly addressing the sharing of discovery costs. He noted that judges already have general authority under Rule 26 to shift discovery costs, but recommended that the proposed amendments themselves, or the accompanying committee notes, specify that a judge may assess part or all of the costs of certain discovery requests on the requesting party. One member suggested that language covering cost sharing be added to the proposed amendment to Rule 26(b)(2)(C). Judge Rosenthal responded that it might be preferable to include such language in the committee note, rather than the rule.

Professor Cooper pointed out that the committee note in fact quotes the *Manual for Complex Litigation*, instructing that certain forms of production be conditioned upon a showing of need or the sharing of expenses. He pointed out, however, that the Standing Committee has been very sensitive to cost sharing or cost bearing, and it is a controversial concept for many members of the bar. Mr. Rabiej added that language regarding cost-shifting had been proposed by the Advisory Committee on Civil Rules in the 2000 amendments to Rule 26, but it had been removed by the Standing Committee.

Judge Kravitz moved to add language at the end of the proposed amendment to Rule 26(b)(2)(C) to specify that if a responding party shows that requested information is not reasonably accessible, the court may order discovery of the information "on such terms as the court may determine." He added that no explicit language as to cost sharing should be included in the text of the rule itself, but a reference to costs could be included in the committee note.

The committee without objection approved Judge Kravitz's motion by voice vote.

FED. R. CIV. P. 33

Judge Rosenthal noted that the proposed amendment to Rule 33(d) (option to produce business records in response to interrogatories) makes it clear that a party may respond to interrogatories by using electronically stored information.

FED. R. CIV. P. 34

Judge Rosenthal explained that the proposed amendments to Rule 34(a) (production of documents and inspection of tangible things) draw a new distinction between "electronically stored information" and "documents." The word "document" in the current rule, she said, is simply not adequate to capture all the types of information stored on computers. The proposed rule, thus, would acknowledge explicitly the expanded importance and variety of electronically stored information subject to discovery. She also pointed out that under the amendment copying, testing, and sampling would apply explicitly both to electronically stored information and tangible things.

She noted that the proposed amendments to Rule 34(b) permit a party to specify the form in which it wants electronically stored information to be produced. If no request is made as to form, or if there is no agreement by the parties, the producing party may turn over the information in the form in which it is ordinarily maintained or in an electronically searchable form. One member suggested that the term "electronically accessible" might be more appropriate than "electronically searchable."

FED. R. CIV. P. 45

Judge Rosenthal reported that Rule 45 (subpoenas) would be amended to conform it to the various changes proposed in the discovery rules to address electronically stored information.

The committee without objection approved the proposed amendments to Rules 16, 26, 33, 34, and 45 and Form 35 for publication by voice vote.

FED. R. CIV. P. 37

Judge Rosenthal reported that the committee had approved a limited "safe harbor" provision in Rule 37 (sanctions for failure to cooperate in discovery) that would give a party protection when information that it is asked to produce has been destroyed or lost through the routine business operation of its computer systems. The loss would occur, for example, when information is destroyed as a result of recycling back-up tapes or automatically overwriting deleted information. She reported that this was the only provision among the proposed amendments in which there had been any disagreement

within the advisory committee. She pointed out, though, that the disagreement had been only as to the actual language of the proposed amendment, and not as to the need for including a limited safe harbor provision in the rules.

As a consequence, she explained, the advisory committee had decided to present the Standing Committee with two alternative versions of a safe harbor provision in FED. R. CIV. P. 37(f). She added that the committee clearly preferred Alternative 1, but several members also wanted to publish Alternative 2 for public comment. Both alternatives, she said, are very narrow. The essential difference between them concerns the standard of culpability applicable to the producing party. Alternative 1 would establish a reasonableness standard, while Alternative 2 would require intentional or reckless conduct. She reported that one member of the advisory committee strongly opposed publishing the second alternative because it would inappropriately limit a court's discretion.

Judge Rosenthal said that whether or not both alternate versions are published, it should be made clear in the publication that the committee is continuing to consider both culpability standards and would like to generate public comment specifically directed to them.

One participant emphasized that Rule 37 deals with sanctions for violation of discovery obligations. But, he said, spoliation issues are generally governed by a separate body of law. He pointed out that what occurs before a case is filed in the district court is not, and cannot be, covered by the rules. Thus, he said, the rules committees should focus on a party's obligation under applicable discovery law, not on spoliation. He suggested that the committee note state explicitly that spoliation is governed by a different body of law, even though discovery and spoliation issues often tend to blend in practice.

He added that the culpability standard under discovery law is negligence, including intentional neglect. But, he said, the key problem is not so much the applicable standard as the boundary of obligations arising before a case is filed and discovery obligations that attach after a case has been filed. Other members pointed out that lawyers' legal and ethical obligations before filing are clearly established by existing law.

One member said that even though the bar had made a compelling case for a safe harbor at the recent Fordham conference, it appeared that any effective protective provision would lie outside the scope of the rules. He suggested that it would take legislation to achieve the sort of protection that the bar seeks. Other members responded, though, that an effective safe harbor provision could indeed be crafted with some additional work.

In light of the difficult competing considerations and the committee discussions, Judge Rosenthal agreed to craft some additional language to address the concerns expressed by the participants. She emphasized the need to include a safe harbor provision together with the rest of the proposed electronic discovery amendments because all the amendments fit together as part of a single, interrelated package.

On the second day of the meeting, Judge Rosenthal presented the committee with revised language for both the text of the proposed Rule 37 amendments and the accompanying committee note. She noted that the proposed revisions would make it clear that the rule does not address the actions of a party before a case is filed.

Judge Rosenthal said that the recommendation of the advisory committee was to publish only one alternative for public comment. But, she said, that version would include appropriate brackets and footnotes to draw the attention of the public to the fact that the committee would continue to study what standard of fault must be met to take a party out of the safe harbor protection.

Dean Kane moved to approve publication of the proposed amendment, together with appropriate cover language —— to be drafted by the advisory committee — directing the public's attention to the committee's desire to receive public comment on the applicable culpability standard and the other issues identified by the committee. The motion was approved without objection by voice vote.

Amendments for Delayed Publication

1. Pure Style Revisions

FED. R. CIV. P. 38-63, except FED. R. CIV. P. 45

Judge Rosenthal reported that the advisory committee was planning to publish the complete set of restyled civil rules as a single package in February 2005. She noted that the Standing Committee at earlier meetings had approved publication of restyled Rules 1-37. She asked for authority to publish the current batch of proposed amendments — Rules 38-63, except Rule 45 — subject to further refinement before publication. And she reported that the remaining civil rules, Rules 64-86, would be presented to the Standing Committee at its January 2005 meeting.

Judge Rosenthal said that the advisory committee, in partnership with the Style Subcommittee of the Standing Committee and its consultants, would continue to make refinements in the language of the rules. It would also resolve a series of "global" style

issues and present a completed style package of all the civil rules at the January 2005 meeting.

The committee without objection authorized delayed publication of the proposed amendments by voice vote.

2. "Style-Substance" Amendments

FED. R. CIV. P. 4, 8, 9, 11, 14, 16, 26, 30, 31, 36, 40

Judge Rosenthal reported that the goal of the restyling project was very narrow — simply to restate the present language of the civil rules as clearly as possible in consistent English without any change in meaning. Nevertheless, she said, as part of the restyling effort, the advisory committee had approved a limited number of minor, non-controversial improvements in language that are arguably more than purely stylistic in nature. She pointed out that the proposed changes, although possibly substantive, reflect sound common sense, universal current practice, or the likely intention of the drafters. Accordingly, she said, the advisory committee would like authority to publish in tandem with the style package a separate track of proposed "style-substance" changes to Rules 4(k), 8(a) & (d), 9(h), 11(a), 14(b), 16(c)(1), 26(g), 30(b), 31(c), 36(b), and 40. She added that a few additional minor "style-substance" changes might be presented to the Standing Committee at the January 2005 meeting.

One member spoke against the proposed deletion of Rule 8(d)(1) as part of the "style-substance" package. Although the proposed committee note suggested that the current rule is redundant and no longer needed, the member said that it might be helpful to retain it. Judge Rosenthal responded that it was important to restrict the "style-substance" package to purely non-controversial items. Thus, in light of the objection expressed, the advisory committee would drop the proposal from the list of proposed amendments.

The committee without objection approved the proposed "style-substance" amendments for deferred publication by voice vote.

Informational Item

Judge Rosenthal reported that the advisory committee had published a proposed new FED. R. CIV. P. 5.1 (constitutional challenge to a statute) to implement 28 U.S.C. § 2403 and replace the final three sentences of FED. R. CIV. P. 24(c). The statute and current rule require a court to certify to the attorney general of the United States or a state when a federal or state statute has been drawn into question. In addition, the rule requires

a party challenging the constitutionality of a statute to call the court's attention to its duty to certify.

Judge Rosenthal pointed out that the reporting obligation is routinely — and unintentionally — violated, perhaps because it is buried in Rule 24. Thus, the advisory committee had proposed moving the reporting requirements from Rule 24 to the proposed new Rule 5.1 in order to attract attention to the reporting obligations by locating them next to the rules that require notice by service and pleading.

In addition, the new rule would have added a requirement that a party drawing into question the constitutionality of a statute serve the pertinent attorney general by mail with a Notice of Constitutional Question and a copy of the underlying court pleading or motion. The advisory committee had thought that the additional requirement would impose only a slight burden on the challenging party.

Judge Rosenthal pointed out that there had been few public comments on the rule. But, she said, concerns emerged in the advisory committee that the new notice and mailing obligation was unwise and should be reexamined. Accordingly, the committee decided to defer the proposed new rule and not present it at this time to the Standing Committee for final approval.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Carnes and Professor Schlueter presented the report of the advisory committee, as set forth in Judge Carnes's memorandum and attachment of May 18, 2004. (Agenda Item 9)

Amendments for Final Approval

FED. R. CRIM. P. 12.2(d)

Judge Carnes reported that the proposed amendment to Rule 12.2(d) (failure to comply with the requirement to give notice of an insanity defense or submit to a mental examination) would fill a gap created in the 2002 amendments to the rule. The current rule provides no sanction when the defendant does not comply with the requirement to disclose the results and reports of an expert examination. He pointed out that a comment had been received from the defense bar that the proposed amendment goes too far. But, he noted that the decision to impose a sanction is discretionary with the court.

The committee without objection approved the proposed amendments for final approval by voice vote.

FED. R. CRIM. P. 29(c), 33(b), 34(b), and 45(b)

Judge Carnes explained that the proposed amendments to Rule 29 (motion for a judgment of acquittal), Rule 33 (motion for a new trial), Rule 34 (motion to arrest judgment), and Rule 45 (computing time) would remove the requirement that the court rule on a post-trial motion within seven days after a guilty verdict or after the court discharges the jury.

The committee without objection approved the proposed amendments for final approval by voice vote.

FED. R. CRIM. P. 32(i)(4)

Judge Carnes said that the proposed amendment to Rule 32(i)(4) (opportunity to speak at sentencing) would extend the right of allocution — which currently applies only to victims of crimes of violence or sexual abuse — to victims in all felony cases. The rule, he said, allows the victim either to speak at sentencing or submit a written statement to the judge. If a crime involves multiple victims, the rule gives the court discretion to limit the number of victims who will address the court.

Judge Carnes added that Congress was likely to pass comprehensive legislation in the near future dealing with victims' rights. He said that the legislation, among other things, would give a wide array of rights to victims of all offenses, including victims of petty offenses and other misdemeanors. He stated that if the pending legislation were enacted, the committee should ask to withdraw the rule.

The committee without objection approved the proposed amendments for final approval by voice vote.

FED. R. CRIM. P. 32.1(b) and (c)

Judge Carnes reported that the proposed amendments to Rule 32.1 (revoking or modifying probation or supervised relief) would address an oversight in the rules by giving the defendant the right to allocution at a revocation or modification hearing.

The committee without objection approved the proposed amendments for final approval by voice vote.

FED. R. CRIM. P. 59

Judge Carnes reported that the proposed new Rule 59 (matters before a magistrate judge) would set forth the procedures for a district judge to review the decision of a

magistrate judge. He explained that the rule is derived in part from FED. R. CIV. P. 72. It distinguishes between "dispositive" and "nondispositive" matters, but does not attempt to define the terms, which are widely used in case law.

Judge Carnes pointed out that on a nondispositive matter, the district judge must consider any timely objections to the magistrate judge's order and set aside any part of the order that is contrary to law or clearly erroneous. But if a party fails to object within 10 days after being served with a copy of the magistrate judge's order, it waives its right to review.

As for dispositive matters, the district judge must decide de novo any recommendation of the magistrate judge to which an objection has been filed. A party's failure to object within 10 days after being served with a copy of the magistrate judge's recommended disposition waives its right to review. There is no need for the district judge to review de novo any matter to which there has not been a timely objection. Nevertheless, despite the waiver provision, the district judge retains authority to review any decision or recommendation of the magistrate judge, whether or not objections are timely filed.

One member said that he supported the rule, but he had a general problem with the way time is computed under this and some other rules. The proposed rule, he pointed out, states that a party must file an objection "within 10 days after being served with a copy" of the magistrate judge's order or recommendation. He pointed out that judges have no way of telling when a party has actually been served with a copy of a particular document. He suggested that consideration be given at a future committee meeting to addressing this uncertainty in computing time.

The committee without objection approved the proposed new rule for final approval by voice vote.

Amendments for Publication

FED. R. CRIM. P. 5(c)

Judge Carnes reported that two amendments were proposed to Rule 5(c)(3) (initial appearance in a district other than the one where the offense was committed). First, the amendment to Rule 5(c)(3)(C) would remove a reference to Rule 58(b)(2)(G). That rule, in turn, would be amended to eliminate a conflict with Rule 5.1(a) regarding the defendant's right to a preliminary examination. Second, the amendment to Rule 5(c)(3)(D) would take account of advances in technolgy and permit a magistrate judge to accept a warrant by any "reliable electronic means," rather than just by "facsimile."

The committee without objection approved the proposed amendments for publication by voice vote.

FED. R. CRIM. P. 32.1(a)(5)

Judge Carnes explained that the proposed change to Rule 32.1 (revoking or modifying probation or supervised release) was similar to that proposed for Rule 5(c). It would authorize a magistrate judge to accept a copy of a judgment, warrant, or warrant application by "reliable electronic means."

The committee without objection approved the proposed amendments for publication by voice vote.

FED. R. CRIM. P. 40(a) and (e)

Judge Carnes said that the proposed revision of Rule 40(a) (arrest for failing to appear in another district) would fill a gap in the rules by giving a magistrate judge explicit authority to set conditions of release for a defendant who has been arrested only for violation of conditions of release set in another district. He pointed out that the current rule refers only to a defendant who has been arrested for failure to appear altogether, and not to one who has only violated conditions of release.

The committee without objection approved the proposed amendments for publication by voice vote.

FED. R. CRIM. P. 41

Judge Carnes reported that the proposed amendment to Rule 41(e) (issuing a search warrant) would permit a magistrate judge to use "reliable electronic means" to issue warrants. In that respect, it parallels the proposed amendments to Rules 5 and 32.1.

The committee without objection approved the proposed amendments for publication by voice vote.

FED. R. CRIM. P. 58(b)

Judge Carnes explained that the proposed amendment to Rule 58(b)(2)(G) (initial appearance in a petty offense or other misdemeanor case) would remove a conflict between that rule and Rule 5.1 (preliminary examination) and clarify the advice that must be given to a defendant during an initial appearance.

The committee without objection approved the proposed amendments for publication by voice vote.

Informational Items

FED. R. CRIM. P. 29

Associate Attorney General McCallum expressed the concerns of the Department of Justice regarding the May 2004 decision of the Advisory Committee on Criminal Rules to reject the Department's proposed amendments to Rule 29 (motion for a judgment of acquittal). The proposal would have required a judge to defer ruling on a motion for a judgment of acquittal until after the jury has returned a verdict. The current rule gives a judge discretion to rule on an acquittal motion either before or after verdict.

Mr. McCallum pointed out that a district judge's granting of an acquittal motion before a jury verdict is a non-appealable action due to the Double Jeopardy clause of the U. S. Constitution. It is the only area, he said, in which the government has no right to correct an improper action of a trial judge. An appeal does lie, however, when a judge grants a motion for acquittal after a jury verdict.

He emphasized that United States attorneys are deeply troubled by the current rule and certain specific experiences that they have had under it. He noted that the original proposal of the Department had been to amend the rule to require a district judge to defer a ruling on an acquittal motion until after the jury returns a verdict. The aim, he said, was not to limit judicial discretion, but to address the timing of the judge's action, which has important constitutional consequences.

He explained that members had expressed concerns at the October 2003 advisory committee meeting that the Department's proposal might be too broad. They suggested that it is entirely appropriate for a judge to grant a dismissal before judgment in certain circumstances — particularly in the case of a hung jury or a multiple-defendant or multiple-count case. The advisory committee, he said, had asked the Department to consider crafting modifications to its proposal to address these two situations.

Mr. McCallum reported that the Criminal Division had prepared an amendment to deal with hung juries, but it was unable to devise a satisfactory amendment to address the problems of multiple defendants and multiple counts. But, he said, Judge Levi developed a very helpful, alternate proposal that would allow a judge to grant a dismissal before verdict conditioned upon the defendant waiving double-jeopardy rights and permitting an appeal by the government.

He said that because of the importance of this matter, the Department would like to present additional written materials and make a case for amending Rule 29 to the Standing Committee at its next meeting. If the Standing Committee were then to agree with the Department's recommendation — or with Judge Levi's alternate proposal or some other variation — it might propose an amendment itself. But, he noted, a more likely result would be for the Standing Committee to remand the matter back to the advisory committee with a direction to explore every possible alternative to achieve the result of preserving the government's right to appeal. He added that the Department would provide a comprehensive constitutional-law analysis of the Double Jeopardy clause and craft appropriate devices to avoid procedural traps. In short, he emphasized, the Department would like to work cooperatively with the Standing Committee to figure out a way to meet the government's concerns.

Judge Carnes reported that Administrative Office staff had prepared statistics on how often pre-verdict dismissals are granted in the federal courts. In the Fiscal Year 2002, for example, more than 80,000 felony defendants were disposed of in the district courts. Of that total, 3,000 were tried before a jury, and Rule 29 motions were granted in only 37 cases. He warned that the numbers may not be exact because of reporting difficulties in trying to pinpoint pre-verdict acquittals. Neverthless, he said, the number of dismissals under Rule 29 is extremely small. This, he explained, was a primary reason why the majority of the advisory committee were persuaded that there was no compelling case to amend the rule. He pointed out, though, that several members of the advisory committee were very much concerned that when a judge grants a pre-verdict dismissal mistakenly or in questionable circumstances, it reflects badly on the judicial system. In that regard, he noted that the Department had presented the committee with some anecdotes of district judges arguably abusing the process.

Judge Carnes further explained that several members of the advisory committee were concerned that certain prosecutors overcharge. Thus, judges should be able to winnow out groundless charges before a case is submitted to the jury. For that reason, he said, the advisory committee had asked the Department to consider amending its proposal to retain the authority of a trial judge to dismiss specific counts in a multiple-count case or certain defendants in a multi-defendant case. But, he explained, neither the Department nor the advisory committee could fashion a satisfactory proposal addressing those situations.

Judge Carnes said that the issues had been thoroughly explored by the advisory committee, including Judge Levi's alternate solution. If the matter were referred back to the advisory committee, he said, the same result would prevail again. Judge Levi agreed with this assessment, but he added that the Department should have a further opportunity to make a case. He pointed out that the Department has a vital role in the Rules Enabling Act process, and it has been supportive of the process. Therefore, he said, if the

Department concludes that a matter is very important to the government and it asks the Standing Committee to take a second look, the committee should accommodate the request.

Judge Levi pointed out that it is very common in rulemaking for empirical data to show that a particular problem is statistically insignificant. But the rejoinder by proponents of an amendment is always that the small number of problem occurrences in fact represents important matters. He recommended that the committee allow the Department to make its case at the January 2005 meeting. He suggested that the Department consider producing additional information, focusing particularly on the character of the actual cases in which it believes a pre-verdict dismissal was improperly granted and the government denied its right to appeal. He added that the Standing Committee might decide to return the proposal to the advisory committee with instructions.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Smith and Professor Capra presented the report of the advisory committee, as set forth in Judge Smith's memorandum and attachment of May 15, 2004. (Agenda Item 5)

Judge Smith explained that it is the policy of the advisory committee for proposed amendments to evidence rules generally to be limited to resolving case law conflicts in the courts. The committee's presumption, thus, is strongly against amending the rules. The four rules amendments recommended for publication, he said, would resolve serious conflicts in the courts.

Amendments for Publication

FED. R. EVID. 404(a)

Judge Smith reported that the proposed amendments to Rule 404(a) (admissibility of character evidence) would resolve a case law conflict regarding the admissibility in a civil case of character evidence offered as circumstantial proof of conduct. He noted that courts routinely admit such information into evidence in criminal cases. A minority of courts have also permitted its use in civil cases. The proposed amendment would allow the evidence only in criminal cases.

The committee without objection approved the proposed amendments for publication by voice vote.

FED. R. EVID. 408

Judge Smith reported that the proposed amendments to Rule 408 (compromise and offers to compromise) would resolve three important conflicts in the case law as to the admissibility of statements and offers made in settlement negotiations. He added that the proposals had been substantially debated and reworked by the advisory committee.

Judge Smith pointed out that the first amendment would resolve the split in the case law regarding the admissibility in later criminal prosecutions of statements and offers made in civil settlement negotiations. He pointed out that the Department of Justice strongly supported allowing the use in criminal cases of admissions made earlier during settlement negotiations, noting that they can be critical evidence to establish guilt in certain cases. After much debate, he said, the advisory committee agreed to present an amendment that would authorize the use of admissions of fault in later criminal prosecutions, but not allow admission of the fact that there has been a civil settlement or negotiations. He emphasized that the committee had worked hard to reach the proper balance between protecting settlement negotiations and allowing critical evidence to be used in criminal cases.

Second, Judge Smith reported that the proposed amendments would resolve a conflict in case law by prohibiting the use of statements made in settlement negotiations when offered to impeach a witness through a prior inconsistent statement or through contradiction. He noted that the proposal reinforces the main purposes of the rule — to promote unfettered settlement discussions.

Third, the proposed amendments would resolve a conflict over whether offers of compromise may be admitted in favor of the party who made the offer. The proposal would bar a party from introducing its own statements and offers when offered to prove the validity, invalidity, or amount of the claim. Judge Smith said that the advisory committee was of the view that a party should not be able to waive unilaterally the protections of the rule because introduction of the evidence would show implicitly that the opposing party had also entered into a settlement agreement. Exclusion of such evidence would not be required, though, when offered for other purposes, such as to prove the bias or prejudice of a witness.

The committee without objection approved the proposed amendments for publication by voice vote.

FED. R. EVID. 606(b)

Judge Smith reported that the proposed amendment to Rule 606(b) (juror as a witness) would limit the testimony of a juror regarding the validity of a verdict to whether

there has been a clerical mistake in reporting the verdict. He explained that some courts have also allowed juror tetimony on a broader basis, such as to explore whether the jury understood the court's instructions or the impact of their actions. He added that the proposed amendment is very narrowly designed to protect jury deliberations and prevent invasions of the jury process. He pointed out, however, that testimony could still be allowed from a juror as to fraud or outside influence.

The committee without objection approved the proposed amendment for publication by voice vote.

FED. R. EVID. 609(a)(2)

Judge Smith reported that Rule 609(a)(2) (impeachment by evidence of conviction of a crime) provides for automatic impeachment of a witness with evidence that the witness has been convicted of a crime that "involved dishonesty or false statement." The problem, he said, is in determining which crimes involve dishonesty or false statement.

Most prior convictions, he noted, occur in other jurisdictions, especially state courts. The issue for the federal court is to determine the extent to which it may look behind the prior conviction to determine whether it involved dishonesty or false statement. Some courts, he said, make the determination by looking only at the actual elements of the crime for which the witness was found guilty. Other courts, though, allow a more detailed inquiry into the facts of the case.

Judge Smith explained that the proposed amendment takes a middle position. It would allow automatic impeachment of a witness if an underlying act of dishonesty or false statement can be "readily determined." Judges, thus, would have discretion to look behind the elements of the crime to the facts of the case. But it is contemplated that their review would be to make a quick determination, such as by reviewing the charging documents, that a crime involved dishonesty or false statement. The court, though, should not conduct a minitrial on the issue. He added that a similar problem exists under the Sentencing Guidelines, where district judges may have to look behind the elements of a crime to determine whether a prior conviction of the defendant had been for a crime of violence. Professor Capra added that the committee note sets forth some examples of key documents that could be used by judges to make the determination of dishonesty or false statement.

The committee without objection approved the proposed amendment for publication by voice vote.

Informational Items

Professor Capra explained that these four proposals complete a package of amendments that the advisory committee had been considering for several meetings. He said that the advisory committee did not have plans to bring forward to the Standing Committee in the near future other potential amendments that it had under consideration. In addition, he said, the advisory committee would continue to examine the hearsay exceptions, but it will not propose any amendments until the full impact of *Crawford v. Washington* has been determined.

REPORT OF THE TECHNOLOGY SUBCOMMITTEE

Judge Fitzwater presented the report of the Technology Subcommittee. (Agenda Item 10)

He reported that the E-Government Act of 2002 requires all federal courts to post on the Internet all case documents filed electronically or filed in paper and converted to electronic form. The Act also mandates the promulgation under the Rules Enabling Act of new federal rules addressing security and privacy concerns raised by electronic posting of case documents. The Standing Committee, he noted, had created the E-Government Subcommittee to coordinate the task of drafting appropriate revisions to the rules, and it asked representatives of other Judicial Conference committees to serve on the subcommittee.

He explained that the subcommittee had asked Professor Capra to develop a template that each advisory committee could use to develop appropriate amendments to their own rules. He pointed out that each of the advisory committees had reviewed the template and had raised a number of policy issues. In addition, the Department of Justice and other interested parties had offered practical and helpful comments on the template.

Judge Fitzwater reported that the E-Government Subcommittee met just before the Standing Committee meeting and revised the template in several respects. He emphasized that in making policy choices, the subcommittee had worked from the Judicial Conference's recent privacy policy statements and the assumptions made by the Court Administration and Case Management Committee. The revised template, he said, would now be sent back to the advisory committees for further consideration at their autumn meetings.

NEXT COMMITTEE MEETING

The next committee meeting was scheduled for Thursday and Friday, January 13-14, 2005.

Respectfully submitted,

Peter G. McCabe
Secretary

FORDHAM
University School of Law

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

Daniel J. Capra
Philip Reed Professor of Law

Phone: 212-636-6855
e-mail:dcapra@law.fordham.edu
Fax: 212-636-6899

Memorandum To: Advisory Committee on Evidence Rules
From: Dan Capra, Reporter
Re: Proposed Amendments Issued for Public Comment
Date: December 15, 2004

As you know, four proposed amendments to the Evidence Rules are out for public comment. The public comment period ends, as a practical matter, around March 15, 2004. As of this date the Committee has received four written comments on the proposed amendments. Those comments are attached to this memorandum, as are the proposed amendments.

The only comment of substantial importance is that received by Judge Weinstein. Interestingly, his objections to the amendments to Rules 408 and 609 are directed at the compromises reached with the Department of Justice at the last Committee meeting: 1) allowing statements made in compromise—but not offers—to be admitted in a criminal case; and 2) allowing automatic admission of certain convictions for impeachment even if their elements do not always indicate dishonesty or false statement.

It should be noted that any discussion that the Committee may wish to have about the proposed amendments and the received comments can be preliminary. No final decisions need to be made at this meeting. The public comment period is not over, and the majority of comments are usually received at the very end of that period. The final decision with respect to these amendments will be made at the April 2005 Committee meeting.

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

Rule 404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes*

(a) Character evidence generally.—Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) Character of accused.— ~~Evidence~~ In a criminal case, evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution;

---

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

Proposed Amendment to Evidence Rule 404(a)

(2) Character of alleged victim.—

~~Evidence~~ In a criminal case, and subject to the limitations imposed by Rule 412, evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor;

* * *

Committee Note

The Rule has been amended to clarify that in a civil case evidence of a person's character is never admissible to prove that the person acted in conformity with the character trait. The amendment resolves the dispute in the case law over whether the exceptions in subdivisions (a)(1) and (2) permit the circumstantial use of character evidence in civil cases. *Compare Carson v. Polley*, 689 F.2d 562, 576 (5th Cir. 1982) ("when a central issue in a case is close to one of a criminal nature, the exceptions to the Rule 404(a) ban on character evidence may be invoked"), *with SEC v. Towers Financial Corp.*, 966 F.Supp. 203 (S.D.N.Y. 1997) (relying on the terms "accused" and "prosecution" in Rule 404(a) to conclude that the exceptions in subdivisions (a)(1) and (2) are inapplicable in civil cases). The amendment is consistent with the original intent of the Rule, which was to prohibit the circumstantial

use of character evidence in civil cases, even where closely related to criminal charges. *See Ginter v. Northwestern Mut. Life Ins. Co.*, 576 F.Supp. 627, 629-30 (D. Ky.1984) ("It seems beyond peradventure of doubt that the drafters of F.R.Evi. 404(a) explicitly intended that all character evidence, except where 'character is at issue' was to be excluded" in civil cases).

The circumstantial use of character evidence is generally discouraged because it carries serious risks of prejudice, confusion and delay. *See Michelson v. United States,* 335 U.S. 469, 476 (1948) ("The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice."). In criminal cases, the so-called "mercy rule" permits a criminal defendant to introduce evidence of pertinent character traits of the defendant and the victim. But that is because the accused, whose liberty is at stake, may need "a counterweight against the strong investigative and prosecutorial resources of the government." C. Mueller & L. Kirkpatrick, *Evidence: Practice Under the Rules*, pp. 264-5 (2d ed. 1999). See also Richard Uviller, *Evidence of Character to Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom*, 130 U.Pa.L.Rev. 845, 855 (1982) (the rule prohibiting circumstantial use of character evidence "was relaxed to allow the criminal defendant with so much at stake and so little available in the way of conventional proof to have special dispensation to tell the factfinder just what sort of person he really is"). Those concerns do not apply to parties in civil cases.

The amendment also clarifies that evidence otherwise admissible under Rule 404(a)(2) may nonetheless be excluded in a criminal case involving sexual misconduct. In such a case, the admissibility of evidence of the victim's sexual behavior and predisposition is governed by the more stringent provisions of Rule 412.

Advisory Committee on Evidence Rules
Proposed Amendment: Rule 408

Rule 408. Compromise and Offers to Compromise*

(a) General rule. -- ~~Evidence of~~ The following is not admissible on behalf of any party, when offered as evidence of liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction:

(1) furnishing or offering or promising to furnish, ~~—~~or ~~(2)~~ accepting or offering or promising to accept, ~~—~~a valuable consideration in compromising or attempting to compromise ~~a~~ the claim ~~which was disputed as to either validity or amount~~; and ~~, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of~~

(2) in a civil case, conduct or statements made in compromise negotiations ~~is likewise not admissible~~ regarding the claim.

~~This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations.~~

---

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

(b) Other purposes. -- This rule ~~also~~ does not require exclusion ~~when~~ if the evidence is offered for ~~another purpose, such as~~ purposes not prohibited by subdivision (a). Examples of permissible purposes include proving a witness's bias or prejudice ~~of a witness,~~ ; ~~negativing~~ negating a contention of undue delay~~,~~ ;~~or~~ and proving an effort to obstruct a criminal investigation or prosecution.

Committee Note

Rule 408 has been amended to settle some questions in the courts about the scope of the Rule, and to make it easier to read. First, the amendment clarifies that Rule 408 does not protect against the use of statements and conduct during civil settlement negotiations when offered in a criminal case. *See, e.g.*, *United States v. Prewitt*, 34 F.3d 436, 439 (7th Cir. 1994) (statements made in civil settlement negotiations are not barred in subsequent criminal prosecutions, given the "public interest in the prosecution of crime"). Statements made in civil compromise negotiations may be excluded in criminal cases where the circumstances so warrant under Rule 403. But there is no absolute exclusion imposed by Rule 408.

The amendment distinguishes statements and conduct in compromise negotiations (such as a direct admission of fault) from an offer or acceptance of a compromise of a civil claim. An offer or acceptance of a compromise of a civil claim is excluded under the Rule if offered against a criminal defendant as an admission of fault. In that case, the predicate for the evidence would be that the defendant, by compromising, has admitted the validity and amount of the civil claim, and that this admission has sufficient probative value to be considered as proof of guilt. But unlike a direct statement of fault, an offer or acceptance of a compromise is not very probative of the defendant's guilt. Moreover, admitting such

an offer or acceptance could deter defendants from settling a civil claim, for fear of evidentiary use in a subsequent criminal action. *See, e.g.*, Fishman, *Jones on Evidence, Civil and Criminal*, § 22:16 at 199, n.83 (7th ed. 2000) ("A target of a potential criminal investigation may be unwilling to settle civil claims against him if by doing so he increases the risk of prosecution and conviction.").

The amendment retains the language of the original rule that bars compromise evidence only when offered as evidence of the "validity", "invalidity", or "amount" of the disputed claim. The intent is to retain the extensive case law finding Rule 408 inapplicable when compromise evidence is offered for a purpose other than to prove the validity, invalidity, or amount of a disputed claim. *See, e.g., Athey v. Farmers Ins. Exchange,* 234 F.3d 357 (8th Cir. 2000) (evidence of settlement offer by insurer was properly admitted to prove insurer's bad faith); *Coakley & Williams v. Structural Concrete Equip.,* 973 F.2d 349 (4th Cir. 1992) (evidence of settlement is not precluded by Rule 408 where offered to prove a party's intent with respect to the scope of a release); *Cates v. Morgan Portable Bldg. Corp.,* 708 F.2d 683 (7th Cir. 1985) (Rule 408 does not bar evidence of a settlement when offered to prove a breach of the settlement agreement, as the purpose of the evidence is to prove the fact of settlement as opposed to the validity or amount of the underlying claim); *Uforma/Shelby Bus. Forms, Inc. v. NLRB,* 111 F.3d 1284 (6th Cir. 1997) (threats made in settlement negotiations were admissible; Rule 408 is inapplicable when the claim is based upon a wrong that is committed during the course of settlement negotiations). Nor does the amendment affect the case law providing that Rule 408 is inapplicable when evidence of the compromise is offered to prove notice. *See, e.g., United States v. Austin,* 54 F.3d 394 (7th Cir. 1995) (no error to admit evidence of the defendant's settlement with the FTC, because it was offered to prove that the defendant was on notice that subsequent similar conduct was wrongful); *Spell v. McDaniel,* 824 F.2d 1380 (4th Cir. 1987) (in a civil rights action alleging that an officer used excessive force, a prior settlement by the City of another brutality claim was properly admitted to prove that the City was on notice of aggressive behavior by police officers).

The amendment prohibits the use of statements made in settlement negotiations when offered to impeach by prior inconsistent statement or through contradiction. Such broad impeachment would tend to swallow the exclusionary rule and would impair the public policy of promoting settlements. *See McCormick on Evidence* at 186 (5th ed. 1999) ("Use of statements

made in compromise negotiations to impeach the testimony of a party, which is not specifically treated in Rule 408, is fraught with danger of misuse of the statements to prove liability, threatens frank interchange of information during negotiations, and generally should not be permitted."). *See also EEOC v. Gear Petroleum, Inc.*, 948 F.2d 1542 (10th Cir.1991) (letter sent as part of settlement negotiation cannot be used to impeach defense witnesses by way of contradiction or prior inconsistent statement; such broad impeachment would undermine the policy of encouraging uninhibited settlement negotiations).

The amendment makes clear that Rule 408 excludes compromise evidence even when a party seeks to admit its own settlement offer or statements made in settlement negotiations. If a party were to reveal its own statement or offer, this could itself reveal the fact that the adversary entered into settlement negotiations. The protections of Rule 408 cannot be waived unilaterally because the Rule, by definition, protects both parties from having the fact of negotiation disclosed to the jury. Moreover, proof of statements and offers made in settlement would often have to be made through the testimony of attorneys, leading to the risks and costs of disqualification. *See generally Pierce v. F.R. Tripler & Co.*, 955 F.2d 820, 828 (2d Cir. 1992) (settlement offers are excluded under Rule 408 even if it is the offeror who seeks to admit them; noting that the "widespread admissibility of the substance of settlement offers could bring with it a rash of motions for disqualification of a party's chosen counsel who would likely become a witness at trial").

The sentence of the Rule referring to evidence "otherwise discoverable" has been deleted as superfluous. *See, e.g.,* Advisory Committee Note to Maine Rule of Evidence 408 (refusing to include the sentence in the Maine version of Rule 408 and noting that the sentence "seems to state what the law would be if it were omitted"); Advisory Committee Note to Wyoming Rule of Evidence 408 (refusing to include the sentence in Wyoming Rule 408 on the ground that it was "superfluous"). The intent of the sentence was to prevent a party from trying to immunize admissible information, such as a pre-existing document, through the pretense of disclosing it during compromise negotiations. *See Ramada Development Co. v. Rauch,* 644 F.2d 1097 (5th Cir. 1981). But even without the sentence, the Rule cannot be read to protect pre-existing information simply because it was presented to the adversary in compromise negotiations.

"Clean Copy" of Proposed Amendment To Rule 408

To assist the Committee in its evaluation of the proposed amendment, a "clean copy" of the Rule incorporating all of the proposed amendment is set forth below. If the Committee votes to refer the amendment to the Standing Committee, that Committee will be provided with a clean copy as well.

Rule 408. Compromise and Offers to Compromise

(a) General rule. – The following is not admissible on behalf of any party, when offered as evidence of liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through prior inconsistent statement or contradiction:

(1) furnishing or offering or promising to furnish—or accepting or offering or promising to accept—a valuable consideration in compromising or attempting to compromise the claim; and

(2) in a civil case, conduct or statements made in compromise negotiations regarding the claim.

(b) Other purposes. – This rule does not require exclusion if the evidence is offered for purposes not prohibited by subdivision (a). Examples of permissible purposes include proving a witness's bias or prejudice; negating a contention of undue delay; and proving an effort to obstruct a criminal investigation or prosecution.

Advisory Committee on Evidence Rules
Proposed Amendment: Rule 606(b)

Rule 606. Competency of Juror as Witness*

(a) At the trial. — A member of the jury may not testify as a witness before that jury in the trial of the case in which the juror is sitting. If the juror is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

(b) Inquiry into validity of verdict or indictment. — Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith~~;~~ ~~. except that~~ But a juror may testify ~~on the question~~ about (1) whether extraneous prejudicial information was improperly brought to the jury's attention, (2) ~~or~~ whether any outside influence was improperly brought to bear upon any juror, or (3) whether the verdict reported is the result of a clerical mistake. ~~Nor may a~~ A juror's affidavit or evidence of any statement by the juror ~~concerning~~ may not be received on a matter about which the juror

---

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

would be precluded from testifying ~~be received for these purposes~~.

Committee Note

Rule 606(b) has been amended to provide that juror testimony may be used to prove that the verdict reported was the result of a clerical mistake. The amendment responds to a divergence between the text of the Rule and the case law that has established an exception for proof of clerical errors. *See, e.g., Plummer v. Springfield Term. Ry.*, 5 F.3d 1, 3 (1st Cir. 1993) ("A number of circuits hold, and we agree, that juror testimony regarding an alleged clerical error, such as announcing a verdict different than that agreed upon, does not challenge the validity of the verdict or the deliberation of mental processes, and therefore is not subject to Rule 606(b)."); *Teevee Toons, Inc., v. MP3.Com, Inc.*, 148 F.Supp.2d 276, 278 (S.D.N.Y. 2001) (noting that Rule 606(b) has been silent regarding inquiries designed to confirm the accuracy of a verdict).

In adopting the exception for proof of clerical mistakes, the amendment specifically rejects the broader exception, adopted by some courts, permitting the use of juror testimony to prove that the jurors were operating under a misunderstanding about the consequences of the result that they agreed upon. *See, e.g., Attridge v. Cencorp Div. of Dover Techs. Int'l, Inc.*, 836 F.2d 113, 116 (2d Cir. 1987); *Eastridge Development Co., v. Halpert Associates, Inc.*, 853 F.2d 772 (10th Cir. 1988). The broader exception is rejected because an inquiry into whether the jury misunderstood or misapplied an instruction goes to the jurors' mental processes underlying the verdict, rather than the verdict's accuracy in capturing what the jurors had agreed upon. *See, e.g., Karl v. Burlington Northern R.R.*, 880 F.2d 68, 74 (8th Cir. 1989) (error to receive juror testimony on whether verdict was the result of jurors' misunderstanding of instructions: "The jurors did not state that the figure written by the foreman was different from that which they agreed upon, but indicated that the figure the foreman wrote down was intended to be a net figure, not a gross figure. Receiving such statements violates Rule 606(b) because the testimony relates to how the jury interpreted the court's instructions, and concerns the jurors' 'mental processes,' which is forbidden by the rule."); *Robles v. Exxon Corp.*, 862 F.2d 1201, 1208 (5th Cir. 1989) ("the alleged error here goes to the substance of what the jury was asked

to decide, necessarily implicating the jury's mental processes insofar as it questions the jury's understanding of the court's instructions and application of those instructions to the facts of the case"). Thus, the "clerical mistake" exception to the Rule is limited to cases such as "where the jury foreperson wrote down, in response to an interrogatory, a number different from that agreed upon by the jury, or mistakenly stated that the defendant was 'guilty' when the jury had actually agreed that the defendant was not guilty." *Id.*

It should be noted that the possibility of clerical error will be reduced substantially by polling the jury. Rule 606(b) does not, of course, prevent this precaution. *See* 8 C. Wigmore, *Evidence,* § 2350 at 691 (McNaughten ed. 1961) (noting that the reasons for the rule barring juror testimony, "namely, the dangers of uncertainty and of tampering with the jurors to procure testimony, disappear in large part if such investigation as may be desired is *made by the judge* and takes place *before the jurors' discharge* and separation") (emphasis in original). Errors that come to light after polling the jury "may be corrected on the spot, or the jury may be sent out to continue deliberations, or, if necessary, a new trial may be ordered." C. Mueller & L. Kirkpatrick, *Evidence Under the Rules* at 671 (2d ed. 1999) (citing *Sincox v. United States,* 571 F.2d 876, 878-79 (5th Cir. 1978)).

Advisory Committee on Evidence Rules
Proposed Amendment: Rule 609(a)

Rule 609. Impeachment by Evidence of Conviction of Crime*

(a) General rule.—For the purpose of attacking the ~~credibility~~ character for truthfulness of a witness,

(1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and

(2) evidence that any witness has been convicted of a crime that readily can be determined to have been a crime of dishonesty or false statement shall be admitted ~~if it involved dishonesty or false statement~~, regardless of the punishment.

(b) Time limit. — Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the

---

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

later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than ten years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(c) Effect of pardon, annulment, or certificate of rehabilitation. — Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime ~~which~~ that was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) Juvenile adjudications. — Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult

and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

(e) Pendency of appeal. — The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

Committee Note

The amendment provides that Rule 609(a)(2) mandates the admission of evidence of a conviction only when an act of dishonesty or false statement was the basis of the conviction. Evidence of all other crimes is inadmissible under this subsection, irrespective of whether the witness exhibited dishonesty or made a false statement in the process of their commission. Thus, evidence that a witness committed a violent crime, such as murder, is not admissible under Rule 609(a)(2), even if the witness acted deceitfully in the course of committing the crime.

This amendment is meant to give effect to the legislative intent to limit the convictions that are automatically admissible under subsection (a)(2). The Conference Committee provided that by "dishonesty and false statement" it meant "crimes such as perjury, subornation of perjury, false statement, criminal fraud, embezzlement, or false pretense, or any other offense in the nature of *crimen falsi*, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the [witness's] propensity to testify truthfully." Historically, offenses classified as *crimina falsi* have included only those crimes in which the ultimate criminal act was itself an act of deceit. *See* Green, *Deceit and the Classification of Crimes: Federal Rule of Evidence 609(a)(2) and the Origins of* Crimen Falsi, 90 J. Crim. L. & Criminology 1087 (2000).

Evidence of crimes in the nature of *crimina falsi* must be admitted under Rule 609(a)(2), regardless of how such crimes are specifically charged. For example, evidence that a witness was

convicted of making a false claim to a federal agent is admissible under this subsection regardless of whether the crime was charged under a section that expressly references deceit (e.g., 18 U.S.C. § 1001, Material Misrepresentation to the Federal Government) or a section that does not (e.g., 18 U.S.C. § 1503, Obstruction of Justice).

The amendment also requires that the proponent have ready proof of the nature of the conviction. Ordinarily, the elements of the crime will indicate whether it is one of dishonesty or false statement. Where the deceitful nature of the crime is not apparent from the statute and the face of the judgment – as, for example, where the conviction simply records a finding of guilt for a statutory offense that does not reference deceit expressly – a proponent may offer information such as an indictment, a statement of admitted facts, or jury instructions to show that the witness was necessarily convicted of a crime of dishonesty or false statement. *Cf. Taylor v. United States*, 495 U.S. 575, 602 (1990) (providing that a trial court may look to a charging instrument or jury instructions to ascertain the nature of a prior offense where the statute is insufficiently clear on its face). But the amendment does not contemplate a "mini-trial" in which the court plumbs the record of the previous proceeding to determine whether the crime was in the nature of *crimen falsi.*

The amendment also substitutes the term "character for truthfulness" for the term "credibility" in the first sentence of the Rule. The limitations of Rule 609 are not applicable if a conviction is admitted for a purpose other than to prove the witness's character for untruthfulness. *See, e.g., United States v. Lopez*, 979 F.2d 1024 (5th Cir. 1992) (Rule 609 was not applicable where the conviction was offered for purposes of contradiction). The use of the term "credibility" in subsection (d) is retained, however, as that subdivision is intended to govern the use of a juvenile adjudication for any type of impeachment.

RECEIVED 11/01/04

04-CV-014

04-BK-002

JACK E. HORSLEY, J.D.
LAWYER / AUTHOR
FELLOW AMERICAN COLLEGE OF TRIAL LAWYERS
913 NORTH 31ST STREET • MATTOON, ILLINOIS 61938-2271
(217) 235-5954
GENERAL, JAGD (HON. RES. [RET.])
SEE WHO'S WHO IN AMERICA AND
WHO'S WHO IN AMERICAN LAW
WHO'S WHO IN THE WORLD

CABLE: JALEY
EDITORIAL CONSULTANT
RN MAGAZINE AND
MEDICAL ECONOMICS

04-EV-001

October 26, 2004

Peter G. McCabe, Esq
Secretary
Committee On Rules of Practice an Procedure
Washington D C20544

Dear Mr. McCabe:

It has been an honor for me submit reactions to the various conclusions and targets of the Rules.

The material which came with your letter of Aguust 31st, which reached me today, impressed me. I have studied the Preliminary draft and it appears well put. I note in the material speaking to Rule 33 there are incorporated in substance some of my suggestions previously submitted although I know many others no dobut submitted similar suggestions.

With reference to the preliminary draft received today I studied my file reflecting my earlier analyses. I have only the following observatiosn with respect to the maerial which came with your letter of August 31st:

As to Rule 4002, the purport is well put. The things a debtor must submit are well taken. My only suggestion is that it might be supported to add a sentence requiring the debtor also to submit a verified full financial statement.

Looking to Rule 404, the thrust of the Rule is well supported. Character evidence undr the situation postulated

shouild not be admissible. May it not be correct, however, to enlarge the rule slightly by stating an exception exists if the case involves the element of the person's character as, for instance, if the case has to do with the person's having stated falsely relevant information and this false statement concerns an aspect at issue in the case?

Again, I look with satisfaction on the current material regarding the Preliminary draft of The Rules and I thank you and the others on the Committee for requesting my comments and reactions.

Respectfully,

Jack E. Horsley

JACK E. HORSLEY, J. D.
Fellow American College of
Trial Lawyers

JEH:mm

RECEIVED 11/9/04

United States District Court
EASTERN DISTRICT OF NEW YORK
225 CADMAN PLAZA EAST
BROOKLYN, NEW YORK 11201

04-EV-002

JACK B. WEINSTEIN
SENIOR JUDGE

November 3, 2004

Honorable Jerry E. Smith, Chair
Advisory Committee on Evidence Rules
Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Washington, D.C. 20544

My Dear Chair of the Advisory Committee on Evidence Rules:

I am dubious about allowing any conduct or statement made in compromise negotiations to be used in criminal cases (Rule 408). Often the party will be unsupervised by counsel and may make statements for a variety of reasons that throw doubt on reliability.

I also question the fairness of expanding a "crime" beyond its operative elements (Rule 609). Pleas and convictions are precisely based only upon statutory elements.

Both these proposed changes will seriously disadvantage defendants in some cases. Both seem based on a bad policy and theory.

Very Respectfully Yours,

JACK B. WEINSTEIN
Senior U. S. District Judge

CC: Hon. David F. Levi, Chair
Standing Committee on Rules of
Practice and Procedure
Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Washington, D.C. 20544

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
Washington, D.C 20544

RECEIVED 11/9/04

Widener University
☐ 4601 Concord Pike P.O. Box 7474 • Wilmington, DE 19803-0474
☐ 3800 Vartan Way • Harrisburg, PA 17110-9450

04-EV-003

School of Law
Direct Dial Number:
302-477-2070
e-mail tjr0001@mail.widener.edu

☐ (302) 477-2100
Fax: (302) 477-2257
☐ (717) 541-3900
Fax: (717) 541-3966

29 October 2004

Peter G. McCabe, Secretary
Committee on Rules of Practice
and Procedure
Administrative Office of the
United States Courts
Washington, DC 20544

RE: Proposed Changes to Federal Rule of Evidence 404(a)

Dear Mr. McCabe:

I enclose my comments on the proposed amendment of Rule 404(a) to do away with character evidence in civil cases in United States Courts, save when character is "an essential element of a claim or defense." (R. 405(b)) In my opinion, the proposed changes will do more harm than good to the Federal Rules of Evidence. Further, if the changes are picked up thoughtlessly by any of the states currently following the Uniform Rules of Evidence, the state that does so is liable to have unintentionally created a rule that bars character evidence in civil actions where character evidence is routinely admitted, e.g., child custody cases.

My comments are in the form of an executive summary of my article on civil character evidence. I enclose a copy of the draft of the article for whatever use you may make of it.

Sincerely,

Thomas J. Reed
Prof. of Law

TJR:tjr
Encl:

EXECUTIVE SUMMARY
EVIDENCE OF VICE & VIRTUE
ADMISSIBILITY OF CHARACTER EVIDENCE IN CIVIL ACTIONS

I. INTRODUCTION

The U.S. Supreme Court's Rules Advisory Committee intends to amend Rule 404(a) to exclude admissibility of character evidence in all civil cases in all U.S. courts.[1] In the writer's opinion, doing away with character evidence in civil cases would do irreparable harm to the U.S. system of evidence. This essay re-examines the literary, philosophical, and scientific basis that shows that character trait evidence is relevant and reliable. It also examines the common law foundation for admitting character evidence in civil cases and the adverse affect that Rules 404, 405 and 406 have had in extending the common law rationale for admitting character trait evidence.

Federal case law on admissibility of character trait evidence in civil actions since1975 is confusing, contradictory and not intelligible to ordinary mortals. The confusion begins with a set of rules about character trait evidence that are an exercise in cognitive dissonance. Rule 404(a)(1) makes evidence that an individual has a relevant character trait inadmissible to prove that the individual acted consistently what that character trait. The rule does permit the accused in a criminal prosecution to prove that the accused is a person of good character who should be acquitted. Rule 404(a)(2) allows the accused charged with a violent crime to prove that the victim possessed the character trait of violence to show the accused acted in self defense. The Government may rebut defense character trait evidence offered under Rules 404(a0(1) and (2)

with its own contradictory character trait evidence. The same rule permits an on the credibility of any witness by proof of bad character trait for truthfulness. Rule 404(a) contains no exception for admissibility of character trait evidence in civil cases.[2]

Rule 404(b) allows proof of similar acts evidence in civil and criminal cases to prove an intermediate issue such as motive intent, knowledge etc. The rule ignores the obvious fact that of similar acts evidence may also prove a bad character trait.[3] Rule 405(b)provides for admission of character trait evidence in civil and criminal cases when "it is an essential element of a claim or defense."[4] Rule 405(b) contradicts Rule 404(a)'s limitation on character trait evidence. Rule 406 admits evidence of a habit to prove that an actor acted in conformity with that habit.[5] Neither "habit" nor "character" are defined anywhere in the rules. Conceivably, evidence of specific acts that prove someone possesses a relevant character would be inadmissible under Rule 404(a) and under Rule 404(b) but admissible under Rule 405(b) if "essential to a claim or defense." Rule 404(a) and 405(a) have co-existed in cognitive dissonance since 1975. The same evidence of a character trait may be admitted as evidence of a "habit" under Rule 406, as if a bright line could be drawn between the possession of a "habit" and a "character trait."

Part Two examines the use of character traits and character in literature, philosophy and psychology. Fiction writers depend upon character traits to develop the story and the predictability of the protagonists' behavior within the story. They recognize character as a moral dimension of human personality and use the implied principle that human beings behave in predictable ways in accordance with long-standing moral predispositions in order to write

believable stories.[6]

Philosophers make use of character to explain how human beings develop vices and virtues. Character development by acquiring virtuous habits and getting rid of vicious habits has been the backbone of moral philosophy since Aristotle.[7] In turn, psychologists have developed empirically-based theories of personality development that support the reality of character traits and the predictability of human behavior based on knowledge of character traits. If literature, philosophy and science recognize the existence of and measurability of human character traits as predictors of future behavior, then there is a solid basis for permitting character trait evidence in the courts.[8]

Part Three reviews the common law basis for admitting character trait evidence in civil trials. The common law dealt with character trait evidence by examining its relevance, the method by which character traits were proved, and by balancing probative value against prejudice, confusion and waste of time. The courts allowed proof of a character trait by reputation in civil cases when a character trait was relevant to the matter to be decided. The courts also permitted proof of a character trait by specific instances of conduct under the "similar acts" doctrine to establish intermediate issues such as notice, knowledge or a plan or design. Character trait evidence was also admitted as habit and routine business practice evidence. Although the courts tried to make a distinction between habit and character trait evidence, they never established a bright line test for habit evidence.[9]

Part Four describes the development of Rules 404 through 406 before and after ratification by Congress in 1975. The 1942 Model Code of Evidence included the direct ancestors of Rules 404 though 406. The drafters of the 1942 Model Code were influenced by Prof. Julius Stone's two character evidence articles in the Harvard Law Review. The drafters gave little thought to character trait evidence in civil cases, concentrating on admissibility of such evidence in criminal prosecutions.[10]

Rules 404 through 406 provoked little comment or discussion by the Rules Advisory Committee and the Congressional legislative history on these rules is very sparse. Congress did put a smidgeon of legislative history in the record relating to the use of uncharged misconduct evidence in criminal cases. No one thought that Rules 404 through 406 would as troublesome as they proved to be since adoption. The addition of the three sex offender evidence rules in 1992-93 helped to confuse the situation by making a special exception to Rule 404(a) for evidence of sexual misconduct in civil cases.

Part Five is a review of Federal character trait case law since 1975. The character trait of honesty may or may not be admissible in fraud litigation to disprove a claim of fraud. The circuits are split on this. A civil RICO plaintiff may be able to prove "a pattern of racketeering activities" by proof of specific bad acts that show that pattern and incidentally show that the defendants had bad character traits. Character trait evidence relating to either the defendants or to the plaintiff in police and corrections officer brutality cases may or may not be admissible depending upon the circuit in which the plaintiff happens to bring suit. Character trait evidence in Civil Rights Act

cases involving race, age or sex discrimination and in sexual harassment litigation is not clearly admissible, despite the plaintiff's requirement to prove a pattern of prohibited conduct by defendant. [11]

The scholarly community is attracted to a handful of diversity of citizenship cases in which the courts have allowed specific instances of bad conduct character trait evidence to be admitted in civil cases under Rule 405(b). The diversity cases are accompanied by one or two civil rights cases that admitted character trait evidence to establish probable cause for extreme police behavior. The commentators conclude that evidence of a party's good or bad moral character trait should be excluded in civil actions, based on perceived misuse of character trait evidence. The diversity cases are not fairly representative of the kind of civil cases tried in Federal courts, and provoke discussion that misses the mark.[12]

Rules 405(b) and (404(b) are the primary sources of admission of character trait evidence in current Federal practice. Rule 405 ostensibly describes how to prove character trait evidence deemed admissible under Rule 404. However, Rule 405(b) apparently authorizes proof of a character trait by specific instances of similar conduct despite Rule 404(a). Rule 404(b) permits proof of intermediate issues by proof of specific instances of conduct even though those incidents also prove a character trait. Neither rule really faces up to the problem.[13]

Part Five is the author's recommendations. The Federal Rules should be re-written to separate character evidence in civil cases from character evidence in criminal cases. The

overdrafting necessary to make a "one-size fits all cases" evidence rule for civil and criminal trials leads to confusion. The rationale for using character trait evidence in criminal prosecutions is historically different from the rationale for the same evidence in civil trials.

PROPOSED AMENDED RULES 404(a)

Rule 404. Character Evidence Definitions
(a) "Character" means the predisposition of a person to act or refuse to act under similar external conditions. Character is proved by proof of a character trait. "Character" includes habitual acts or omissions of a person.
(b) "Habit" is evidence of a character trait based on proof of unreflective repetitive acts or omissions of a person.[14]

* * * * *

Rule 406. Character Evidence in Civil Cases
(a) In General.
(1) The pleadings , pretrial order, and any other pertinent motions or orders of the court govern the relevance of any character trait of any party or any other relevant person in a civil action;
(2) If a character trait is relevant to an issue under subsection (1), any party may offer evidence to prove or to disprove the character trait in its case in chief;
(3) Any party may rebut character evidence offered in another party's case in chief in its rebuttal case;
(4) Any party may prove some intermediate issue such as motive, guilty knowledge, intent, absence of mistake or accident, plan or design, or identity of the perpetrator in its case in chief by means of act of uncharged misconduct, although admission of uncharged misconduct may also lead to the inference that the relevant person was a person of bad moral character.
(5) Any party may impeach any witness by proof of that the witness has a character trait of dishonesty as provided for in Rules 607, 608 and 609.
(b) Method of proof.
When character evidence is admissible under subsection (a) it may be proved by opinion evidence from a lay person who has personal knowledge of the relevant person's behavior, by reputation, by expert opinion evidence or by proof of sufficient specific instances of conduct to establish the trait.
(c) Admissibility subject to Rule 403
This rule is subject to the balancing of probative value against prejudice to the opposition, waste of time and confusion of the issues specified in rule 403.

NOTES

1. Proposed Revised Rule 404(a) would read as follows:
(a) Character evidence generally.– Evidence of a person's character or a trait of character is not

admissible for the purpose of proving action in conformity therewith on a particular occasion, except:
(1) Character of accused.– In criminal cases, evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution.
(2) Character of alleged victim.– In a criminal case, and subject to the limitations imposed by Rule 412, evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that alleged victim was the first aggressor. Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY, CIVIL, AND CRIMINAL PROCEDURE, AND THE FEDERAL RULES OF EVIDENCE 180-81 (2004)

2. (a) Character Evidence Generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) Character of Accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same.

(2) Character of Alleged Victim. Evidence of a pertinent trait of character of the victim of the crime offered by the accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor.

(3) Character of witness. Evidence of a pertinent trait of character of a witness is admissible as provided in Rules 607, 608 and 609. Fed. R. Evid. 404(a) (2003)

3. Other crimes, wrongs , or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the

accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial. Fed. R. Evid. 404(b) (2003)

4. (b) Specific Instances of Conduct. In cases in which character or a trait of character of a person is an essential element of a charge, claim or defense, proof may also be made of specific instances of that person's conduct. Fed. R. Evid. 405(b) (2003)

5. Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not, and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice. Fed. R. Evid. 406 (2003).

6. See text at notes 13 to 18.

7. See text at notes 19 to 33.

8. See text at notes 34 to 109.

9. See text at notes 109 to 137 .

10. See text at notes 138 to 178.

11. See text at notes 139 to 230.

12. See text at notes 231 to 243.

13. See text after note 243.

14. Civil character evidence must be separated from criminal character evidence, where constitutional issues and a heavy burden of proof assignment may require different treatment. A suggested new Rule 405 for Character Evidence in Criminal Cases may look something like the following:

Rule 405. Character Evidence in Criminal Cases

(a) In General.

(1) The prosecution may not prove a relevant character trait of the defendant or any other person in its case in chief;

(2) The defendant may elect to prove the character of the defendant or any other person in its case

in chief; and

(3) The prosecution may rebut defense character evidence in its rebuttal case.

(4) The prosecution may prove some intermediate issue such as motive, guilty knowledge, intent, absence of mistake or accident, plan or design, or identity of the perpetrator in its case in chief by means of act of uncharged misconduct, although admission of uncharged misconduct may also lead to the inference that the relevant person was a person of bad moral character.

(5) The prosecution or the defendant may impeach any witness by proof of that the witness has a character trait of dishonesty as provided for in Rules 607, 608 and 609.

(6) The party against whom character evidence is offered under subsections (1) through (4) may offer character evidence in rebuttal.

(b) Method of proof.

When character evidence is admissible under subsection (a) it may be proved by opinion evidence from a lay person who has personal knowledge of the relevant person's behavior, by reputation, by expert opinion or by proof of sufficient specific instances of conduct to establish the trait

(c) Admissibility subject to Rule 403

This rule is subject to the balancing of probative value against prejudice to the opposition, waste of time and confusion of the issues specified in rule 403.

FEDERAL PUBLIC DEFENDER
EASTERN DISTRICT OF VIRGINIA
1650 KING STREET, SUITE 500
ALEXANDRIA, VIRGINIA 22314
TELEPHONE: (703) 600-0800
FAX: (703) 600-0880

Frank W. Dunham, Jr.
Federal Public Defender

RECEIVED 12/6/04

04-CR-001

04-EV-004

November 29, 2004

Secretary of the Committee on Rules
of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, N.E.
Washington, D.C. 20544

RE: Comments on the Preliminary Draft of Proposed Amendments to Criminal Procedure Rule 5 and Federal Rule of Evidence 408

With regard to proposed changes to Rule 5, Fed.R.Crim.P., Initial Appearance:

The Rule should make clear that non-certified photocopies are not the equivalent of "reliable electronic means."

With regard to proposed changes to Rule 408, Fed.R.Evid., Compromise and Offers of Compromise:

It should be made clear within the context of the Rule itself that statements made by a representative or agent of a party in an attempt to settle a claim are never admissible against the party in any context, civil or criminal.

Very truly yours,

Frank W. Dunham, Jr.
Federal Public Defender

FORDHAM
University School of Law

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

Daniel J. Capra
Philip Reed Professor of Law

Phone: 212-636-6855
e-mail:dcapra@mail.lawnet.fordham.edu
Fax: 212-636-6899

Memorandum To: Advisory Committee on Evidence Rules
From: Dan Capra, Reporter
Re: Discussion of the possible need to amend Evidence Rule 1101 after *Blakely v. Washington.*
Date: December 9, 2004

The Court in *Blakely v. Washington* struck down a state's sentencing guidelines, to the extent that they permitted a sentence to be increased beyond the range applicable to the crime proved to the jury. Under *Blakely* any fact that increases the sentence beyond the guidelines range must be proved to a jury beyond a reasonable doubt, with two exceptions: 1) the right to jury trial can be waived; and 2) the judge can increase a sentence on the basis of the defendant's prior convictions.

The Supreme Court has, of course, taken two cases to determine whether and to what extent the *Blakely* holding affects the Federal Sentencing Guidelines. At this writing, these cases (*United States v. Booker* and *United States v. Fanfan*) have not been handed down, but it is virtually certain that they will be issued before the Evidence Rules Committee meets in January.

If the Court strikes down the Federal Sentencing Guidelines, either in whole or in part, this may have an impact on the Evidence Rules. There are a number of possible scenarios that may arise if the Guidelines are found invalid. The most likely short-term possibilities are:

1) Congress acts quickly to impose "topless" Guidelines, so that there can be no case in which a judicial finding could increase the sentence beyond that authorized for the crime found by the jury. This is also known as the "Bowman fix."

2) Congress acts quickly to "Blakelyize" the Guidelines — meaning that Congress authorizes facts enhancing a sentence (often called "sentencing facts") to be proved to a jury rather than a judge.

3) Congress does not act immediately, and the courts decide to "Blakelyize" on their own, by trying sentencing facts before a jury, ordinarily in a bifurcated proceeding.

4) Congress does not act immediately, and the courts decide to treat the Guidelines as "advisory" or "instructive" — meaning that judges still find the enhancing facts but are not bound to use them to increase a sentence.

For long-term fixes, the most likely results appear to be: 1) topless guidelines; 2) "Blakelyization" by streamlining the Guidelines so that the sentencing facts to be decided by the jury are not unnecessarily complicated; and 3) proliferation of mandatory minimum sentences.

The only remedy that could affect the Evidence Rules is "Blakelyization", defined loosely as referring facts that would enhance a sentence to the jury in a bifurcated proceeding (like the Kansas system discussed in *Blakely*). If "Blakelyization" is chosen by Congress or the courts, then an argument can be made that an amendment is required, to provide that the Evidence Rules apply in some manner to sentencing proceedings.

This memo considers, as a preliminary matter, the questions the Committee might have to analyze in determining whether to propose an amendment that would make the Evidence Rules applicable to sentencing proceedings. The memorandum assumes that the Guidelines will be found unconstitutional at least insofar as they allow judicial factfinding to increase a sentence beyond that for the crime the jury found. The memo also assumes that "Blakelyization" is the remedy chosen to fix the constitutional defect in the Guidelines.

This memorandum is divided into four parts. Part 1 sets forth the current Rule 1101. Part 2 discusses the arguments for and against an amendment to Rule 1101 that would apply the Federal Rules of Evidence to sentencing proceedings. Part 3 considers how the Rule can best be amended if a decision is in fact made to amend it. Part 4 sets forth drafting models.

I. Rule 1101 and Sentencing Proceedings

The current Rule 1101 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 Anti-Smuggling 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.

If the federal courts "Blakelyize", either unilaterally or through legislation, this will mean that juries will have to determine facts that had been previously found by judges under the Sentencing Guidelines. Some of those facts could probably be added to the trial without much difficulty (such as the quantity of drugs or the amount of loss); no amendment to the Evidence Rules would be required if the "sentencing facts" are actually proved at the trial, as that proof would be subject to the same rules as any other kind of proof. The problem arises when proof of the fact would prejudice the trial in such a way that the trial judge would wish to, or be required to, bifurcate the proceedings. Examples include 1) information that would prejudice the defendant, such as relevant conduct or more than minimal planning, and 2) cases where the defendant would have to make contradictory arguments to challenge the sentencing facts in the guilt phase — for example, that he was not a drug dealer, but if he was, it was in a lesser amount than the quantity asserted by the government.

So let us assume that the trial court wishes to, or must, bifurcate the trial to keep the "sentencing facts" from affecting the guilt phase. Application of Rule 1101 in its current form would mean that the Federal Rules of Evidence would not apply to the second stage. The question then is whether Rule 1101 should be amended to apply the Evidence Rules to such proceedings, and if so, what are the problems that must be encountered in drafting such an amendment.

II. Arguments in favor of and against an amendment to Rule 1101

The Evidence Rules are not constitutionally required at sentencing proceedings, even after Blakely:

Jury determination of sentencing facts is justified by the constitutional right to jury trial and the right to have the prosecution prove all the elements of a crime beyond a reasonable doubt. It does not follow, however, that the Federal Rules of Evidence must apply to sentencing proceedings in which juries are determining sentencing facts. The Federal Rules have never been held to be constitutionally required. Those rules ordinarily comply with the constitution, but they have never been held to establish a minimum constitutional requirement. Thus, a court that orders a separate jury proceeding to determine sentencing facts is not required by the Constitution to apply the Federal Rules of Evidence. See, e.g., Judge Conner's standing order (M.D.Pa) providing that the Federal Rules of Evidence are inapplicable to sentencing proceedings that will be conducted before juries after *Blakely*.

Of course, the due process clause and the defendant's right to confrontation will be applicable to the proof of sentencing facts to a jury, but the court could adopt flexible rules or principles of evidence to comply with those constitutional requirements. For example, a court could find evidence of the defendant's activity to be admissible despite the fact that it would be excluded at a trial under Rule 403. It could find a conviction to be admissible to impeach a defendant even though it would not be admissible at trial under Rule 609.

If the court were to use the constitutional minima in regulating proof at a sentencing proceeding, it would create a situation akin to the standards used by federal courts in habeas actions for claims of evidentiary error: i.e., the question is not whether the state misapplied a rule of evidence, but rather whether the evidence admitted was so unreliable or prejudicial as to violate the rights to confrontation or due process. See, e.g., *Estelle v. McGuire,* 502 U.S. 602 (1991) (evidentiary error in admitting prior bad acts did not "rise to the level of a due process violation").

In sum, while it might be good policy to apply the Federal Rules of Evidence to sentencing proceedings in which juries are involved, it is not a matter of constitutional necessity.

The possibility of Congressional intervention

Assuming that rules of evidence must be implemented for jury determination of sentencing facts, it is by no means clear that this will be done through the rules process.It may well be that Congress would decide to amend the Evidence Rules directly rather than wait for the rules process to unfold. Thus the Committee may wish to consider the efficacy of working on an Evidence Rule amendment only to be preempted by Congress.

On the other hand, the fact that the Evidence Rules Committee is working on an amendment has sometimes been enough to stave off Congressional action. An example arose with Rule 702. Bills were introduced in Congress to amend Rule 702 directly, but they were abandoned when Congress was informed that the Evidence Rules Committee had already prepared an amendment to that rule.

Finally, Congress might be persuaded that there is no immediate need to amend the Evidence Rules so that they are applicable to "Blakelyized" sentencing proceedings. There is arguably no emergency because the sentencing court must still comply with constitutional limitations on evidence presented to the jury. So it is not as if a sentencing proceeding conducted during the pendency of a rule will be a standard-less free for all. Thus Congress might be persuaded to wait on the rulemaking process.

It should be noted that some Congressional action might be required before a rulemaking amendment to Rule 1101 could take effect. 18 U.S.C. § 3661 provides as follows:

> No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.

See also Guideline 6A1.3:

> In resolving any dispute concerning a factor important to the sentencing determination, the court may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy.

It would seem that the statute and guideline would be in conflict with an Evidence Rule amended to impose the Federal Rules of Evidence in sentencing proceedings. The supercession clause would not be sufficient to render the amendment applicable, because the amendment would apply the Evidence Rules, and the Rules of Evidence themselves defer to independent legislation. See the discussion on Rule 1101(e) below.

It could be argued, though, that there is no conflict between an amendment to Rule 1101 and

the statute/guideline. The statute and guideline both refer to evidence received by a "court." Thus the statute/guideline may not even apply when the evidence is received for a jury determination.

The problem of applying constitutional minima to jury determination of sentencing facts:

There are several policy arguments in favor of applying the Federal Rules of Evidence even though they may not be constitutionally required. First, the constitutional minima for evidentiary requirements is indeterminate. Without clear rules to guide the court, there may be a good deal of uncertainty, unpredictability, and disparate rulings on evidence, from court to court, in "Blakelyized" sentencing proceedings.

Moreover, it would seem anomalous to control the jury determination at trial by using the Federal Rules of Evidence, and then to apply a new set of more flexible and permissive principles when the same jury is asked to find sentencing facts. The use of two different sets of rules may well be confusing to both the litigants and the jury. There may be cases where evidence excluded at the trial would be admissible at the sentencing proceeding under more permissive rules, and this could lead to even greater confusion. The jury, hearing this evidence for the first time, might well use the sentencing proceeding as a de facto way to "convict" the defendant on charges as to which the evidence was excluded at trial.

In sum, while the Federal Rules of Evidence are not mandated in "Blakelyized" sentencing proceedings, those Rules may be useful to avoid confusion and prejudice. And as a policy matter, it could be argued that the factual determinations made by the jury in a sentencing proceeding are just as important, and just as necessary to structure, as are the factual determinations it makes at trial. That policy question is, of course, for this Committee and others in the rulemaking process to make in deciding whether to propose an amendment to Rule 1101.

III. What is the best amendment to Rule 1101?

Assuming that Rule 1101 should be amended so that the Evidence Rules are applicable to "Blakelyized" sentencing proceedings, there is still the question of how best to amend the Rule. This section of the memorandum analyzes several versions that an amendment could take.

1. Deleting "sentencing" from Rule 1101(d)(3):

The simplest amendment would be to delete the reference to sentencing proceedings found

in Rule 1101(d), the provision of the Rule that expressly excludes certain proceedings from evidence rule-applicability. This solution would require deletion of two words: ~~sentencing or~~ — from subdivision (d)(3).

But this simple amendment could lead to problems. Most importantly, courts have held that several kinds of proceedings are exempt from the Evidence Rules even though they are not specifically mentioned in Rule 1101(d). Examples include: supervised release revocation proceedings (*United States v. Frazier,* 26 F.3d 110 (11th Cir. 1994)); suppression hearings (*United States v. Matlock,* 415 U.S. 164 (1974)); and psychiatric release and commitment proceedings (*United States v. Palesky,* 855 F.2d 34 (1st Cir. 1988)).

Thus, it is not absolutely certain that deleting sentencing proceedings from the list of exclusions will result in court holdings that the Federal Rules of Evidence are applicable to "Blakleyized" sentencing proceedings. It is true that courts are more likely to hold the Evidence Rules applicable to sentencing proceedings after a specific amendment is enacted that deletes the term "sentencing" from the list of exclusions. But it would seem prudent to provide a more specific amendment.

2. Deleting "sentencing" from Rule 1101(d)(3) and adding "sentencing proceedings" to Rule 1101(b)

A more specific amendment would be to delete the term "sentencing" from Rule 1101(d)(3), as discussed above, and also to specify that the Federal Rules of Evidence are applicable to sentencing proceedings by amending subdivision (b). That part of the amendment could look like this:

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

This amendment would mean that the Federal Rules of Evidence would be fully applicable in all sentencing proceedings. It is for the Committee to determine whether such an amendment is justified on policy grounds.

3. Less than full applicability to sentencing proceedings:

Even if the Supreme Court finds th Guidelines unconstitutional, it does not follow that all factual determinations in a sentencing proceeding must be made by a jury. Under the Supreme Court's *Apprendi* jurisprudence, it is only those facts that take a sentence beyond a

statutory/guideline maximum that must be decided by the jury. So if there is a fact that will increase the sentence, but not beyond the guideline maximum, it can still be decided by the judge. Moreover, any fact that is used to *reduce* a sentence can still be determined by a judge. Finally, the judge may decide any fact question concerning the defendant's prior convictions, because the Court carved out that exception to *Apprendi* in *United States v. Almendarez-Torres.*

So a "Blakelyized" sentencing will present a mixed bag—some factual issues for the jury, other factual issues for the court. It is not obvious that the Federal Rules of Evidence should apply to factual determinations made by a judge at a sentencing proceeding. Traditionally judges have not been bound by evidence rules in sentencing proceedings, because such proceedings are said to demand a flexible rather than a formal inquiry. See *Williams v. New York,* 337 U.S. 241 (1949) (noting that under common law "a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law"). Arguments that evidence rules should be mandated in the fact-intensive Guidelines regime have been widely rejected. See *United States v. Silverman,* 976 F.2d 1502 (6th Cir. 1992) (the procedures for establishing "the factual basis of sentencing, akin to the real offense aspects of pre-guidelines sentencing, continue from formal sentencing practices.)"; *United States v. Petty,* 982 F.2d 1365 (9th Cir. 1993) ("the procedural protections afforded a convicted defendant at sentencing are traditionally less stringent than the protections afforded a presumptively innocent defendant at trial").

There would be an obvious problem in using two different sets of evidentiary controls in the same sentencing proceeding— one for the jury, one for the judge. But a "Blakelyized" system does not require a single sentencing proceeding in which the court decides some facts (presumably by a preponderance of the evidence) and the jury decides others (beyond a reasonable doubt). It would make more sense to hold two separate sentencing proceedings, one for "judge facts" and the other for "jury facts". Thus, it would not be unworkable to apply the Federal Rules of Evidence to jury determinations at sentencing, but not to court determinations. (This may be the best result for criminal defendants, because most of the issues left to be determined by a judge will involve downward departures, and the defendant may wish to be unconstrained by the Federal Rules in making his case for a lesser sentence.)

It is for the Committee to determine whether the Federal Rules of Evidence should apply to proof of facts to be determined by the court in a sentencing proceeding. *Blakely* does not govern this question. If the Committee were to decide to differentiate jury findings from court findings at sentencing proceedings, the amendment to Rule 1101 would make something like the following change to Rule 1101(b):

> (b) *Proceedings generally.* — These rules apply generally to civil actions and proceedings, including admiralty and maritime cases, to criminal cases and proceedings, <u>including sentencing proceedings to the extent that a jury makes findings of fact,</u> to contempt proceedings except those in which the court may act summarily, and to proceedings and

cases under title 11, United States Code.

Further, Rule 1101(d)(3) would have to be amended as follows:

> (3) Miscellaneous proceedings. — Proceedings for extradition or rendition; preliminary examinations in criminal cases; sentencing (except sentencing proceedings to the extent that a jury makes findings of fact), 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.

4. Other possible changes to Rule 1101:

If the Committee decides that it should propose an amendment to Rule 1101 to accommodate jury determination of sentencing facts, it might also consider whether any other aspects of Rule 1101 should be amended. In 2001, the Evidence Rules Committee conducted a thorough review of Rule 1101 and noted that there are a number of anomalies in the Rule. But the Committee determined that those anomalies did not justify the cost of an amendment. Yet if the Rule is going to be amended on other grounds, the Committee might wish to address those anomalies that were previously uncovered. This section of the memo reprises the analysis that the Committee did on Rule 1101 in 2001.

a. Proceedings in which case law has held Evidence Rules inapplicable:

There are a number of proceedings that have been found exempt from the Evidence Rules, even though these proceedings are not mentioned as exempt under Rule 1101(d). What follows is a short discussion of each such proceeding.

Supervised release revocation proceedings

Rule 1101(d) provides that the Rules of Evidence are not applicable to "sentencing, or granting or revoking probation"; but it makes no reference to supervised release revocation proceedings. Of course, supervised release proceedings did not exist when Rule 1101 became law. But the absence of a specific reference has led to litigation on whether the Evidence Rules apply to supervised release proceedings.

In the leading case of *United States v. Frazier,* 26 F.3d 110 (11th Cir. 1994), Frazier made

several interesting arguments in support of the proposition that the Evidence Rules are applicable to supervised release revocation proceedings. These arguments were: 1) Supervised release proceedings are not specifically listed in Rule 1101(d); 2) Rule 1101 was amended after supervised release proceedings were instituted in 1984 (for example, to refer to "magistrate judges" rather than "magistrates"), and yet no attempt was made to amend subdivision (d) to include a reference to supervised release proceedings; 3) The Criminal Rules have been amended to refer to supervised release proceedings, while the Evidence Rules have not; and 4) Supervised release proceedings are different from parole and probation proceedings, because supervised release is statutorily required in specified circumstances, whereas parole and probation are discretionary acts of grace.

The Court in *Frazier* rejected all these arguments. It reasoned that the failure to amend Evidence Rule 1101 to refer to supervised release revocation proceedings was not dispositive, "because we believe that Congress considered probation revocation and supervised release revocation so analogous as to be interchangeable." It also concluded that supervised release is "conceptually the same" as parole. A proceeding to revoke either parole or supervised release is by definition more flexible than a trial, and therefore neither proceeding should be constrained by the Rules of Evidence. Finally, the Court observed that as with parole revocation proceedings, the subject of a supervised release proceeding is still protected by minimal evidentiary standards of reliability.

The courts that have dealt with the question have all held, consistently with *Frazier*, that the Federal Rules of Evidence are inapplicable to supervised release revocation proceedings. See *United States v. Portalla,* 985 F.2d 621 (1st Cir. 1993); *United States v. Stephenson,* 928 F.2d 728 (6th Cir. 1991) (at a supervised release revocation proceeding, a "judge may consider hearsay if it is proven to be reliable"); *United States v. Walker,* 117 F.3d 417 (9th Cir. 1997).

It appears clear that if the Evidence Rules are inapplicable in probation revocation proceedings, then they should be inapplicable to supervised release revocation proceedings as well. The question is: whether Rule 1101(d) should be amended to specifically *exempt* supervised release proceedings from the purview of the Evidence Rules. As indicated above, the current Rule is silent on the matter, and therefore ambiguous. On the other hand, the courts that have decided the question have reached a uniform result without much problem. Assuming that Rule 1101 is to be amended to accommodate jury determination of certain sentencing facts, the Committee may wish to consider adding a reference to supervised release revocation proceedings in subdivision (d). A model to that effect is found in part 4.

Suppression hearings:

Unlike proceedings to obtain a warrant, suppression hearings are not specifically covered by the Rule 1101(d) exclusion. This has not deterred most courts, however, from holding that the

Federal Rules are not applicable in suppression hearings. The Supreme Court dealt with the question in *United States v. Matlock,* 415 U.S. 164 (1974), a pre-Rules case which discussed the then-proposed Rule 1101. The Court reasoned that suppression hearings are essentially preliminary hearings on the admissibility of evidence, and are thus controlled by the general provision of Rule 1101(d) exempting the determination of preliminary questions of fact from the Evidence Rules. The Court also relied on the rationale that "in proceedings where the judge himself is considering the admissibility of evidence, the exclusionary rules, aside from rules of privilege, should not be applicable; and the judge should receive the evidence and give it such weight as his judgment and experience counsel." The *Matlock* Court concluded that at a suppression hearing "the judge should be empowered to hear any relevant evidence, such as affidavits or other reliable hearsay." See also *United States v. Jackson,* 213 F.3d 1269 (10th Cir. 2000) (hearsay statement properly credited at a suppression hearing; the Federal Rules of Evidence do not apply to suppression hearings);*United States v. Schaefer,* 87 F.3d 562 (1st Cir. 1996) ("a judge presiding at a suppression hearing may receive and consider any relevant evidence, including affidavits and unsworn documents that bear indicia of reliability.").

While the lack of a reference to suppression hearings in Rule 1101(d) has not created a problem in the courts, the Committee may wish to add clarifying language as part of a larger amendment. A model in part 4 includes suggested language that would specifically exclude suppression hearings from the purview of the Federal Rules of Evidence.

Psychiatric Release and Commitment Proceedings:

Rule 1101 is silent on whether it applies to proceedings for psychiatric commitment and release, such as are established in 18 U.S.C. § 4243 for criminal defendants found insane. In *United States v. Palesky,* 855 F.2d 34 (1st Cir. 1988), the court held that the Rules of Evidence are not applicable in hearings held to determine whether a person will be committed to or released from a psychiatric facility. The Court analogized such hearings to bail release hearings, and further reasoned that a court determining the question of psychiatric commitment or release "should not be too confined in the kinds of evidence it considers".

The reasoning of *Palesky* certainly seems sound, and is consistent with the rationale for exempting other types of proceedings from the Evidence Rules, such as bail hearings and suppression hearings. The question remaining is whether Rule 1101 should be amended to *exempt* psychiatric commitment proceedings from the Evidence Rules. Since the court in *Palesky* had little trouble reaching its result, and since there is no contrary authority, it would appear that there is no critical need for a freestanding amendment to Rule 1101(d) that would specifically exempt psychiatric commitment proceedings. But if the Rule is to be amended on other grounds, a clarification with respect to psychiatric commitment proceedings might usefully be added to that amendment.

Juvenile Transfer Proceedings:

The Evidence Rules have been held inapplicable to proceedings brought under 18 U.S.C. 5032 to determine whether a juvenile should be tried as an adult. Rule 1101 is silent as to such proceedings, but the courts have reasoned that a transfer proceeding "is of a preliminary nature and is consequently not comparable to a civil or criminal trial." *Government of Virgin Islands in Interest of A.M.*, 34 F.3d 153 (3rd Cir. 1994). The court in *A.M.* stated that juvenile transfer proceedings were most analogous to preliminary examinations in criminal cases, which are specifically exempted by Rule 1101(d)(3). See also *United States v. Anthony Y,* 990 F.Supp. 1310 (D.N.Mex. 1998) (juvenile court records admissible even though hearsay, because the Evidence Rules do not apply to juvenile transfer hearings).

As part of a larger amendment, the Committee may wish to consider whether Rule 1101(d) should be amended to state specifically that the Evidence Rules are inapplicable to juvenile transfer proceedings. The courts are having no problem finding the rules to be inapplicable. But if Rule 1101 is to be amended on other grounds, a clarification might usefully be added to that amendment. Language to that effect is included in a model in part 4.

Preliminary injunction proceedings

Rule 1101 is silent on whether the Federal Rules are applicable to preliminary injunction proceedings. The rather sparse case law on the matter provides that the Evidence Rules are not applicable to such proceedings if they are held independently from the trial. There are at least three reasons for this exemption. First is the argument that the Federal Rules are really designed to protect juries, and therefore they should not be used to hinder judges in making preliminary determinations, because judges can properly weigh information that would be inadmissible at a trial. Second, when preliminary injunction hearings are held independently from a trial on the merits, there is a need for speed and flexibility that is inconsistent with the formal Rules of Evidence. Third, Civil Rule 65(a) appears to contemplate that a judge can and will consider inadmissible evidence in determining whether a preliminary injunction will be issued. Rule 65(a)(2) provides that where consolidation of the preliminary injunction proceeding and the trial is not ordered, "any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial." This provision presumes that some of the evidence considered at the preliminary injunction hearing would *not* be admissible if offered at trial. It also presumes, reasonably enough, that if the preliminary injunction proceeding *is* consolidated with a trial, then the Rules of Evidence will apply.

The court in *SEC v. General Refractories Co.,* 400 F.Supp. 1248 (D.D.C. 1975), summed it up as follows:

> Rule 65(a) of the Federal Rules of Civil Procedure contemplates the introduction at a hearing on a preliminary injunction of evidence which would not be admissible in a final trial on the merits. This relaxation of the rule of evidence at the preliminary injunction stage is consonant with one of the key purposes of a preliminary injunction: the need for speedy relief. Sworn affidavits and investigatory transcripts of testimony taken under oath are properly admitted as probative evidence at a preliminary injunctive hearing, where, as here, testimony of numerous live witnesses is simply not practical and the magnitude of inquiry would preclude any meaningful "trial type" hearing at a preliminary stage.

Again the question for the Committee is whether Rule 1101 should be amended to specify that the Evidence Rules are inapplicable to preliminary injunction proceedings, at least where they are not consolidated with a trial on the merits. Again the best answer appears to be that clarification would be useful, but the need to clarify is not itself so critical as to require an amendment to the Rule. If the Rule is to be amended on other grounds, a clarification might usefully be added to that amendment. A model providing clarifying language is included in part 4.

b. The possible deletion of Rule 1101(e):

Evidence Rule 1101(e) sets forth a laundry list of proceedings in which the Evidence Rules are applicable to the extent that matters of evidence are not governed by other rules or statutes. It appears that this provision is devoid of substantive effect. All of the proceedings specified are civil actions or proceedings tried in the federal courts (e.g., habeas corpus proceedings). The Evidence Rules are already applicable to these proceedings under the provisions of Rule 1101(a) and (c). So the only apparent purpose for subdivision (e) is to highlight the fact that other rules and statutes might trump the Evidence Rules in particular circumstances. Yet this merely states the obvious. Moreover, Rule 1101(e) is woefully incomplete. There are more than 100 other statutes that limit the applicability of the Rules of Evidence in certain special proceedings.

An argument can be made that Rule 1101(e) should be abrogated, given the fact that it makes no attempt to be comprehensive and has no substantive effect. On the other hand, it appears to be doing no harm, and can be said to somewhat helpful in that it highlights the relationship between the Evidence Rules and some of the evidentiary law outside those Rules. As with other ambiguities in the Rule, any problem with Rule 1101(e) does not on its own appear to justify an amendment. Yet if a decision is made to amend the Rule on other grounds, the Committee might consider an abrogation of Rule 1101(e) as part of a larger amendment.

It can be argued that Rule 1101(e) should be retained in any amendment because it is necessary to prevent the enumerated statutes from being superseded by the Evidence Rules. But these independent statutes will not be superseded if Rule 1101(e) is abrogated. This is because the Evidence Rules are written so as not to supersede any statutory rule of evidence. The statutory rules of evidence generally govern one or more of five topics: 1) presumptions; 2) relevance and prejudice; 3) privilege; 4) hearsay; and 5) authentication. On each of these topics the Evidence Rules defer to applicable statutory authority. For example, Rule 301 provides a rule on presumptions to the extent "not otherwise provided for by Act of Congress". Rule 402 says that relevant evidence is admissible, unless otherwise provided by Act of Congress, etc.. Rule 501 provides for a federal common law of privilege except as otherwise provided by Act of Congress, etc.. Rule 802 provides that hearsay is not admissible except as otherwise provided by Act of Congress, etc.. And Rule 901 governs authenticity, but does not purport to supersede statutes that provide for authentication; the examples in 901 are illustrative only.

Moreover, if Rule 1101(e) *were* needed to preserve pre-existing statutes, it would be doing a poor job of it. The Rule clearly makes no attempt to be inclusive. At least one of the statutory references (that dealing with immigration) is erroneous. (It should be read to refer to "judicial proceedings for naturalization or revocation of naturalization under sections 310-360 of the Immigration and Nationality Act (8 USCS §§ 1421-1503)"). Moreover, some of the statutory references in the Rule are outmoded or require updating.

If the Committee decides that Rule 1101 should be amended, then it should give strong consideration to deleting subdivision (e). While it is harmless and unnecessary as is, it might well be useful to delete the provision as part of a larger amendment.

There might be understandable concern that deletion of subdivision (e) could send the wrong signal that the intent of the amendment is indeed to supersede the statutory evidence rules in the specified statutes. But any such concern could be addressed in the Committee Note. The Note might say that subdivision (e) is deleted because it is unnecessary; that the intent of the original Advisory Committee was to signal to courts and practitioners that statutory rules of evidence remained in existence; but that such a reminder is no longer needed, especially since some of the statutes referred to have been abrogated or relocated. Language to this effect is included in the draft Committee Notes in part 4.

IV. Drafting Models

Two models are set forth below. Model One provides that the Evidence Rules are to be applicable to sentencing proceedings. Model Two provides that the Evidence Rules are applicable to sentencing proceedings to the extent that the jury determines the facts. Both models include the suggested changes discussed in part 3, i.e., specifying that certain proceedings held by the courts to be exempt from the Rules are in fact exempt, and deleting Rule 1101(e). Those suggested changes can simply be dropped if the Committee so decides.

Model One: Federal Rules Applicable to Sentencing Proceedings:

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 <u>including sentencing proceedings</u>, 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 or supervised release; proceedings for psychiatric commitment or release; proceedings on motions to suppress or exclude evidence; proceedings to determine whether a juvenile should be prosecuted as an adult; preliminary injunction proceedings when conducted separately from a trial on the merits; issuance of warrants for arrest, criminal summonses, and search warrants; and proceedings with respect to release on bail or otherwise.

~~(c) *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 Anti-Smuggling 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.~~

Draft Committee Note

Subdivision (b) of the Rule has been amended to provide that the Federal Rules of Evidence are applicable to sentencing proceedings. This change is necessary to accommodate Supreme Court rulings mandating that facts used to increase a sentence beyond a statutory or guideline maximum must be found by the jury and not the court. See [cite to *Booker* and *Fanfan*]

Subdivision (d) of the Rule has been amended to add certain proceedings to which the evidence rules (except those with respect to privilege) are not applicable. Case law has generally held that the Federal Rules of Evidence are not applicable to the proceedings specified by the amendment. *See, e.g., United States v. Walker,* 117 F.3d 417 (9th Cir. 1997) (evidence rules do not apply in a supervised release revocation proceeding); *United States v. Palesky,* 855 F.2d 34 (1st Cir. 1988) (Federal Rules of Evidence are not applicable in hearings held to determine whether a person will be committed to or released from a psychiatric facility); *United States v. Jackson,* 213 F.3d 1269 (10th Cir. 2000) (hearsay statement properly credited at a suppression hearing; the Federal Rules of Evidence do not apply to suppression hearings); *Government of Virgin Islands in Interest of A.M.*, 34 F.3d 153 (3rd Cir. 1994) (Federal Rules of Evidence do not apply to juvenile transfer hearings); *United States v. Matlock,* ; *SEC v. General Refractories Co.*, 400 F.Supp. 1248 (D.D.C. 1975) (Evidence Rules not applicable to preliminary injunction hearing separate from a trial on the merits).

Subdivision (e) of the Rule has been abrogated. That subdivision is unnecessary to the extent that it was designed to preserve statutory evidence rules. The Federal Rules of Evidence preserve statutory evidence rules without regard to subdivision (e). See Federal Rules of Evidence 301, 402, 501 and 802. See also 5 Mueller and Kirkpatrick, *Federal Evidence* § 596, n.3 (2nd ed. 1994) (noting that the interest in preserving statutory rules of evidence is "achieved by the various qualifications found elsewhere in the Rules"). To the extent the Rule was intended as a signal to courts and practitioners that statutory rules of evidence remain in existence, the Committee believes that the usefulness of the subdivision has been diminished by the passage of time. The subdivision does not begin to cover all of the statutes bearing on admissibility of evidence, and some of the statutes referred to in the subdivision have been abrogated or relocated.

Nothing in the amendment is intended to affect the applicability of evidentiary rules provided by Act of Congress.

Model Two: Rules of Evidence Applicable Only to Proof of Sentencing Facts that are Decided by the Jury

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, including sentencing proceedings to the extent that a jury makes findings of fact, 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 (except sentencing proceedings to the extent that a jury makes findings of fact), or granting or revoking probation or supervised release; proceedings for psychiatric commitment or release; proceedings on motions to suppress or exclude evidence; proceedings to determine whether a juvenile should be prosecuted as an adult; preliminary injunction proceedings when conducted separately from a trial on the merits; issuance of warrants for arrest, criminal summonses, and search warrants; and proceedings with respect to release on bail or otherwise.

~~(c) *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 Anti-Smuggling 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.~~

Draft Committee Note

Subdivision (b) of the Rule has been amended to provide that the Federal Rules of Evidence are applicable to proof of facts that must be determined by a jury in sentencing proceedings. This change is necessary to accommodate Supreme Court rulings mandating that facts used to increase a sentence beyond a statutory or guideline maximum must be found by the jury and not the court. See [cite to *Booker* and *Fanfan*] The amendment does not extend the Evidence Rules to proof of facts that are properly determined by the court at a sentencing proceeding.

Subdivision (d) of the Rule has been amended to add certain proceedings to which the evidence rules (except those with respect to privilege) are not applicable. Case law has generally held that the Federal Rules of Evidence are not applicable to the proceedings specified by the amendment. *See, e.g., United States v. Walker,* 117 F.3d 417 (9th Cir. 1997) (evidence rules do not apply in a supervised release revocation proceeding); *United States v. Palesky,* 855 F.2d 34 (1st Cir. 1988) (Federal Rules of Evidence are not applicable in hearings held to determine whether a person will be committed to or released from a psychiatric facility); *United States v. Jackson,* 213 F.3d 1269 (10th Cir. 2000) (hearsay statement properly credited at a suppression hearing; the Federal Rules of Evidence do not apply to suppression hearings); *Government of Virgin Islands in Interest of A.M.*, 34 F.3d 153 (3rd Cir. 1994) (Federal Rules of Evidence do not apply to juvenile transfer hearings); *United States v. Matlock,* ; *SEC v. General Refractories Co.,* 400 F.Supp. 1248 (D.D.C. 1975) (Evidence Rules not applicable to preliminary injunction hearing separate from a trial on the merits).

Subdivision (e) of the Rule has been abrogated. That subdivision is unnecessary to the extent that it was designed to preserve statutory evidence rules. The Federal Rules of Evidence preserve statutory evidence rules without regard to subdivision (e). See Federal Rules of Evidence 301, 402, 501 and 802. See also 5 Mueller and Kirkpatrick, *Federal Evidence* § 596, n.3 (2nd ed. 1994) (noting that the interest in preserving statutory rules of evidence is "achieved by the various qualifications found elsewhere in the Rules"). To the extent the Rule was intended as a signal to courts and practitioners that statutory rules of evidence remain in existence, the Committee believes that the usefulness of the subdivision has been diminished by the passage of time. The subdivision does not begin to cover all of the statutes bearing on admissibility of evidence, and some of the statutes referred to in the subdivision have been abrogated or relocated.

Nothing in the amendment is intended to affect the applicability of evidentiary rules provided by Act of Congress.

FORDHAM
University School of Law

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

Daniel J. Capra
Philip Reed Professor of Law

Phone: 212-636-6855
e-mail:dcapra@law.fordham.edu
Fax: 212-636-6899

Memorandum To: Advisory Committee on Evidence Rules
From: Dan Capra, Reporter
Re: Proposed Amendment to Rule 803(8)
Date: December 15, 2004

At its Spring 2004 meeting the Evidence Rules Committee resolved unanimously to defer any consideration of a proposed amendment to Rule 803(8)—the hearsay exception for public reports. One version of a proposed amendment would have streamlined the rule to provide essentially that public reports are admissible unless the court finds that they are prepared in an untrustworthy manner. Another version would have narrowed the exclusionary language that currently applies in criminal cases.

The Committee voted to defer consideration of any amendment to Rule 803(8) because of the Supreme Court's decision in *Crawford v. Washington.* The Court in *Crawford* radically revised its Confrontation Clause jurisprudence. The question of whether a statement falling within a hearsay exception satisfies the accused's right to confrontation is now subject to a completely new and somewhat indeterminate set of standards. The constitutional law is in flux after *Crawford.* This uncertainty has a direct bearing on the proper scope of Rule 803(8), because most of the problems in using the Rule have arisen when the government offers a public report in a criminal case. This means that any amendment of Rule 803(8) that would apply to criminal cases is almost surely premature and unwise so shortly after *Crawford.*

In August 2004, the Committee received a request from a member of the public to consider an amendment to Rule 803(8). That request, from the Center for Regulatory Effectiveness (the "Center"), together with the extensive supporting documentation, is attached to this memorandum. The Evidence Rules Committee is required to consider a proposed amendment from a member of the public. The Reporter will report the Committee's resolution to the Center.

The amendment proposed by the Center is set forth in exhausting detail in the attached materials. This Reporter's memorandum is intended to inform the Committee on whether there is

a real need to amend the Rule in the manner suggested by the Center. It concludes that there is no such need.

Rule 803(8) currently provides as follows:

> **Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial**
>
> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> * * *
>
> (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.

Reporter's Background Discussion of Rule 803(8)

Rule 803(8) is one of the most complex of all the Federal Rules of Evidence. The exception is divided into three parts and each is slightly different in its reach. Part (A) permits any record, report, etc., setting forth the activities of an office or agency to be admitted. It applies in both civil and criminal cases and allows *any* party to take advantage of it. *See, e.g., United States v. Hardin*, 710 F.2d 1231 (7th Cir. 1983) (DEA statistical report showing the average retail price and purity of cocaine purchased by DEA undercover agents, offered to prove the defendant's intent to distribute the large amount of cocaine he was arrested with, was admissible under Rule 803(8)(A)). Part (B) covers matters observed by public officials pursuant to duty imposed by law when there is also a duty to report these matters; this Part does not on its face appear to allow anyone to use this exception in a criminal case to admit reports of matters observed by police officers and law enforcement personnel. Thus, (B) appears to apply to both sides equally in civil and criminal cases. In criminal cases it permits both the government and the accused to utilize the exception for some

public reports–specifically reports of matters observed by someone who is a public official but not a law enforcement officer– but would seem to limit *both* sides by barring law enforcement reports from admission into evidence. Part (C) covers findings resulting from an investigation made pursuant to legal authority. It applies in *both* civil and criminal cases, but appears to state that *only* the defendant can utilize it in a criminal case. This is apparently a judgment that the government should be bound by its own findings, but that the defendant is protected by confrontation principles from being similarly bound—though of course the constitutional basis of the exclusionary language must be revisited in light of *Crawford.*

Because of the strong presumption of reliability accorded to public reports, the burden of proving untrustworthiness is borne by the party seeking exclusion. The Fourth Circuit explained the rationale for placing the burden on the objecting party:

> Placing the burden on the opposing party makes considerable practical sense. Most government-sponsored investigations employ well-accepted methodological means of gathering and analyzing data. It is unfair to put the party seeking admission to the test of "re-inventing the wheel" each time a report is offered. * * * [I]t is far more equitable to place that burden on the party seeking to demonstrate why a time tested and carefully considered presumption is not appropriate.

Ellis v. International Playtex, Inc., 745 F.2d 292, 301 (4th Cir. 1981).

Suggestions for Amendment Deferred at the Spring 2004 Meeting:

At the Spring 2004 meeting the Reporter set forth, for discussion purposes, two possible versions of a proposed amendment to Rule 803(8). Both proposals were deferred because of the uncertainty in criminal cases created by *Crawford.* The two versions follow.

Model One–Rectifying the Textual Anomalies

The most obvious textual anomalies in the existing Rule 803(8) are: 1) confusing placement of the trustworthiness clause; 2) apparent exclusion of exculpatory law enforcement reports offered by the accused under Rule 803(8)(B); 3) overbroad exclusion of law enforcement reports when offered by the government under Rules 803(8)(B) and (C) (subject of course to *Crawford*).

The suggested amendment that might take care of these three textual anomalies provided 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 made under adversarial circumstances and offered against the accused, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made under adversarial circumstances pursuant to authority granted by law~~, unless~~. This exception is inapplicable if the sources of information or other circumstances indicate lack of trustworthiness in the preparation of the record, report, statement or data compilation.

Model Two: Deleting Overlapping Categories

The textual problems of Rule 803(8) arguably result from the unnecessary complexity of the three overlapping categories of public records. The suggested amendment for streamlining the amendment and making it less confusing provides as follows:

(8) Public records and reports.—Records, reports, statements, or data compilations, in any form, of public offices or agencies made pursuant to a duty imposed by law , ~~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 Basics of the Center's Proposed Amendment to Rule 803(8):

The Center proposes the following amendment to Rule 803(8):

(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~~ indicia, including noncompliance with duly promulgated quality standards for information disseminated by federal agencies, indicate lack of ~~trustworthiness~~ reliability.

The Center's Justifications for the Proposed Amendment:

The Center argues that the amendment will fulfill at least four functions:

1) First, it will impose the reliability requirements that have been promulgated by federal legislation and OMB guidelines to guarantee the quality of information in reports issued by the Federal Government.

2) Second, it will expand the kinds of factors that courts can use to determine whether a public report is sufficiently reliable to be admissible; specifically, the court will now be allowed to consider characteristics of the report (e.g., accuracy and completeness) as distinct from the methods of its preparation.

3) Third, it will apply the gatekeeper function of *Daubert* to the review of public reports.

4) Fourth, it will make clear that concerns about the reliability of a public report are questions of admissibility, not weight.

The four justifications are given substantial elaboration in the Center's report, attached to this memo.

Questions and Concerns for the Evidence Rules Committee:

There are a number of questions and concerns that the Evidence Committee might wish to address in considering the advisability of the Center's proposed amendment to Rule 803(8). Among these questions are:

1. Does the proposed amendment make any more sense than the amendments previously deferred in light of *Crawford*?

2. Is there a need for Rule 803(8) to reference the quality control standards of federal legislation and OMB guidelines?

3. Is there a need to expand the factors that are currently considered by the courts in determining the reliability of public reports? And if so, does the amendatory language accomplish that expansion?

4. Assuming the proposal is meritorious, does it justify an amendment to the Rule during the time that another package of amendments is working its way through the rulemaking process?

Each of these questions will be evaluated in turn.

1. Does the proposed amendment make any more sense than the amendments previously deferred in light of *Crawford*?

The Center's proposal is different in some respects from the proposals deferred by the Committee at its last meeting. However, the proposals share a basic goal: to admit reliable public reports and to exclude unreliable ones. This common goal, however, runs straight into the change wrought by *Crawford* in criminal cases. *Crawford* holds that if hearsay is testimonial, it doesn't matter how reliable it might be — the only way it can be admitted is if the declarant is subject to cross-examination.

This is not to say that law enforcement reports are going to be more or less admissible after *Crawford*. The question will be whether a particular law enforcement report is or is not testimonial. An argument could be made that routine tabulations of unexceptional data (e.g., border patrol records of vehicle crossings) are not in fact testimonial within the meaning of *Crawford*, because such reports are not prepared with a view to producing them as accusatory statements in a criminal case. Thus, there is an argument that only those law enforcement reports prepared with an eye toward prosecuting a particular accused will be found to be testimonial after *Crawford*. If that is the case, then the admissibility of law enforcement reports will end up in about the same place as it is in most courts today, i.e., tempering the absolute exclusionary rule in the text, and excluding only those reports prepared under adversarial circumstances.

On the other hand, it could be argued that *every* law enforcement report is testimonial when offered against an accused. The Court in *Crawford*, in compiling its list of clearly testimonial statements, seemed to focus on the participation of law enforcement in the production of the hearsay. The examples included accomplice confessions to law enforcement, grand jury testimony, and plea allocutions of accomplices. If the listing of these examples is intended to mean that law enforcement participation in preparing the statement *is* what makes a hearsay statement testimonial, then the result of *Crawford* would be that Rule 803(8)(B) and (C) are to be applied the way they are written, i.e., no law enforcement report can be admitted against a criminal defendant.

Of course, there is no way to predict with certainty how law enforcement reports will fare after *Crawford*. This is because the Court specifically declined to define the term "testimonial." The definition of that term must await a good deal of case law and perhaps an eventual resolution in the Supreme Court. Thus, even if admissibility of law enforcement reports ends up in exactly the same place as it is today, that will only occur after a few years of case law. So far, there has been no published decision that I am aware of that has evaluated a law enforcement report under *Crawford*.

It is notable that there is nothing in the Center's proposed amendment that makes it less susceptible to *Crawford* uncertainties than are the proposals deferred by the Committee at its last meeting. The Center's proposal applies to those public reports that are admitted by the courts in criminal cases ---- i.e., the routine, nonadversarial reports.

So with respect to the Center's proposal, there is the same risk that concerned the Committee

at its last meeting: the amended Rule could be unconstitutional as applied after *Crawford*. This could happen in one of two ways: 1) the amended rule could be construed to cover public records that are testimonial, and the reliability requirement of the amended rule would not satisfy the *Crawford* requirement of cross-examination for such reports; or 2) the amended rule could be construed to cover public records that are *not* testimonial, and yet the standards set forth by the amendment may not match the requirements for non-testimonial hearsay that are left for further development by the Court in *Crawford*.

Of course it is true that the *current* Rule 803(8) is susceptible to the same unconstitutional application after *Crawford*. But it is one thing to have the Supreme Court create constitutional questions about existing rules. It is another thing to pay the costs of amendment and yet end up with a rule that *still* raises the same constitutional questions.

The Center argues that its amendment can be construed to apply only to civil cases, and therefore no *Crawford* problems are presented. Yet the amendment does not say that it is only limited to civil cases. It does amend a subdivision that seems to exclude law enforcement reports, but the subdivision has not been read as it is written. That subdivision has been read to admit public reports that are routine and nonadversarial, such as records of border crossings. So if the language that has not been read literally is retained — as it is in the Center's proposal — there is no reason to think that courts would read it any differently than they had previously.

But even if the Center's amendment were to specify that it was only intended to affect civil cases, the problem then would be the possible need for serial amendments to the Rule. It may well become necessary at some point to amend Rule 803(8) to accommodate the changes wrought by *Crawford* in criminal cases. However, the need for or specifics of such an amendment will have to await judicial clarification of the meaning of *Crawford* —i.e., what exactly does "testimonial" mean, and what constitutional standards, if any, are applicable to non-testimonial hearsay? If the Center's amendment were to be proposed now, this could create the undesirable situation of having to amend the same rule twice in a relatively short period of time.

It would seem that Rule 803(8) would have to be creating extremely serious problems in civil cases before the Committee would wish to impose the costs of a sequential amendment to the Rule. As will be seen in the sections below, it does not appear that the Center has made the case that the problems are serious, if indeed there is any problem at all.

2. Is there a need for Rule 803(8) to reference the quality control standards of federal legislation and OMB guidelines?

The Center's memorandum sets forth the provenance and intent of the federal legislation on information quality and the corresponding OMB Guidelines. The memorandum appears to imply that the current Rule 803(8) is somehow inconsistent or in conflict with the legislation and guidelines. The complaint does not appear to be that the current Rule *precludes* a court from using the legislation and guidelines as a reference point for determining whether a proffered public report is admissible under Rule 803(8). Rule 803(8) requires a court to consider whether a public report is trustworthy, and certainly the information quality standards for public reports can be considered relevant to trustworthiness. An amendment would not seem necessary to *permit* a court to rely upon the information quality standards.

Instead, the complaint seems to be that courts are admitting public reports that do not satisfy the information quality standards, by holding those reports sufficiently trustworthy and ignoring the federal standards. The argument therefore goes that Rule 803(8) is in conflict with the information quality standards because it does not require courts to use them, even though the standards are applicable to the proffered reports. So the goal of the amendment is to *require* courts to employ the information quality standards in reviewing the admissibility of a public record. The failure of a proffered report to comply with the information quality standards is, by the terms of the amendment, a factor supporting exclusion.

The problem with this analysis is that there is nothing at all in the federal legislation, nor in the OMB standards, that purports to govern evidentiary admissibility. Simply put, these are not rules of evidence. Nothing in the legislation or standards suggests that failure to comply will render a report inadmissible in a federal trial. The Center makes a passing argument that Congress was concerned about disseminating unreliable reports, and dissemination to a jury "surely comes within Congressional intent." But there is nothing sure about that at all. Ordinarily, when Congress passes a statute outside the Federal Rules of Evidence that purports to govern evidentiary admissibility, it makes that point clearly. The federal courts have held that statutes are not to be used to exclude relevant evidence unless the statute clearly expresses its intent to exclude evidence from a federal trial. See, e.g., *United States v. Lowery,* 166 F.3d 1119 (11th Cir. 1999) (holding that relevant evidence obtained in violation of the McDade Act could not be excluded; noting that if Congress wants a statute to require exclusion of evidence, "it will have to tell us that in plain language using clear terms."). The fact is that the legislation and standards on information quality are designed to guarantee that a public report is reliable; there is no design to exclude non-complying reports from a federal trial.

Beyond the lack of any conflict between Rule 803(8) and the information quality standards, it bears noting that requiring a court to use those standards may result in problems of application. It seems certain that many of the public reports that are offered in federal courts are not even subject to the information quality standards. Examples include reports of ad hoc commissions, state agencies, and law enforcement bodies. (Put another way, not every report admitted under Rule

803(8) is a report by a federal agency subject to the information quality standards.) How are those reports to be treated? The Center's proposed amendment seems to indicate that the court might have to apply the information quality standards to those reports. Under the amendment the court must factor in "noncompliance" with the information quality standards. The term "noncompliance" can certainly mean a failure to meet the standards even if not bound by them—just as easily as it can mean that the report is bound by the standards and fails to meet them. Yet a different and equally serious problem will be created if the amendment is construed not to cover reports that are exempt from the information quality standards. In that case, there will be two sets of reliability standards in the same rule—one for reports subject to the information quality standards, and a lesser one for reports not so subject. It makes no sense to apply two different reliability standards to comparable reports offered under the same rule. Nor does it make sense to apply stricter reliability standards to the reports of federal agencies, as it would seem that these reports are likely to be more trustworthy than any other kind.

In sum, it appears that there is little good and possibly some harm in specifying that federal courts are to consider information quality standards in assessing the trustworthiness of a public record offered under Rule 803(8). Federal courts are not currently prohibited from considering such standards, where appropriate, under the existing Rule; nothing in the legislation requires that evidence be excluded for failure to comply with the standards; and including specific language in the Rule will result in uncertain and perhaps nonsensical application of the standards. It seems preferable to leave the relevance of information quality standards to the discretion of the trial judge, as the current Rule 803(8) already does.

3. Is there a need to expand the factors that are currently considered by the courts in determining the reliability of public reports? And if so, does the amendatory language accomplish that expansion?

The Center states that an amendment to Rule 803(8) is necessary because "factors such as objectivity (or bias), accuracy, completeness, and reproducibility (i.e., adequate disclosure of methodology and underlying data)" are specified in the information quality standards and yet are allegedly ignored by many federal courts assessing the admissibility of public records. Thus, the Center suggests that the rule make clear that these factors must be taken into account by the court.

There are several problems with the Center's premise that the factors "such as" objectivity, accuracy, completeness and reproducibility" should be added to a list of relevant factors. The first problem is that there *is no list* in the existing Rule. There are several factors that are listed as relevant in the Committee Note (i.e., timeliness, special skill or experience, conduct of a hearing, and motivation), but there is nothing in the text of the Rule. It is therefore confusing at best to add some

factors relevant to trustworthiness to the text and leave others to the Note.

It should be noted that there are many references to trustworthiness and reliability in the Federal Rules of Evidence, and none of those Rules contain a list of factors in the text of the Rule. See, e.g., Rule 803(6) (referring generally, as does Rule 803(8), to the source of information and the method and circumstances of preparation, as bearing on lack of trustworthiness); Rule 804(b)(3) (referring generally to "corroborating circumstances" that must clearly indicate the trustworthiness of the statement); Rule 807 (referring generally to "circumstantial guarantees of trustworthiness" equivalent to the other hearsay exceptions). Even the amendment to Rule 702, whose major purpose was to guarantee the reliability of expert testimony, does not establish a list of relevant factors in the text of the Rule. The amendment simply requires in general terms that an expert's testimony be based on "reliable principles and methods."

There is good reason to avoid a list of reliability factors in the text of a rule. The risk is the factors in the list will be treated as exclusive even though they are not intended to be. Even if not seen as exclusive, there is a risk that the listed factors will be treated as more important than the relevant factors that are not listed. And there is no possible way to list all of the factors that might pertain to reliability, and so there is no chance of having an all-inclusive list. Thus, the prior history of the Evidence Rules, as well as good sense, cuts against listing the factors cited by the Center in the text of the Rule.

It might be argued that the Center does not in fact list any reliability factors in the text of its proposed amendment to Rule 803(8); rather it simply refers to noncompliance with information quality standards as a factor to be taken into account. But it is not that simple. First, the information quality standards are now a listed factor—no such other factor is listed nor is any like factor found in any other trustworthiness rule. Moreover, by referencing the information quality standards, the amendment would in fact incorporate trustworthiness factors into the text of the Rule. Indeed, it would so in a manner that is likely more problematic than listing the factors would be. Under the Center's amendment, the federal court would have no ready list of factors. It would have to plumb through OMB regulations to determine which information quality standards should apply to the proffered report. These factors may vary, at least in some degree, from agency to agency. This is hardly a user-friendly proposal.

All of this might be worth it if there is evidence that Federal courts have ignored "factors such as objectivity (or bias), accuracy, completeness, and reproducibility (i.e., adequate disclosure of methodology and underlying data)" in reviewing public reports under Rule 803(8). It does seem that factors such as bias, completeness, reliable methodology and sufficient basis should be considered relevant factors in determining the reliability of most public reports— though it is also probable that flexibility is required because public reports differ in provenance, subject matter, etc., so that a rigid list of factors appears unwarranted. At any rate, accepting that the Center's listed factors are important, it is by no means the case that federal courts are wholly ignoring these factors.

In fact such factors as bias, completeness, reliable methodology and sufficient basis are

routinely considered by courts in reviewing the trustworthiness of public reports. This is so despite the conclusions drawn by the Center on the basis of its review of the case law. The Center assumes that most courts are ignoring these factors whenever they declare that a factor such as bias is a question of "weight" rather than "admissibility". But a more careful look indicates that almost all of the cases cited by the Center consider the factors cited by the Center as relevant to reliability and thus admissibility. However, these courts have ruled that a minor flaw in any of these factors does not justify exclusion; rather, a minor flaw is to be addressed on cross-examination and argument and thus becomes a question of weight. And the reason that a minor flaw is not determinative is that public reports are presumed trustworthy; thus, the opponent must make a strong case of untrustworthiness before a report can be excluded. See *Beech Aircraft v. Rainey,* 488 U.S. 153, 167 (1988) (relying on Advisory Committee Note to the Rule indicating that with respect to public reports "admissibility is assumed in the first instance"). It therefore makes perfect sense that minor flaws in the reliability factors, whether singly or cumulatively, are ordinarily questions of weight. It is only when those flaws are serious and substantial that they become questions of admissibility. And the Center's proposal does not purport to change that presumption. In sum, the case law cited as problematic presents little if any problem.

The Center's Analysis of Case Law

It would not be worth the time to undertake a point by point critique of every case cited by the Center as problematic. But it is probably worth it to analyze a few of them, to illustrate the point that the courts have been getting it right in excluding only those public reports that are demonstrably untrustworthy.

1. *Blake v. Pellegrino,* 329 F.3d 43 (1st Cir. 2003): This was a malpractice action in which the decedent's cause of death was listed as "asphyxia by choking." The trial court excluded this part of the report because he was not persuaded that the decedent's death was in fact caused by choking. The Court reversed on the ground that the trial court had arrogated to itself the role of the jury in deciding whether to believe the conclusion in the report. The court held that the ultimate conclusion of the report was for the jury. The methodology used by the reporter was for the court.

The ruling in *Blake* is unexceptional and indeed eminently correct. In deciding admissibility, a judge does not decide whether evidence can be believed by the jury. The Supreme Court made this very point in *Daubert*, when it declared that the gatekeeper function applied to the expert's methodology, but that the expert's conclusion was for the jury. It is also consistent with the amendment to Rule 702, which provides in the Committee Note that

> When facts are in dispute, experts sometimes reach different conclusions based on competing versions of the facts. The emphasis in the amendment on "sufficient facts or data" is not intended to authorize a trial court to exclude an expert's testimony on the ground that the court believes one version of the facts and not the other.

Indeed, if what the Center means by "accuracy" is a determination that the judge agrees with the conclusion of the public report, then there is all the more reason to reject the proposed amendment. Allowing the judge to exclude a public report on the ground that he does not agree with it is completely contrary to the presumption of reliability that a public report carries, and is also completely inconsistent with the jury's role.

2. *Gentile v. County of Suffolk,* 926 F.2d 142 (2d Cir. 1991): The Center complains that the Court looked at the trustworthiness question as a matter of weight rather than admissibility. The report, about the County's negligence in police training, was found by Judge Weinstein to be reliable and was admitted at trial. The County complained that it was precluded from attacking the report at trial as a result of Judge Weinstein's ruling on trustworthiness. But the court held that the County was confusing the trustworthiness of the report (an admissibility question) with the weight it should be given by the jury; the County was free at trial to attack the report for bias, incompleteness, or any other flaw. The court noted that the judge properly refused to instruct the jury that he had found the report to be trustworthy, and instead instructed the jury that the report was admissible for whatever weight the jury chose to give it.

It is difficult to understand the Center's objection to the result and analysis in *Gentile.* It is clear that the question of trustworthiness is a threshold requirement for the judge, and then it is for the jury to determine how much credit to give to the report. In attacking the "credibility" of the report to the jury, the opponent may well make the same arguments at trial that it would make at an admissibility determination. But there is nothing remarkable or unusual about this. See, e.g., *Beech Aircraft, supra,* 488 U.S. at 168 ("it goes without saying that the admission of a report containing "conclusions" is subject to the ultimate safeguard -- the opponent's right to present evidence tending to contradict or diminish the weight of those conclusions").

For example, a criminal defendant who claims that a confession was involuntary will seek to exclude the confession by bringing to the judge's attention the fact that he was threatened by police officers. If the judge finds nonetheless that the confession was voluntary, the defendant can attack the weight of the confession by bringing to the jury's attention the fact that he was threatened by police officers. It is quite common for admissibility and weight factors to track each other. There is nothing at all in *Gentile* to indicate that Rule 803(8) is creating a problem in the courts. And note that the trial judge in *Gentile* was Judge Weinstein, who is unlikely to make an elementary gaffe in the application of an evidence rule.

3. *Complaint of Nautilus Motor Tanker Co.,* 862 F.Supp. 1251 (D.N.J. 1994): The Center complains that the court admitted a Coast Guard report under Rule 803(8) without considering, at the admissibility level, the charge that the Coast Guard investigator was unqualified and that the report was incomplete. In fact the court acted properly in reaching its decision to admit the report.

The court began its analysis with the well-accepted proposition that public reports are presumed reliable and that the opponent faced a "heavy burden" in challenging the trustworthiness of the report. The court recognized the fact that questions of the quality of the investigator and thoroughness of the investigation were pertinent to the admissibility of the report. It simply held that factual assertions of problems on these two counts were not "sufficiently convincing" to show the report was untrustworthy. The court found that the existence of other factors of trustworthiness (e.g., timeliness and lack of bias) outweighed the possible defects stressed by the opponent. Therefore, the defects became questions of weight.

The *Nautilus* result is completely unremarkable given the presumption of reliability that attaches to public reports. Given this presumption, it cannot be the case (as the Center seems to assume) that a report should be excluded whenever the opponent raises a claim of lack of qualifications, incompleteness, or faulty methodology. As applied to admissibility, the claim of defect must be so serious as to substantially outweigh any positive trustworthiness factors that are found. If they are not that serious, then they become questions of weight. Far from excluding the factors of qualification and completeness as part of the admissibility question, the *Nautilus* court explicitly considered those factors before finding the report admissible. It simply held that the defects cited did not substantially outweigh the trustworthiness factors that it had found to exist. In other words, a public report does not have to be perfect to be admitted.

4. *Moss v. Ole South Real Estate, Inc.*, 933 F.2d 1300 (5th Cir. 1991): The Center declares that *Moss* is a "leading case on credibility and weight v. admissibility" and is relied upon in other circuits. It therefore is a worthy candidate for investigating the Center's premise that the courts have misapplied Rule 803(8) by treating factors pertinent to admissibility solely as questions of weight for the jury. The case involved two reports— one by the Air Force and one by HUD — investigating allegations of housing discrimination. The magistrate judge found that the reports were not admissible under Rule 803(8). He reasoned that the reports drew inaccurate conclusions from the information that had been obtained; that the reports were incomplete; and that the reports relied on biased witnesses. The court found that the magistrate judge had abused its discretion, in that he excluded the reports because he found them not credible. Essentially, the magistrate judge had disagreed with the conclusions in the reports. The court concluded that "in determining trustworthiness under Rule 803(8)(C), credibility of the report itself or the testimony in the report are not the focus. Instead the focus is the report's reliability. As the Supreme Court stated in *Beech Aircraft*, 'this trustworthiness inquiry -- and not an arbitrary distinction between 'fact' and 'opinion' -- was the Committee's primary safeguard against the admission of unreliable evidence.'"

Contrary to the conclusion of the Center, the court in *Moss* did not misinterpret admissibility factors as questions of weight. Rather, the court in *Moss* reaches the correct result: that a public report is not to be excluded simply because the court disagrees with its conclusions. As with expert testimony, conclusions are for the jury; in deciding admissibility, the trial court is to focus on the methodology employed by the public body in reaching its conclusion.

The Center takes specific exception to the *Moss* court's assertion that the following factors are pertinent only to weight: 1) the accuracy of the report; 2) the completeness of the report; and 3) the possibility that the report relies on information coming from biased witnesses. Taking each of these assertions in turn:

1) The accuracy of a report is indeed almost always a question of weight rather than admissibility. If the court excludes a report simply because it finds the conclusion inaccurate, this is a classic usurpation of the jury's role. Essentially, "inaccurate" is simply another word for "not credible". To take another example, assume that a trial judge excluded a dying declaration even though it was made by a person who had personal knowledge of the event and was under belief of impending death. Assume that the ground for exclusion is, "I think the victim's identification of the perpetrator was not accurate." That judge would be reversed for usurping the jury's role in determining the credibility of witness testimony (the witness in this case being a hearsay declarant). The same should be true when a trial judge excludes a public report, otherwise admissible, on the ground that it is "inaccurate."

It is true that in extreme cases, a report might be so inaccurate that it should not be admitted. It is at least conceivable that the report's conclusion is so patently incorrect that a court could conclude that there must be something wrong with the methodology employed by the public entity. This is the same principle applied to expert testimony under Rule 702, i.e., that conclusions are for the jury except in extreme cases where the conclusion is so patently wrong as to indicate some problem with the methodology. See the Advisory Committee Note to the 2000 amendment to Rule 702.

The Center omits a footnote by the *Moss* court recognizing that in extreme cases the inaccuracy of a report can be a question of admissibility. Note 5 of the opinion provides as follows:

> Of course, a court should not completely ignore an 803(8)(C) report's conclusions. If reasonable jurors could not accept the report's conclusions, then there would be no reason to admit the report. There must be, in other words, some reasonable basis for the conclusions. The absence of some reasonable basis will, however, be unusual because of the nature of the reports covered by Rule 803(8)(C). The two reports before us do not have such a problem. The conclusions are supported by reasonable factual findings and reasonable jurors could accept the conclusions.

2) The fact that a public report did not take into account all of the pertinent sources of information is properly considered a question of weight, again with the exception of extreme cases in which there was virtually no investigation. The reason for this is, once again, that public reports are presumed reliable. See *Moss* at 1308 ("while Rule 803 is concerned with hearsay and hearsay is excluded because of the general distrust of out-of-court declarants, Congress has ruled that there is a presumption that this distrust should generally not apply to public officials doing their legal duties. Evaluative reports generally do not have the four problems associated with most hearsay -- problems of memory, perception, ability to communicate, and sincerity. Whether evaluative reports do in fact have

these hearsay dangers is most often a question of methodology, not a question of credibility.")

The *Moss* court does not say that an incomplete public report is always admissible, with the lack of completeness always a question of weight. Rather, it says that given the presumption of reliability attached to public reports, any defect in completeness is presumed to be a question of weight. Exclusion on admissibility grounds is reserved for those public reports in which the entity patently failed to use proper investigative methods (e.g., failed to consider any of the relevant sources of information).

3) The court in *Moss* does not say that reliance on biased sources is always a question of weight rather than admissibility. Rather, it says that given the presumption of reliability attached to public reports, any reliance on biased sources is presumed to be a question of weight. However, in extreme cases, a public report can be excluded for inappropriate reliance on biased sources. For example, if the public entity relies *solely* on sources that are clearly unreliable because they have a motive to falsify, the report may be excluded under the trustworthiness clause of Rule 803(8). The Center omits the footnote in *Moss* (note 3) that makes this point:

> We do not suggest that bias may never render a report unreliable under Rule 803(8)(C). In this case, however, from reading the magistrate's ruling, we are also left with the opinion that he either disagreed with the conclusions of the Air Force and HUD or did not think that evaluative reports should generally be admissible. Neither reason is within a court's discretion.

Indeed there are a number of cases — not cited by the Center — that exclude public reports relying predominantly or exclusively on sources of information that are biased or otherwise untrustworthy. See e.g., *Anderson v. City of New York,* 657 F.Supp. 1571 (S.D.N.Y. 1987) (report concerning police misconduct was excluded because only one side's evidence was heard); *Faries v. Atlas Truck Body Mfg. Co.,* 797 F.2d 619 (8th Cir. 1986) (accident report prepared by police officer was properly excluded because the officer prepared his report after talking to only one of the drivers).

As Judge Selya says, "we need go no further." The Center has simply not made the case that courts construing Rule 803(8) are improperly treating factors pertinent to admissibility as solely questions of weight. While it is not worth writing out all of the cases for the Committee, it appears that every one of the cases cited by the Center can be explained on the following terms: public reports are presumed reliable, and therefore the trial court only needs to determine whether the methods employed by the public entity are those that tend to guarantee trustworthiness. Questions of accuracy, completeness, bias, etc., are questions of weight except in extreme cases in which the report is so plainly defective that it makes no sense to give it to the jury.

Given the fact that the Center does not challenge the basic premise of Rule 803(8)—that public reports are presumed reliable because it is the government's job to make reliable reports — it is clear that any confusion over admissibility and weight with respect to public reports lies with the Center and not with the courts.

The alleged disparity between admissibility of public reports and admissibility of expert testimony

The Center contends that an amendment to Rule 803(8) is necessary to guarantee that the gatekeeper standards of Rule 702 are applied to scrutinize public reports. The Center is correct that the conclusions found in public reports will probably be treated by a jury as tantamount to expert testimony. The Center is also correct that if a report of a public entity will be treated as expert testimony, it should be scrutinized by the court in the same basic way as the court would review expert testimony for trial. But there are two major differences between review of expert testimony in a public report and review of an expert proffered for trial.

First, the conclusion of an expert in a public report may necessarily be more compressed and less tailored to litigation than the testimony of an expert preparing for trial. So in reviewing a public report the court acting as gatekeeper should not expect the kind of detailed explication of methodology, basis, etc., as would be expected from a witness preparing for trial. Second, and more importantly, a public report is presumed reliable—the burden is on the opponent to show unreliability, and therefore public reports are excluded only if the public "expert's" opinion is patently unreliable. In contrast, it is the proponent's burden to show that a trial expert's testimony is reliable.

Taking the differing presumption into account, the Center has simply not made the case that the cases concerning public "expert" conclusions under Rule 803(8) are somehow in conflict with or disparate from the case law involving trial experts under *Daubert* and Rule 702. The Center cites 13 cases as being "in conflict with the specific factors for determining reliability under Rule 702." (There are three other citations with a cf. reference, but each of those cases was decided on grounds other than reliability). It is notable that six of these cases were decided before *Daubert* imposed the gatekeeper function on expert testimony. (One cited case was decided 43 years before *Daubert*). It seems unwise to find an inconsistency between treatment of public "experts" and trial experts when the standards for trial experts had not even been set. Two of the post-*Daubert* cases cited are *Blake* and *Gentile*, discussed above. In both of those cases, the courts drew a distinction between conclusion and methodology—exactly the same distinction drawn by the *Daubert* Court. Nor was either case one in which the conclusion in the public report was so demonstrably unreliable that it should have been excluded because of some presumed flaw in the methodology.

It bears noting that the Court in *Daubert* does not say that the reliability of an expert's opinion is purely a question of admissibility and never a question of weight. Rather, the trial court's

job is to exclude clearly unreliable evidence; the fact that the expert's testimony is not perfect is a question of weight rather than admissibility. For example, the fact that an expert's conclusion might be inaccurate is not a ground for exclusion, for the Court in *Daubert* declared that the "focus, of course, must be solely on principles and methodology, not on the conclusions they generate." Moreover, as the Committee Note to Rule 702 puts it:

> A review of the caselaw after *Daubert* shows that the rejection of expert testimony is the exception rather than the rule. *Daubert* did not work a "seachange over federal evidence law," and "the trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system." *United States v. 14.38 Acres of Land Situated in Leflore County, Mississippi,* 80 F.3d 1074, 1078 (5th Cir. 1996). As the Court in *Daubert* stated: "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." 509 U.S. at 595.

And all this goes double for public "expert" reports, where there is a heavy presumption of reliability. Thus, the five remaining post-*Daubert* cases cited by the Center for "disparity" can all be explained by the fact that the courts refuse to exclude the public reports simply because there is some flaw in the methodology or basis of the "expert's" opinion. These rulings would probably be within the court's discretion under *Daubert* even if the expert were to testify at trial. They are definitely within the court's discretion to admit given the presumption of reliability attendant to public reports.

To take one example cited by the Center: the court in *Union Pacific v. Kirby Inland Marine,* 296 F.3d 671 (8th Cir. 2002), held that a report by the Coast Guard concerning a bridge was properly admitted. The plaintiff opposed admission on the ground that the Coast Guard relied on hearsay to reach its conclusion. The court held that reliance on hearsay did not render the report inadmissible. The Center criticizes this result and argues that it is disparate with what a gatekeeper would do were the expert to testify at trial. But in fact this is not so. Experts who testify at trial can rely on hearsay, so long as it is the type of information relied upon by other experts in the field. See Rule 703. From what can be gleaned of the facts in *Union Pacific*, the hearsay relied upon the Coast Guard was precisely the kind on which engineers would rely in determining whether a bridge posed an obstruction to navigation, i.e., reports from those experienced with the river and knowledgeable about the bridge. As the court in *Moss* put it:

> Under Rule 703, experts are allowed to rely on evidence inadmissible in court in reaching their conclusions. There is no reason that government officials preparing reports do not have the same latitude.

Finally, it should be noted that there are a number of reported cases — none cited by the Center — that uphold exclusion of public reports when it is clear that the report would be excluded if coming from a trial expert. See, e.g., *Jenkins v. Whittaker Corp.*, 785 F.2d 720 (9th Cir. 1986) (report excluded where public official had little competence or experience and did little

investigation); *Matthews v. Ashland Chem., Inc.*, 770 F.2d 1303 (5th Cir. 1985) (public report on cause of a fire was properly excluded due to insufficient investigation and official's lack of qualifications).

In sum, there is no justification for amending Rule 803(8) to rectify a disparity between that Rule and Rule 702. The disparity, if any, is due to the presumption of reliability attendant to public reports, and there is no good argument for doing away with that presumption.

4. Assuming the Center's proposal is meritorious, does it justify an amendment to the Rule during the time that another package of amendments is working its way through the rulemaking process?

The long-term planning report adopted by the Standing Committee states that a Committee should try to "package" its amendments. The rationale for "packaging" is that a constant stream of piecemeal amendments to the rules is confusing to courts and litigants and is damaging to the integrity of the rulemaking process. The proposed amendments to the Evidence Rules that are currently out for public comment were packaged in compliance with the long-term planning report. The amendment to Rule 404(a), for example, was held for at least a year until the other amendments were discussed and approved.

The amendment to Rule 803(8) proposed by the Center cannot be packaged with any other current proposal, as the proposals to amend the other Evidence Rules are currently out for public comment. If the Center's amendment were approved, presumably it would be proposed to the Standing Committee for release for public comment at the Spring 2005 meeting. This would mean that one proposed amendment to the Evidence Rules would be out for public comment while others would be before the Judicial Conference and then the Supreme Court. That is a situation to be avoided, at least in the absence of exigent circumstances. And it is clear from the above analysis that the circumstances supporting the Center's proposal are not exigent, if indeed they exist at all. So even if the Committee is in favor of the Center's proposal, it may wish to defer any amendment to Rule 803(8) until at least the January 2006 meeting of the Standing Committee. By that time, the current package will have been enacted, if all goes well.

It may be that exigent circumstances might require the Committee to consider and propose some other amendment to the Evidence Rules before the current package is enacted. The obvious possibility is an amendment to Rule 1101 to provide that the Evidence Rules apply to sentencing proceedings — an amendment that might be made necessary by the Supreme Court's decisions in *Booker* and *Fanfan*. If that is the case, then the Committee may wish to consider whether to include an amendment to Rule 803(8) as part of a new package. But that assumes that the Center's proposal is indeed needed to solve a problem that the courts are having in applying Rule 803(8). While there might be a problem in applying 803(8) in criminal cases, it appears that the Center has found no problem worth addressing in civil cases.

Scanned

Center for Regulatory Effectiveness

Suite 700
11 Dupont Circle, N.W.
Washington, D.C. 20036-1231
Tel: (202) 265-2383 Fax: (202) 939-6969
www.TheCRE.com

RECEIVED 3/5/04 By Fax

04-EV-A

March 5, 2004

Peter G. McCabe
Secretary, Committee on Rules
of Practice and Procedure
Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Bldg.
1 Columbus Circle, NE – Rm. 4-170
Washington, DC 20544

I am writing to advise the Standing Committee and the Advisory Committee on Evidence Rules that we plan to submit, after the Advisory Committee's April meeting but well prior to its Fall meeting, a detailed, formal proposal to amend Federal Rules of Evidence 803(8) (hearsay exception for public records and reports) and 702 (testimony by experts). We will propose specific language for incorporating into those evidence rules the new information quality and reliability standards required by recently-enacted federal legislation.[1]

We are advising you at this time of our plans to submit such a formal proposal because we understand that at its April meeting the Advisory Committee expects to consider Reporter's recommendations on the advisability of certain revisions to evidence Rule 803(8). The intention to consider amendments to Rule 803(8) is reflected in the minutes of the Committee's Spring 2003 meeting, although the exact nature of the amendments which might be proposed is not explained. We believe the Committee might wish to consider at the Fall meeting our upcoming proposal in conjunction with any Rule 803(8) amendment(s) recommended by the Reporter. It is likely that the amendment(s) we will propose to Rule 702 will closely mirror ones we will propose for Rule 803(8).

We were unable to complete detailed materials to support our planned proposal for such amendments in time to allow for careful review by the Reporter and the Committee prior to its April meeting. However, we believe it advisable to provide some general background at this time.

---

[1] P.L. 106-554, App. C, sec. 515, Dec. 21, 2000; 114 Stat. 2763, 2763A-153; 44 U.S.C. § 3516 note.

In 2000, Congress enacted legislation directing the Office of Management and Budget to issue rules for ensuring the quality of information disseminated by the federal government. In September 2001 and February 2002, OMB issued government-wide information quality guidelines. At the end of September 2002, all federal agencies issued their agency-specific guidance to comply with the OMB guidelines. The OMB and agency rules establish specific minimum quality standards for the acceptability of federal agency information that is to be made public. The rules are even more specific for certain scientific and technical information, and especially for "influential" scientific, technical, and financial information.[2]

We believe that the Committee will want to give careful consideration to amending the evidence rules to incorporate these Congressionally-mandated standards which pertain to assessment of the "reliability" and "trustworthiness" of information disseminated or sponsored by federal agencies.

We would appreciate being advised of a date by which our proposal should be submitted to allow for such consideration by the Advisory Committee this Fall.

Sincerely,

William G. Kelly, Jr. T.B.
General Counsel

cc: Honorable Jerry E. Smith, Chair, Advisory Committee on Evidence Rules
Prof. Daniel J. Capra, Reporter, Advisory Committee on Evidence Rules

[2] The OMB rules were published at 66 FR 49718, Sept. 28, 2001 and 67 FR 8452, Feb. 22, 2002. For the rules of individual agencies, see www.TheCRE.com ("Data Quality Guidelines by Agency"), or www.whitehouse.gov/omb/inforeg/agency_info_quality_links.html.

Scanned

Center for Regulatory Effectiveness

Suite 700
11 Dupont Circle, N.W.
Washington, D.C. 20036-1231
Tel: (202) 265-2383 Fax: (202) 939-6969
www.TheCRE.com

RECEIVED 8/10/04

04-EV-A

August 9, 2004

Peter G. McCabe
Secretary, Committee on Rules
of Practice and Procedures
Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Bldg.
1 Columbus Circle, NE – Rm. 4-170
Washington, DC 20544

Dear Mr. McCabe:

Re: Suggestion for an amendment to the "trustworthiness" proviso of Federal Rule of Evidence 803(8)(C), Hearsay Exceptions, Availability of Declarant Immaterial, Public Records and Reports (findings from an investigation)

On behalf of the Center for Regulatory Effectiveness ("CRE"), I am submitting the attached memorandum which suggests an amendment to the "trustworthiness" proviso of evidence rule 803(8)(C).[1] The amendment is suggested for the purposes of (1) resolving conflicts and inconsistencies in federal case law interpreting and applying the Rule's "trustworthiness" proviso, including a circuit split; and (2) achieving consistency between federal case law interpreting the proviso and the recent federal information quality legislation and the agency rules promulgated in 2002 to implement that legislation. The information quality legislation and agency rules have now established basic quality standards which must be met by all information disseminated to the public by federal agencies.

We request that this suggestion be considered for distribution with a request for comments to the bench, bar, Congress, the legal academic community, and other interested parties by the Advisory Committee on Evidence Rules at its Fall meeting, currently scheduled for November 15, 2004 in Washington, D.C.

---

[1] CRE addresses not only issues concerning federal regulations, but also issues concerning federal "regulation by information" and "regulation by litigation". CRE, Congress, and others have recognized that dissemination of information by government agencies can affect the private sector to an extent similar to direct regulation. That recognition was the impetus for the information quality legislation.

We understand that the Committee recently decided, at its April 2004 meeting, to defer consideration of certain potential proposed amendments to Rules 803(8), 803(3) and 804(b)(3); however, those proposed amendments were not related to the ones suggested here, which, we believe, deserve, and require, more immediate attention. We are fully aware of the situation with regard to the U.S. Supreme Court's March 2004 decision in *Crawford v. Washington*, and the Advisory Committee's subsequent statements of reluctance to address amendments to the hearsay exceptions in view of that decision. We believe that such reluctance should not extend to the suggestion we are submitting.

The *Crawford* decision did not address the trustworthiness or reliability of information sought to be introduced into evidence under one of the hearsay exceptions; it turned on whether law enforcement reports proffered in criminal cases against the accused under a hearsay exception are "testimonial" in nature, regardless of reliability. Allowing the case law on what constitutes "testimonial" evidence to evolve and mature before addressing issues concerning the use of law enforcement records and reports in criminal cases under 803(8) or other hearsay exceptions – the rationale for deferring consideration of the amendments to 803(8) that were under consideration in April 2004 -- will not assist in addressing the need to resolve circuit conflicts and inconsistences in interpreting the trustworthiness proviso, nor ensure that the trustworthiness provision is consistent with Congressional intent regarding the reliability of public records and reports. While the case law on "testimonial"public records or reports is evolving, the courts will still need to confront issues of trustworthiness and reliability which were not in any way addressed in *Crawford*, and which were explicitly avoided. Congressional primacy with regard to the Rules appears to require that the issues raised here, and the suggested amendment, be addressed expeditiously. Even if deferral of a Committee recommendation on the suggested amendment were desirable, it would be appropriate to begin the process of soliciting comments from the bench, bar, Congress, and others, and Committee consideration of the issues, especially given the extended period often required for consideration of a rules amendment.

The federal legislation on information quality was enacted in 1995 and 2000, and government-wide final rules implementing the legislation were promulgated in 2002. Rule 803(8) was enacted in 1975; therefore, the supersession provisions of 28 U.S.C. § 2072 do not apply, and the later Congressional directives on information quality and the rules implementing the legislation control.

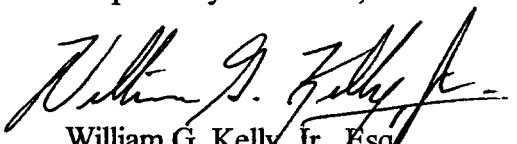
An amendment is necessary because some federal circuit and district courts have interpreted the "trustworthiness" proviso of 803(8)(C) in a manner that is inconsistent with other circuits, and is now inconsistent with the information quality legislation and rules, by disallowing consideration of accuracy, bias, reliability of methodology and underlying data, and reproducibility when ruling on trustworthiness for the purpose of admissibility. An amendment, and explanatory notes, would also increase the awareness of the legal community concerning these new information quality requirements in those circuits and districts that do not have such inconsistent case law. Furthermore, the amendment would provide an opportunity to revise the Advisory Committee's Note on 803(8)(C) to reflect other important developments since 1975, such as the Supreme Court's decision in *Beech Aircraft Corp v. Rainey*, 488 U.S. 153 (1988), which resolved the split among the circuits as to

whether 803(8)(C) covers "evaluative" reports by governmental entities. The current Note was prepared and issued prior to 1973 and is now inaccurate in reflecting an unresolved conflict.

We believe it is particularly important to circulate this suggested amendment for comment because it appears that many pertinent court decisions on admissibility under 803(8)(C) are unpublished, and many more might never have been the subject of a written opinion, and might not have been appealed in view of the highly deferential review standard of "abuse of discretion" observed in all circuits. Even in the case of published or unpublished opinions available for review, the opinions often do not contain sufficient detail to ascertain the exact nature of the objection(s) to admission. It therefore appears that circulation of the suggestion with an explanation of the issues it would address is the only way to gauge fully the seriousness of the current inconsistencies in interpretation of the trustworthiness proviso of 803(8)(C) and the need for clarification. In addition, our suggestion and supporting memorandum address only federal case law, and it would be valuable to obtain some idea of the extent to which inconsistent federal case law has influenced state case law. We have information indicating that federal agency reports – particularly reports relating to potential health hazards – are frequently used in personal injury litigation in state courts. We also have received anecdotal information that inconsistencies in interpreting the trustworthiness proviso have given rise to considerable forum shopping. It does not appear that comments on these subjects in connection with a suggested amendment have ever been solicited by the Standing Committee.[2]

If you or others have questions regarding the attached memorandum or subject matter, or requests for additional information, please address them to me, using the contact information below, with a copy to the Center for Regulatory Effectiveness at the address shown in the letterhead. I will plan to attend the Fall meeting of the Advisory Committee.

Respectfully submitted,



William G. Kelly, Jr., Esq.
General Counsel
184 Mt. Owen Dr.
Driggs, ID 83422
(208) 354-3050
wgkelly@tetontel.com

Attachment

[2] There is precedent for the Advisory Committee and Standing Committee soliciting comment even on a tentative decision not to propose an amendment, as in the case of the Standing Committee's September 1995 Request for Comment, which included a tentative decision not to amend rule 803(8).

Center for Regulatory Effectiveness

Memorandum in Support of a Suggestion for an Amendment to the "Trustworthiness" Proviso in Rule 803(8) of the Federal Rules of Evidence

August 9, 2004

Submitted by:
William G. Kelly, Jr., Esq.
General Counsel, Center for
Regulatory Effectiveness
D.C. Bar # 411594

Table of Contents

Table of Cases and Other Authorities

I. Cases

II. Statutes and Regulations

III. Other Authorities

Center for Regulatory Effectiveness

I. The Suggested Amendment

The suggested amendment is to add the underlined language and delete the stricken language:

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

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

. . .

(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~~ indicia, including noncompliance with duly promulgated quality standards for information disseminated by federal agencies, indicate lack of ~~trustworthiness~~ reliability.

II. Explanation of the Suggested Amendment

The language "duly promulgated quality standards for information disseminated by federal agencies" refers to the 1995 and 2000 federal legislation on information quality, the government-wide "guidelines"[1] promulgated by the federal Office of Management and Budget in 2002 pursuant to the directives in that legislation, and the "guidelines" promulgated by each federal agency in conformance with the OMB guidelines and pursuant to the legislative directives. The legislative and rulemaking background is discussed below. An explanation that the amendatory language refers to those particular legislative enactments and rules would be contained in a revised Advisory Committee Note, since detailed reference to the relevant provisions of the legislative enactments, the OMB implementing rules, and the numerous agency implementing rules within the text of the rule itself would be unwieldy.

While Rule 803(8) covers public records and reports regardless of whether they are prepared by a federal, State, local, foreign, or international government agency, the suggested amendment would pertain only to records or reports currently "disseminated" (as that term is defined in the information quality rules) to the public by a U.S. federal agency.

---

[1] Although labeled "guidelines", all of the OMB and agency "guidelines" come within the definition of "rules" under the Administrative Procedure Act, 5 U.S.C. § 551(4). A "rule" is defined as "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy . . . ." All of the guidelines/rules clearly implement and interpret the information quality legislative directives, as discussed below. The APA does not employ or define the term "guidelines".

Deletion of the word "circumstances", and substitution of the word "indicia", would clarify that factors such as the accuracy, completeness, bias, and reproducibility of the information are to be considered in ruling on admissibility; whereas the term "circumstances" could be read (and apparently has been read) as allowing only consideration of factors which do not pertain to the reliability of the actual contents of the record or report, such as whether it appears that a report was prepared in anticipation of use in litigation.

Substitution of the word "reliability" for "trustworthiness" would more accurately reflect the case law. The case law interpreting 803(8)(C) uniformly equates trustworthiness with reliability. On the other hand, some cases, discussed below, appear to interpret lack of trustworthiness as indicating a motive to falsify or fabricate. As also discussed below, and as recognized in case law, trustworthiness and reliability have been interpreted in the great majority of cases to pertain to factors beyond possible falsification or fabrication. In addition, it is the articulated policy of some federal agencies to insert policy bias into their reports, and compliance with such an agency policy by its personnel would not be considered an act of falsification or fabrication, nor would it bear any relation to a "motive" to falsify or fabricate.[2]

The basic purpose of the amendment would be to clarify that factors such as objectivity (or bias), accuracy, completeness, and reproducibility (*i.e.*, adequate disclosure of methodology and underlying data) specified in the information quality legislation and rules, in addition to the four factors currently outlined in the Advisory Committee Note (timeliness, special skill or experience, conduct of a hearing, and motivation), should be regarded as circumstances (indicia) bearing on trustworthiness (reliability) when a trial court considers whether a federal record or report should be admitted into evidence under Rule 803(8)(C).

Those additional factors have now been established through federal legislation and rulemaking as basic standards of quality for federal information disseminated to the public. Therefore, Congressional primacy with regard to judicial rules and related issues[3] requires that any significant

---

[2] The terminology "indicia of reliability" has been used, for example, in *Ellis v. Int'l Playtex*, 745 F.2d 292, 300 (4th Cir. 1984); *Miller v. Caterpillar Tractor Co.*, 697 F.2d 141, 144 (6th Cir. 1983); *City of New York v. Pullman Inc.*, 662 F.2d 910, 914 (2d Cir. 1981), *cert. denied*, 454 U.S. 1164 (1982), in discussing a ruling under 803(8)(C).

[3] Congressional primacy with regard to the rules is reflected, for example, in 28 U.S.C. §§ 2071(a) and 2074, as well as by the many occasions on which Congress has either intervened in the judicial rulemaking process (as it did with regard to promulgation of the original Federal Rules of Evidence when they were originally proposed in 1973, and eventually enacted the Rules legislatively) and the many occasions on which it has enacted supplementary rules (some of which are referenced, for example, in the Advisory Committee Note to evidence rule 803(8)(C)). 28 U.S.C. § 2071(a) provides that any rules prescribed by the Supreme Court or other federal courts "shall be consistent with Acts of Congress." 28 U.S.C. § 2074 requires that Congress be given an opportunity to review, and amend or reject, rules prescribed by the Supreme Court under

inconsistency between federal legislation and the evidence rules be resolved as soon as possible. A substantial number of cases in many, but not all, federal circuits and their district courts have held that such factors should not be considered by the trial court in ruling on "trustworthiness" and admissibility under 803(8)(C), but, rather, should be considered as factors that are only appropriate for consideration by the trier of fact in judging the weight to be given to the record or report once it has been admitted. Many of those cases are summarized in Appendix B to this memorandum, which also shows that there is a circuit split on what factors can be considered by the trial court in ruling on trustworthiness and admissibility under 803(8)(C). The cases which have ruled that factors such as accuracy, completeness, bias, reliability of underlying data, and reproducibility do not bear on admissibility, but only bear on the weight to be given the record or report by the trier of fact, appear to have resulted from a failure to recognize that precedents containing such a distinction were originally based on the federal business records legislation, which contained an explicit provision on the matter, but that provision was abrogated when the Federal Rules of Evidence were enacted in 1975. The suggested amendment would ensure that, contrary to those cases, the rule is consistent with Congressional intent regarding the importance of such factors in judging the quality of federal records and reports.

Such an amendment would also achieve greater consistency with the intent behind Rule 702, as revised following the Supreme Court's decisions in *Daubert*, *Joiner*, and *Kumho Tire*, by ensuring that the trial court acts as a thorough "gatekeeper" with regard to the reliability of scientific, technical, and other specialized information disseminated by federal agencies. Reports issued by federal agencies and potentially admissible under 803(8)(C) are often the equivalent of expert testimony under Rule 702, which governs "scientific, technical, or other specialized knowledge", because the agency which issues the report will be generally viewed as "expert" in its field. However, as we discuss below, many federal courts do not apply the same degree of "gatekeeper" rigor in ruling on admissibility under 803(8)(C) as is required under 702, instead admitting the report and leaving it to the jury to determine the "weight" to be given to the report. Evidence concerning scientific, technical, or other specialized information admissible under 803(8)(C) should be consistent in quality with expert evidence of that sort admissible under 702.

In addition, apart from incorporating the new federal information quality standards, the amendment and an accompanying revised Note would resolve inconsistencies among the circuits and districts as to whether consideration of such factors is appropriate when ruling on admissibility. The Committee might view it desirable to clarify that consideration of such factors applies to all public records and reports, not just federal information disseminated to the public which is subject to the new information quality standards.

At the same time, the suggested amendment would preserve the broad discretion that has been accorded to trial courts (under the "abuse of discretion" standard of review) in judging

---

the Rules Enabling Act. See, *e.g.*, Pub. L. No. 93-12, Mar. 30, 1973, 87 Stat. 9, which provided that the rules approved by the Supreme Court on Nov. 28 and Dec. 18, 1972, would have "no force or effect except to the extent, and with such amendments, as they may be expressly approved by the Act of Congress."

trustworthiness and reliability, as well as preserving the principle, consistently enunciated by the federal courts and implied by the language of the rule, that the burden is on the party opposing admission to convince the trial court that the record or report lacks trustworthiness (reliability). Indeed, the overall impact of the suggested amendment would be to remove restrictions on the trial judge's discretion in determining "trustworthiness" for purposes of admissibility which have been imposed in some circuits.

III. Previous Suggestions for Amendment of Rule 803(8), and Advisory Committee Action

Since 1995, the Advisory Committee has considered, or has begun consideration, of a number of issues relating to the use of police records or reports against criminal defendants under the several subdivisions of 803(8); however, it has not previously raised or considered the issues presented herein or similar issues. The Committee did receive, in 1996, one suggestion pertaining to the need to revise the trustworthiness proviso of 803(8)(C) that raised some aspects of the issues presented here, but a report was never prepared and there is no recorded discussion of how to resolve the suggestion.[4]

A detailed account of Committee consideration of 803(8) issues is provided in Appendix A. Such an account appears necessary in view of the Reporter's recent recommendation, and the Committee's apparent decision, to defer for an indefinite time consideration of amendments to 803(8) that would address certain issues pertaining to use police records and reports as evidence in criminal trials. That decision could – unjustifiably, we believe -- potentially affect Committee consideration of the amendment suggested here.

As noted in the transmittal cover letter for this suggested amendment, the Supreme Court's March 2004 decision in *Crawford v. Washington* (discussed in Appendix A) did not address a trustworthiness proviso to a hearsay exception. *Crawford* held that an exception to the hearsay rule, in particular Rule 804(b)(3), could not be applied to allow admission of a hearsay statement that was "testimonial" in nature because admission would deprive the accused of his right to confrontation under the Sixth Amendment. The Court declined to define "testimonial", and also declined to address whether the hearsay statement at issue was reliable; and it held that "testimonial" hearsay was not admissible in a criminal trial even if it were determined to be "reliable" by the trial court.

What is important to recognize is that the Supreme Court did not dispense with the reliability (or trustworthiness) requirement for hearsay exceptions. Even if hearsay which would come within an existing exception is non-testimonial, if is found unreliable or untrustworthy by a trial court it will still be inadmissible. And a finding that the evidence is unreliable could avoid the necessity to make a finding regarding "testimonial" or non-testimonial nature of the evidence. In addition, *Crawford* does not apply to civil cases. Thus, reliability or trustworthiness remains an important qualification

---

[4] The Advisory Committee on Evidence dockets, minutes, and reports which we have reviewed are those posted on the website of the Administrative Office of the U.S. Courts (www.uscourts.gov/rules). Since those posted records go back only to 1992, it is possible that there was some Committee consideration of amendments to Rule 803(8) prior to then.

on application of the hearsay exception in Rule 803(8)(C), and it is important that the integrity of that reliability constraint on use of the exception be carefully guarded in a manner consistent with both the original intent of the Rule and Congressional intent as expressed recently through the information quality legislation and rules.

IV. The Information Quality Legislation and Rules

A. The Information Quality Legislation

The information quality legislation consists of two statutes: The original information quality directives were contained in provisions of the Paperwork Reduction Act of 1995, and supplemental Congressional directives were enacted as part of OMB's appropriations legislation in 2000.

In 1995, Congress passed legislation to re-authorize and revise the Paperwork Reduction Act, which governs the collection of information from the public by federal agencies. 44 U.S.C. chapter 35, Pub. L. No. 104-13, Sec. 2, May 22, 1995, 109 Stat. 163. At that time, Congress also decided that provisions were needed in the Paperwork Reduction Act to ensure that information disseminated by federal agencies met certain standards for quality.

Congress stated that a purpose of the 1995 legislation was to "improve the quality and use of Federal information to strengthen decisionmaking, accountability, and openness in Government and society". 44 U.S.C. § 3501 (emphasis added.) Congress thus indicated its intention to ensure the quality of information used not only within the government, but also elsewhere throughout society.

The 1995 legislation made the Director of the Office of Management and Budget responsible for developing government-wide standards on information quality. The law provided that "[w]ith respect to information dissemination, the Director shall develop and oversee the implementation of policies, principles, standards, and guidelines to--(1) apply to Federal agency dissemination of public information, regardless of the form or format in which such information is disseminated . . . ." 44 U.S.C. § 3504(d)(1). The legislation also stated that "[t]he Director shall promulgate rules, regulations, or procedures necessary to exercise the authority provided by this subchapter." 44 U.S.C. § 3516.

The term "public information" was defined in the legislation as "any information, regardless of form or format, that an agency discloses, disseminates, or makes available to the public." 44 U.S.C. § 3502(12).

Each federal agency, in turn, was made responsible for "complying with the requirements of this subchapter and related policies established by the Director [of OMB]." 44 U.S.C. 3506(a)(1)(B).

Subsequent to the 1995 legislation, OMB promulgated Paperwork Reduction Act guidance through an OMB "circular", Circular A-130. This circular was unfamiliar to the public and barely

made mention of requirements for federal information disseminated to the public. Consequently, in October 1998, Congress urged OMB, in its report on FY 1999 appropriations[5], to issue specific rules on information quality, with public involvement, as previously mandated by the Paperwork Reduction Act. The report stated:

> *Reliability and Dissemination of Information*
>
> The committee urges the Office of Management and Budget (OMB) to develop, with public and Federal agency involvement, rules providing policy and procedural guidance to Federal agencies for ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by Federal agencies, and information disseminated by non-Federal entities with financial support from the Federal government, in fulfillment of the purposes and provisions of the Paperwork Reduction Act of 1995 (P.L. 104-13). The Committee expects issuance of these rules by September 30, 1999. The OMB rules shall also cover the sharing of, and access to, the aforementioned data and information, by members of the public. Such OMB rules shall require Federal agencies to develop, within one year and with public participation, their own rules consistent with the OMB rules. The OMB and agency rules shall contain administrative mechanisms allowing affected persons to petition for correction of information which does not comply with such rules; and the OMB rules shall contain provisions requiring the agencies to report to OMB periodically regarding the number and nature of petitions or complaints regarding Federal, or Federally-supported, information dissemination, and how such petitions and complaints were handled. OMB shall report to the Committee on the status of implementation of these directives no later than September 30, 1999.

H.R. Rep. No.592, 105th Cong., 2d Sess., at 49-50. The conference report adopted this language.[6]

Congressional use of the term "Reliability" in its report directive is particularly noteworthy in view of the consistent use of that term as a synonym for "trustworthiness" in cases applying Rule 803(8). There are also statements in the case law equating the "trustworthiness" and reliability of information under 803(8)(C) and other hearsay exception with its "quality", "accuracy", or "objectivity". *See Paolitto v. John Brown E & C, Inc.*, 151 F.3d 60, 65 (2d Cir. 1998) ("quality"); *Professional Mobile Home Brokers, Inc. v. Security Pacific Housing Serv.* (4th Cir. 1995, unpublished, WL 255937) (803(6) case, "accuracy"); *Smith v. Ithica Corp.*, 612 F.2d 215, 222 (5th Cir. 1980) ("objective"); *United States v. Versaint*, 849 F.2d 827, 832 (3d Cir. 1988) ("accurate"); *Bradford Trust Co. of Boston v. Merrill Lynch, Pierce, Fenner and Smith, Inc.*, 805 F.2d 49, 54 (2d Cir. 1986) ("accurate"); *Baker v. Firestone Tire & Rubber Co.*, 793 F.2d 1196, 1199 (11th Cir. 1986)

---

[5] The federal fiscal year ("FY") runs from October 1 to September 30. The 1999 fiscal year ran from October1, 1998 to September 30, 1999.

[6] Conference Report Joint Explanatory Statement, Cong. Rec. Oct.19, 1998, H11508.

("objective"); *Ellis v. Int'l Platex, Inc.*, 745 F.2d 292, 301 (4th Cir. 1984) ("inform the public . . . accurately"); *Robbins v. Whelan*, 653 F.2d 47, 52 (1st Cir. 1981) ("quality"); *United States v. 478.34 Acres of Land*, 578 F.2d 156, 159 (6th Cir. 1978) ("accuracy");*United States v. Williams*, 571 F.2d 344, 350 (6th Cir. 1978) (803(5) case, "accuracy"); *Hartzog v. United States*, 217 F.2d 706, 710 (4th Cir. 1954) (pre-FRE case involving IRS agent's worksheets; "accuracy"); *Ebenhoech v. Koppers Indus., Inc.*, 239 F.Supp.2d 455, 463 (D.N.J. 2002) (803(6) case, "accuracy"). And see generally the Advisory Committee Note to 803(6) (multiple references to "accurate" and "accuracy").

In a May 20, 1999 letter to OMB's Director, Hon. Jacob Lew, Representative Tom Bliley, Chair of the House Commerce Committee, expressed concern over whether OMB was carrying out its responsibilities under the 1995 legislation to issue regulations on information quality, and complying with the directives in House Report 105-592.[7]

When OMB did not issue regulations to implement the 1995 Paperwork Reduction Act information quality provisions by the end of September 1999, as directed by the appropriations committees, Representative Jo Ann Emerson of the House Appropriations Committee wrote to the Administrator of OMB's Office of Information and Regulatory Affairs, Mr. John Spotila. Representative Emerson noted OMB's failure to issue the regulations, requested a progress report, and indicated her intention to bring up the issue at OMB's next budget hearing before the House appropriations subcommittee.[8]

In an April 18, 2000 letter responding to Representative Emerson, Mr. Spotila indicated that OMB was "sensitive to the possibility that OMB Circular A-130 might need to be updated or supplemented to deal with concerns in this area [of "ensuring the quality of federally-disseminated information"]; however, he also indicated that OMB was "reluctant to issue more regulations without a clear sense that they would be useful in promoting data quality."

This reluctant OMB attitude towards its responsibilities under the 1995 legislation clearly was not viewed as satisfactory by Congress, and consequently it enacted a supplementary implementing directive in the appropriations legislation for Fiscal Year 2001.[9] This new legislative directive, stated:

> (a) In General.--The Director of the Office of Management and Budget shall, by not later than September 30, 2001, and with public and Federal agency involvement, issue guidelines under sections 3504(d)(1) and 3516 of title 44, United States Code, that

---

[7] Rep. Bliley's letter indicated copies to the Chair of the House Committee on Appropriations and the Chair of the House appropriations Subcommittee on Treasury, Postal Service, and General Government Appropriations (which has jurisdiction over OMB appropriations).

[8] Letter dated March 20, 2000. The OMB budget hearing was scheduled for March 28, 2000.

[9] 44 U.S.C. § 3516 note, Pub. L. No. 106-554, Sec. 1(a)(3) [title V, Sec. 515], Dec. 21, 2000, 114 Stat. 2763, 2763A-153.

provide policy and procedural guidance to Federal agencies for ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by Federal agencies in fulfillment of the purposes and provisions of chapter 35 of title 44, United States Code, commonly referred to as the Paperwork Reduction Act.

(b) Content of Guidelines.--The guidelines under subsection (a) shall--
(1) apply to the sharing by Federal agencies of, and access to, information disseminated by Federal agencies; and
(2) require that each Federal agency to which the guidelines apply--
(A) issue guidelines ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by the agency, by not later than 1 year after the date of issuance of the guidelines under subsection (a);
(B) establish administrative mechanisms allowing affected persons to seek and obtain correction of information maintained and disseminated by the agency that does not comply with the guidelines issued under subsection (a); and
(C) report periodically to the Director--
(i) the number and nature of complaints received by the agency regarding the accuracy of information disseminated by the agency; and
(ii) how such complaints were handled by the agency.

Hereafter in this memorandum, the 1995 and 2000 legislation are referred to together as the information quality legislation.

B. The Information Quality Rules

As explained above, under the information quality legislation the Office of Management and Budget of the Executive Office of the President ("OMB") was made responsible for issuing the "rules, regulations, or procedures" to provide guidance to all federal agencies for ensuring the "quality, objectivity, utility, and integrity" of information disseminated to the public. 44 U.S.C. §§ 3504 and 3516. Each federal agency was then responsible for issuing guidelines complying with the OMB rules, regulations, or procedures. Thus, it is not necessary in this memorandum to discuss or reference the rules of the many individual federal agencies, since they conform to the OMB guidelines with regard to the issues pertinent to this discussion.[10] The individual agency guidelines differ from the OMB rules mainly in describing the individual agency programs to which the rules apply, the

[10] The guidelines of individual agencies can be found at www.thecre.com⇒Data Quality⇒Data Quality Guidelines.

various administrative measures the agency has put in place to ensure quality, and the specifics of how affected members of the public can petition the agency for correction of information.[11]

For purposes of this memorandum, the most relevant provisions of the OMB rules are those defining "quality" and "objectivity". The term "utility" might, in some cases, be significant for considering possible exclusion of otherwise admissible evidence under Rules 402 and 403.[12] The term "integrity" is not pertinent to the present discussion.[13]

OMB first issued final rules on information quality on September 28, 2001[14], and requested comment on possible revisions. On February 22, 2002, OMB issued the supplemental final rules that currently control.[15] All federal agencies issued their own conforming rules by approximately October 1, 2002.

The OMB rules define "quality" as a term embracing the other terms of "objectivity, utility, and integrity." Through the definition of "objectivity", and the related definitions of "influential scientific, financial, or statistical information" and "reproducibility", the OMB rules specify a "basic standard of quality" which all agency information must meet, while "influential scientific, financial, and statistical information" must also include "a high degree of transparency about data and methods to facilitate the reproducibility of such information by qualified third parties."

The definitions of "objectivity", "influential" and "reproducibility" are set out in full below due to their importance:

> 3. "Objectivity involves two distinct elements, presentation and substance.
>
> (a) "Objectivity" includes whether disseminated information is being **presented in an accurate, clear, complete, and unbiased manner**. This involves whether the information is presented within a **proper context**. Sometimes, in disseminating certain types of information to the public, other information must also be disseminated in order to ensure an accurate, clear, complete, and unbiased presentation. Also, the agency needs to **identify the sources** of the disseminated information (to the extent possible, consistent with confidentiality protections) and,

---

[11] The individual agency guidelines typically provide for some response (which may be interim) within 90 days. If the petition is denied, the petitioner can appeal to other reviewers within the agency. It can take several months to a year or more for an agency to issue a final decision, which then might still be disputed by the petitioner.

[12] Rules 402 and 403 concern relevancy.

[13] "Utility" refers to the usefulness of the information, which might take into consideration its transparency and reproducibility. "Integrity" refers to the security of the information.

[14] 66 FR 49718, Sept. 28, 2001.

[15] 67 FR 8452, Feb. 22, 2002.

in a scientific, financial, or statistical context, **the supporting data and models**, so that the public can assess for itself whether there may be some reason to question the objectivity of the sources. **Where appropriate, data should have full, accurate, transparent documentation, and error sources affecting data quality should be identified and disclosed to users.**

(b) In addition, "objectivity" involves a focus on ensuring **accurate, reliable, and unbiased information**. In a scientific, financial, or statistical context, the original and supporting data shall be generated, and the analytic results shall be developed, using **sound statistical and research methods.**

(i) If data and analytic results have been subjected to formal, independent, external peer review, the information may generally be presumed to be of acceptable objectivity. However, this presumption is rebuttable based on a persuasive showing by the petitioner in a particular instance. If agency-sponsored peer review is employed to help satisfy the objectivity standard, the review process employed shall meet the general criteria for competent and credible peer review recommended by OMB-OIRA to the President's Management Council (9/20/01) (http://www.whitehouse.gov/omb/inforeg/oira_review-process.html), namely, "that (a) peer reviewers be selected primarily on the basis of necessary technical expertise, (b) peer reviewers be expected to disclose to agencies prior technical/policy positions they may have taken on the issues at hand, (c) peer reviewers be expected to disclose to agencies their sources of personal and institutional funding (private or public sector), and (d) peer reviews be conducted in an open and rigorous manner.

(ii) If an agency is responsible for disseminating **influential** scientific, financial, or statistical information, agency guidelines shall include a high degree of **transparency about data and methods** to facilitate the **reproducibility** of such information by qualified third parties.

A. With regard to original and supporting data related thereto, agency guidelines shall not require that all disseminated data be subjected to a reproducibility requirement. Agencies may identify, in consultation with the relevant scientific and technical communities, those particular types of data that can practicable [sic] be subjected to a reproducibility requirement, given ethical, feasibility, or confidentiality constraints. It is understood that reproducibility of data is an indication of **transparency about research design and methods** and thus a replication exercise (i.e., a new experiment, test, or sample) shall not be required prior to each dissemination.

B. With regard to analytic results related thereto, agency guidelines shall generally require sufficient **transparency about data and methods** that an independent reanalysis could be undertaken by a qualified member of the public. These transparency standards apply to agency analysis of data from a single study as well as to analyses that combine information from multiple studies.

i. Making the data and methods publicly available will assist in determining whether analytic results are reproducible. However, the objectivity standard does not override other compelling interests such as privacy, trade secrets, intellectual property, and other confidentiality protections.

ii. In situations where public access to data and methods will not occur due to other compelling interests, agencies shall apply especially rigorous robustness checks to analytic results and document what checks were undertaken. Agency guidelines shall, however, in all cases, require a disclosure of the specific data sources that have been used and the specific quantitative methods and assumptions that have ben employed. Each agency is authorized to define the type of robustness checks, and the level of detail for documentation thereof, in ways appropriate for it given the nature and multiplicity of issues for which the agency is responsible.

C. **With regard to analysis of risks to human health, safety and the environment maintained or disseminated by the agencies, agencies shall either adopt or adapt the quality principles applied by Congress to risk information used and disseminated pursuant to the Safe Drinking Water Act Amendments of 1996** (42 U.S.C. 300g-1(b)(3)(A) & (B). Agencies responsible for dissemination of vital health and medical information shall interpret the reproducibility and peer-review standards in a manner appropriate to assuring the timely flow of vital information from agencies to medical providers, patients, health agencies, and the public. Information quality standards may be waived temporarily by agencies under urgent situations (*e.g.,* imminent threats to public health or homeland security) in accordance with the latitude specified in agency-specific guidelines.

. . .

9. "Influential", when used in the phrase "influential scientific, financial, or statistical information", means that the agency can reasonably determine that dissemination of the information will have or does have a clear and substantial impact on important public policies or important private sector policies or important private sector decisions. Each agency is authorized to define "influential" in ways appropriate for it given the nature and multiplicity of issues for which the agency is responsible.

10. "**Reproducibility**" means that the **information is capable of being substantially reproduced, subject to an acceptable degree of imprecision**. For information judged to have more (less) important impacts, the degree of imprecision that is tolerated is reduced (increased). If agencies apply the reproducibility test to specific types of original or supporting data, the associated guidelines shall provide relevant definitions of reproducibility (*e.g.,* standards for replication of laboratory data). With respect to analytic results, "capable of being substantially reproduced" means that independent analysis of the original or supporting data using identical methods would generate similar analytic results, subject to an acceptable degree of imprecision or error.

67 FR at 8459-60, Feb. 22, 2002 (emphasis added). The referenced sections of the Safe Drinking Water Act Amendments of 1996 (SDWAA) are described and quoted in the preamble to the rules. Subsection (A) of the SDWAA directs agencies to use "(i) the best available, peer-reviewed science and supporting studies conducted in accordance with sound and objective scientific practices; and (ii) data collected by accepted methods or best available methods (if the reliability of the method and the

nature of the decision justifies use of the data)." Subsection (B) directs agencies "to ensure that the presentation of information [risk] effects [sic] is comprehensive, informative, and understandable" and that "in a document made available to the public in support of a regulation [to] specify, to the extent practicable–(i) each population addressed by any estimate [of applicable risk effects]; (ii) the expected risk or central estimate of risk for the specific population [affected]; (iii) each appropriate upper-bound or lower-bound estimate of risk; (iv) each significant uncertainty identified in the process of the assessment of [risk] effects and the studies that would assist in resolving the uncertainty; and (v) peer-reviewed studies known to the [agency] that support, are directly relevant to, or fail to support any estimate of [risk] effects and the methodology used to reconcile inconsistencies in the scientific data."[16]

With regard to the evidence rules amendment proposed herein, and for purposes of considering the federal case law discussed below and in Appendix B, the key terms from the legislation and the OMB rules to keep in mind are:

objective
accurate
clear (overlaps with transparency)
complete
unbiased (overlaps with objective)
transparent (with regard to supporting data, models, and methods)
capable of being substantially reproduced (a type of transparency)

It is important to note that the suggested amendment would not require the trial court to apply these legislative, OMB, and agency information quality standards when making an admissibility ruling under 803(8)(C); what it would require is that the trial court consider those standards in ruling on admissibility. Thus, minor non-compliance with the standards would be unlikely to justify exclusion, while significant non-compliance could be expected to result in exclusion.

C. Congressional Primacy

With regard to the issue of Congressional primacy, it should be noted that all of the above standards – which appear to be the only ones pertinent to the suggested amendment – are within the definition of "objectivity", and that the information quality legislation itself, as well as the implementing rules, requires that agency information be "objective".

The basic intent of the legislation and rules is to prohibit any dissemination of agency information that is not objective and does not otherwise meet the quality standards promulgated by OMB. The 1995 legislation stated that its provisions regarding information quality were broadly

[16] Because the OMB rules state that "agencies shall either adopt or adapt the quality principles applied by Congress" in those statutory provisions, this is one area in which there are some differences among agency rules implementing the OMB rules. Otherwise, as in the case of the definition of "objectivity", all agency rules follow closely or merely repeat the definitions provided in the OMB rules.

aimed at use of such information in "society", not just in government. Presentation of federal agency information to a jury in a public judicial forum surely comes within the Congressional intent to prohibit all dissemination of information by federal agencies that does not meet federal information quality standards.

V. Pertinent Background on the Derivation of Rule 803(8)

As explained at the start of the Advisory Committee Notes to Rule 803(8), the hearsay exception for public records and reports is generally regarded as derived from the common law on business records, and, in federal courts, from federal legislation establishing business records as a hearsay exception, 28 U.S.C. § 1732. *Kay v. United States*, 255 F.2d 476 (4th Cir.1958), which is cited for this point in the Note to 803(8), involved admissibility of State blood alcohol results under 28 U.S.C. § 1732. 255 F.2d at 480.[17] In other words, the work of government agencies in keeping records and preparing reports was regarded as a type of business. In addition, in the case of reports later termed "evaluative", it was presumed that civil servants would carry out their duties carefully and in a fair, accurate, and impartial manner.

What is important to note in reviewing the case law under 803(8)(C), however, is that the Rules diverged significantly from the provisions of the 28 U.S.C. § 1732 when enacted in 1975. Rule 803(6) repealed the provision of 28 U.S.C. § 1732 which stated that "**All other circumstances** of the making of such writing or record, including lack of personal knowledge by the entrant or maker, **may be shown to affects its weight, but such circumstances shall not affect its admissibility**" (emphasis added) and substituted the language that such records and reports are not excluded by the hearsay exception "unless the sources of information or the method or circumstances of preparation indicate lack of trustworthiness." In other words, the distinction between weight and admissibility was abandoned, with exclusion depending on an evaluation by the trial court of whether "the sources of information or the method or circumstances of preparation" "indicate lack of trustworthiness". It is also noteworthy, especially when examining the case law discussed below and in Appendix B, that the "lack of trustworthiness" provision in 803(8) differs from that in 803(6) in referring broadly to "sources of information or other circumstances", without qualification, rather than referring to "or the method of circumstance of preparation" instead of "other circumstances". Many of the cases reviewed below and in Appendix B as inconsistent with the information quality legislation and rules focus on the "circumstances of preparation" even though they are 803(8)(C) cases.

The Notes to 803(8) and 803(6) do not discuss elimination of the weight v. admissibility distinction from 28 U.S.C. § 1732. A review of the legislative history of the 1975 enactment of the evidence rules, and a review of the Rules Committee's public archives (at its offices in Washington, DC) has not uncovered any articulation of the reasoning behind the above change. Even though an

---

[17] See also *Moran v. Pittsburgh-Des Moines Steel Co.*183 F.2d 467, 472-73 & n.6 (3d Cir. 1950), which is also cited in the Note in its discussion of the circuit split over admissibility of "evaluative" reports. *Moran* is discussed in Appendix B to this memorandum. And see, *e.g.*, *Matador Drilling v. Post*, 662 F.2d 1190, 1191 (5th Cir. 1981), and *Crompton Richmond Co., Factors v. Briggs*, 560 F.2d 1196, 1202 n.12 (5th Cir. 1977), which are also discussed in Appendix B. Also see the first paragraph of the Note to 803(6).

articulation has not been uncovered, there appears to be a clear basis for inferring that it was thought that such a categorical distinction between weight and admissibility was unwarranted.[18]

VI. Federal Case Law Interpreting Rule 803(8)(C) Which Is in Conflict with the Information Quality Legislation and Rules

Under the plain wording of Rule 803(8), public records and reports are excluded by the hearsay rule if "the sources of information or other circumstances indicate lack of trustworthiness." The rule does not permit such evidence to be admitted and presented to the jury so that it might be weighed. There is no distinction in the Rule between admissibility and weight as there was in the federal business records statute prior to 1975.

Nevertheless, there is substantial federal case law which has developed since the Rule was enacted in 1975 which has held that factors such as accuracy, completeness, and bias go to weight rather than admissibility under Rule 803(8)(C). In other words, despite indications that a public record is, for example, inaccurate, incomplete, or biased, some courts have ruled that the evidence must be admitted and left to the jury to weigh.

Federal courts (as well as the Advisory Committee) have consistently equated trustworthiness with reliability. The focus of the information quality legislation and rules is also clearly on reliability, with dissemination to the public prohibited unless the information meets certain basic standards of "quality" which clearly encompass "reliability".

In the case of federal records and reports, admission of information disseminated by a federal agency despite the presence of such factors which indicate lack of reliability is inconsistent with an Act of Congress, and therefore prohibited by the Rules Enabling Act. Such an inconsistency requires expeditious attention.

Appendix B to this memorandum contains a detailed summary of many of the federal cases which are inconsistent with the information quality legislation and rules. The focus of Appendix B is on cases which are contrary to the information quality legislation and rules in continuing to allow, and to require, dissemination to a jury of federal agency information which does not meet the legislatively mandated standard of "objectivity", as further defined through the OMB rules. Nevertheless, for the sake of completeness, the case law on this issue in all of the federal circuits has been examined, and is summarized circuit-by-circuit in Appendix B in order to show that apparently not all circuits have case law distinguishing between weight and admissibility in conflict with the

---

[18] The review of the archives indicates that the change to what is now Rule 803(6) was proposed by the Standing Committee as early as 1967. It appears that the change might have been derived from language recommended in 1936 by the Commissioners on Uniform State Laws in its Uniform Business Records as Evidence Act, from the Uniform Rules of Evidence recommended by the National Conference of Commissions on Uniform State Laws in 1953, or from the American Law Institute's Model Code of Evidence, or from more than one of these.

information quality legislation, and that the 6th Circuit in particular is in opposition to many of the other federal circuits on this point.

As can be seen by reviewing Appendix B, many of the cases which have admitted public records or reports based on a distinction between weight and admissibility justify that distinction by characterizing factors such as bias, accuracy, and completeness as issues of "credibility" which must therefore be submitted to the jury. This raises the issue of what is the distinction between credibility and reliability. Factors which are routinely considered as bearing on reliability, and which are given as examples in the Note to 803(8) -- such as "motivational problems" and lack of "special skill or experience"-- clearly bear on both the reliability and credibility of a record or report, and have been given as examples of circumstances justifying exclusion in the Advisory Committee Note. It appears that the appropriate distinction between credibility and reliability lies in whether the proffered evidence is evaluated according to subjective impressions or according to objective indicia of reliability. The suggested amendment takes into account that even objective indicia of unreliability may justifiably be considered by the trial court to be so minor as to be insufficient to support exclusion, but the jury or trier of fact should nevertheless be able to take those minor factors into consideration in weighing the evidence.

The position taken by some federal courts that rulings on accuracy, completeness, an adequate basis, or bias are issues of "credibility" rather than "reliability" is puzzling and unfounded. Evidence which is not credible is not reliable. A report which is incomplete because it failed to consider important facts, studies, or alternative explanations cannot be considered "accurate". A conclusion which is not based on adequate and reliable facts or data cannot be considered accurate and reliable.[19] A study which has significant methodological flaws cannot be considered accurate and reliable. A report which contains significant bias cannot be regarded as factually based, objective, and accurate. Trial courts should have substantial discretion to exclude public records and reports that are suspect with regard to reliability for any sound reason; they should not be restricted from considering certain aspects of reliability, as has happened in many federal cases discussed herein, based on a distinction between weight and admissibility or credibility and reliability. Amending 803(8)(C) to make it consistent with the information quality legislation and rules would restore a trial court's ability to consider all reliability factors in ruling on admissibility.

In the following sections, we have broken down the cases discussed in Appendix B according to the specific aspect of "objectivity" on which they are in conflict with the information quality legislation and rules.[20]

---

[19] For example, a report on levels of chemical emissions and human exposure to those emissions which is based on data obtained with a test method or sampling technique which has since been shown to be inaccurate and unreliable should cause the report to be considered unreliable and untrustworthy.

[20] These are all cases ruling on admissibility under 803(8)(C). There are similar cases under 803(6). See, *e.g.*, *American Equities Group v. Ahava Dairy Products Corp.*, slip op. at 10, and cases cited therein (S.D.N.Y., April 23, 2004, WL 870260).

A. Accuracy: **Cases ruling that accuracy (including expertise of the investigator and reliability of underlying data or sources) cannot be considered in deciding on admissibility, but, rather, must be considered a matter of credibility and weight**

Blake v. Pellegrino (1st Cir. 2003) (inaccuracy of cause of death on death certificate)

Sage v. Rockwell Int'l Corp. (D.N.H. 1979)) (alleged lack of special skill or experience of JAG investigator of aircraft accident)

Moran v. Pittsburgh-Des Moines Steel Co. (3d Cir. 1950) (report on cause of gas tank failure allegedly based on hearsay; pre-FRE case)

Wolf v. Procter & Gamble Co. (D.N.J. 1982) (allegations of serious methodological flaws)

Vanderpoel v. A-P-A Transp. Co. (E.D.Pa. 1992) (police accident report by investigator allegedly lacking expertise and based on inaccurate measurements)

Ellis v. Int'l Playtex, Inc. (4th Cir. 1984) (allegedly flawed methodology in CDC and State studies on toxic shock syndrome)

Moss v. Ole South Real Estate, Inc. (5th Cir. 1991) (allegedly incomplete, biased, misleading, and inaccurate Air Force and HUD housing discrimination reports)

Eason v. Fleming Cos., Inc. (5th Cir. 1993) (allegedly flawed methodology, lack of credible sources, incompleteness, and preparation by non-investigative personnel of EEOC employment discrimination report)

Coates v. AC and S, Inc., (E.D. La. 1995) (EPA and OSHA position papers on asbestos health effects allegedly inaccurate and exaggerated)

Avondale Indus., Inc. v. Bd. of Comm'rs of the Port of New Orleans (E.D. La. 1996) (alleged failure of Coast Guard to interview key witnesses and analyze conflicting accounts in preparing report on collision of vessel with bridge)

King Fisher Marine Servs., Inc. v. M/V SOCOL (S.D. Tex. 2001) (State report on collision of vessel with dredging equipment alleged to be inaccurate and based on non-credible witnesses)

Kehm v Procter & Gamble Mfg. Co. (8th Cir. 1983) (CDC and State studies on toxic shock syndrome alleged to contain numerous statistical biases)

Union Pacific R. v. Kirby Inland Marine, Inc. of Miss. (8th Cir. 2002) (Coast Guard report on collision of vessel with bridge allegedly based on hearsay)

Walker v. Fairchild Indus., Inc. (D. Nev. 1982) (alleged lack of qualifications of investigators and lack of scientific basis for tests involved in Air Force aircraft accident report)

In re Korean Air Lines Disaster of Sept. 1, 1983 (D.D.C. 1991) (trial court commented that although jury might find that governmental report on aircraft disaster might "not [be] worth the paper it is printed on", it should nevertheless be submitted to the jury)

Nakijima v. General Motors Corp. (D.D.C. 1994) (allegedly flawed methodology in NHTSA report on incidents of failure of bus doors)

Lohrenz v. Donnelly (D.D.C. 2002) (alleged inaccuracies and inconsistencies in Navy report on qualifications of fighter pilot)

B. Completeness: Cases ruling that completeness cannot be considered in deciding on admissibility, but rather is a matter of credibility and weight

Gentile v. County of Suffolk (E.D.N.Y. 1990) (alleged failure to address contradictory evidence in State report on police misconduct)

Vanderpoel v. A-P-A Transp. Co. (E.D.Pa. 1992) (allegedly inaccurate measurements in police accident report interpreted by court as allegations that basis for report was incomplete)

Complaint of Nautilus Motor Tanker Co. (D.N.J. 1994) (Coast Guard investigator allegedly left out various piece of relevant information from report on vessel collision)

Moss v. Ole South Real Estate, Inc.(5th Cir. 1991) (alleged lack of completeness in Air Force and HUD housing discrimination reports)

Eason v. Fleming Cos., Inc. (5th Cir. 1993) (alleged incompleteness of EEOC employment discrimination report)

United States. v. School Dist. of Ferndale, Mich. (6th Cir. 1978) (alleged incompleteness of HEW report on school discrimination)

White v. Godinez (7th Cir. 2002) (alleged incompleteness of county jail visitation records)

C. Bias (Lack of Objectivity): Cases ruling that bias cannot be considered in deciding on admissibility, but rather is a matter of credibility and weight

Gentile v. County of Suffolk (E.D.N.Y. 1990) (alleged bias in State investigation of handling of allegations of police misconduct)

Rosario v. Amalgamated Ladies Garment Cutters' Union (2d Cir. 1980) (alleged bias in citizen complaint filed with police)

Moss v. Ole South Real Estate, Inc. (5th Cir. 1991) (alleged reliance on biased witnesses in preparation of Air Force and HUD reports on housing discrimination)

Coates v. AC and S, Inc. (E.D. La. 1994) (alleged bias – exaggeration – in OSHA and EPA reports on health hazards of asbestos)

United States. ex rel. Collins v. Welborn (N.D. Ill. 1999) (alleged bias in government summary of offenses prepared for sentencing purposes offered by defendant in habeas corpus proceeding)

Erickson v. Baxter Healthcare, Inc. (N.D. Ill. 2001) (potential bias in National Academy of Sciences report on contaminated blood products)

Kehm v. Procter & Gamble Mfg. Co. (8th Cir. 1983) (alleged statistical biases in CDC and State epidemiologic investigations of toxic shock syndrome)

Lohrenz v. Donnelly (D.D.C. 2002) (alleged bias in Navy report on qualifications of fighter pilot, characterized by court as "possible motivational problems")

D. <u>Transparency and Reproducibility</u>: Cases ruling that lack of transparency as to data, methods, or sources cannot be considered in deciding on admissibility, but rather is a matter of credibility and weight

Ellis v. Int'l Playtex, Inc. (4th Cir. 1984) (alleged lack of information on methodology employed by CDC and States in conducting investigations into toxic shock syndrome)

Erickson v. Baxter Healthcare, Inc. (N.D. Ill. 2001) (refusal by National Academy of Sciences to disclose authors of report on contaminated blood products and how it was prepared)

VII. The Split Among the Federal Circuits in Interpreting the Trustworthiness Proviso of Rule 803(8)

It can be seen from a review of Appendix B that there is a split between the 6th Circuit (and possibly the 9th, 10th, and 11th circuits) and a number of other circuits on the issue of whether factors such as apparently biased witnesses, lack of investigator qualifications, and inability to verify underlying data can, and should, be considered in determining admissibility under Rule 803(8)(C). The 6th Circuit has held such factors should be considered in ruling on admissibility under 803(8)(C), while a number of other circuits, and district courts within those circuits, including the 1st, 2d, 3d, 4th,

5th (particularly), 7th, 8th, and the D.C. circuits have held that factors such as accuracy, completeness, witness bias, underlying data bias, possible motivational problems, and lack of transparency are not to be considered in ruling on admissibility under 803(8)(C), but only go to the weight that might be given to the evidence once it is admitted. The positions of the 9th, 10th, and 11th circuits are less clear.

We believe the 6th Circuit's position is correct, both considering the information quality legislation and rules, or apart from such consideration, and interpreting the intent of Rule 803(8)(C). We believe that the 6th Circuit has accurately indicated the problem in the positions of those circuits in conflict with its position as incorrectly probably derived from the distinction between admissibility and weight which was contained in the provision of the federal business records statute, 28 U.S.C. § 1732, before that provision was superseded and repealed by evidence rules 803(6) and 803(8) in 1975, and from case precedents which relied on that distinction prior to 1975.

VIII. Case Law Interpreting "Trustworthiness" in Conflict with the Information Quality Legislation and Rules Prohibition Against Bias and the Intent of 803(8)(C)

As indicated in the suggested amendment and the explanation which follows, the term "trustworthiness" would be changed to "reliability" as a more accurate term.

The information quality legislation and rules prohibit "bias" (as an aspect "objectivity") without restriction on the meaning of the term. However, a number of courts have interpreted "lack of trustworthiness" in 803(8)(C) as pertaining to bias only in the sense of a motive to falsify. Indeed, this is the sense in which it appears to be explained in the Note to 803(8)(C), which refers to the "possible motivational problems suggested by *Palmer v. Hoffman*, 318 U.S. 109 (1943)". The "motivational problem" suggested in *Palmer* was that the report at issue had very arguably been prepared for the purpose of being used in litigation to support the preparing party.

Other cases have also considered "lack of trustworthiness" or "bias" to mean either motive, on the part of the preparer, to falsify or distort for purposes of litigation, or for other purposes. See *Coleman v. Home Depot*, 306 F.2d 1333, 1342 (3d Cir. 2002); *Bridgeway Corp. v. Citibank*, 201 F.3d 134, 143-44 (2d Cir. 2000); *Muncie Aviation Corp. v. Party Doll Fleet, Inc.*, 519 F.2d 1178, 1182 (5th Cir. 1975); *Richmond Medical Center v. Hicks*, 301 F.Supp. 499, 512 (E.D. Va. 2004); *Lewis v. Valez*, 149 F.R.D. 474, 488 (S.D.N.Y. 1993); *Gentile v. County of Suffolk*, 129 F.R.D. 435, 457 (E.D.N.Y. 1990); *Chesapeake & Delaware Canal Co. v. United States*, 250 U.S. 123, 129 (1919) (cited in Note on 803(8)).

Other cases have interpreted "trustworthiness" in the sense of "bias", yet, as discussed in Appendix B and above in section VI, they have considered potential bias, including institutional bias, as a factor going to weight rather than admissibility.

Restricting "bias" to a weight of the evidence issue, or to indicating only a motive to falsify, does not adequately cover all types of bias which are covered by the information quality legislation and rules, and which impugn reliability in the sense intended in Rule 803(8)(C). For example, some

federal agencies have adopted clear policies of evaluating scientific information on potential health or safety risks in a biased manner. This is not a matter of falsification or fabrication; it is a policy position well-intentioned to protect the general public, including its most vulnerable members, by interpreting uncertain scientific information in such a way that recommended safety levels or measures are likely to be more stringent than supported by the scientific data, or so that quantitative estimates of risk which will form the basis for potential regulatory measures are more likely to be overstated. Although not involving any motive to falsify or mislead, the information provided by such investigative reports is, nevertheless, "biased" and should not be viewed as "reliable" for purposes of evidence in litigation. This type of bias appears to be exactly the type of bias that was raised as a challenge to trustworthiness, but rejected, in *Coates v. AC and S, Inc.*, 844 F.Supp. 1126, 1132-33 (E.D. La. 1994).

In the case of health risk assessments as currently prepared by the U.S. Environmental Protection Agency, for example, such assessments contain a summary "risk characterization" section. The conclusions stated in the risk characterization section are derived from a risk assessment process that makes use of influential policy-driven "default assumptions", or which incorporate multiple "uncertainty factors".[21] EPA is very frank about how its risk characterizations therefore incorporate "bias". The Agency's handbook on risk characterization states:

> There is an understood, inherent, EPA bias that in the light of uncertainty and default choices the Agency will decide in the direction of more public health protection than [sic] in the direction of less protection. However, it is not always clear where such bias enters into EPA risk assessments. To the extent it may make a difference in the outcome of your assessment, highlight the relevant areas so the impact will not be overlooked or misinterpreted by the risk manager.

At p. 41 of the Handbook.[22] It is not yet clear how this aspect of EPA's information policy will be reconciled with the new information quality legislation and rules; however, the conceded bias should clearly indicate lack of reliability of EPA risk characterizations for use in litigation under 803(8)(C). The use of the term "reliability" in 803(8)(C) in place of "trustworthiness" would make this clearer.

Other federal agencies which produce health and safety assessments employ similar policy-driven "precautionary" or "conservative" biases in the form of assumptions, margins of safety, and uncertainty factors.[23] State health and safety agencies have adopted similar policies. Thus, the

---

[21] The use of "uncertainty factors" or "safety factors" can often reduce an adverse effect exposure level observed experimentally by a thousand-fold.

[22] *EPA Science Policy Council Handbook, Risk Characterization* (EPA 100-B-00-002, December 2000, available on the EPA website at http://epa.gov/osa/spc/htm/rchandbk.pdf, accessed July 27, 2004).

[23] See, e.g., United States General Accounting Office, *Chemical Risk Assessment: Selected Federal Agencies' Procedures, Assumptions, and Policies*, especially p. 32 (August 2001, GAO-01-810) (covering practices of EPA, FDA, OSHA, and DOT's Office of Research and Special Projects Administration).

recommendation to substitute "reliability" for "trustworthiness" in order to clarify that significant policy bias can justify exclusion is broadly supported.

IX. Inconsistency Between 803(8)(C) Case Law and Rule 702 (Testimony by Experts) and the Information Quality Legislation and Rules

Federal agencies are generally regarded by the public as experts in the field they have been assigned by Congress. In the case of reports purporting to convey scientific, technical, or otherwise specialized knowledge, their reports or statements can be considered the equivalent of expert testimony subject to Rule 702, which establishes a standard of evidentiary reliability. This point has been noted by a number of federal courts. *See Desrosiers v. Flight Int'l of Fla., Inc.*, 156 F.3d 952, 962 (9th Cir.), *cert. dismissed*, 525 U.S. 1062 (1998) (exclusion of portion of JAG report was consistent with its role as a "gatekeeper" under *Daubert* and Rule 702); *In re Korean Air Lines Disaster of Sept. 1, 1983*, 932 F.2d 1475, 1483 (D.C. Cir.), *cert. denied*, 502 U.S. 994 (1991) (expert testimony was admissible under Rule 702 because based on government report admitted under Rule 803(8)(C)); *Gentile v. County of Suffolk*, 129 F.R.D. 435, 453 (E.D.N.Y. 1990) (State investigatory commission, in issuing report admitted under 803(8)(C), "as a whole qualified as an expert under Rules 702 and 703"). Therefore, an 803(8)(C) proffer of a report purporting to contain scientific, technical, or other specialized knowledge should be reviewed by the trial court as carefully as expert testimony under Rule 702, and perhaps even more carefully because the "experts" are not required to be, and often are not, available for cross-examination, and juries are likely to give even more credence to a seemingly authoritative government report.

In revising Rule 702 in 2000, the Judicial Conference, the Supreme Court, and Congress indicated an intent to achieve consistency between the Rule and the Supreme Court's decisions interpreting the 1975 version of Rule 702. The Advisory Committee Note (there is no significant legislative history) refers only to *Daubert v. Merrell Dow Pharmaceuticals, Inc.* 509 U.S. 579 (1993) and *Kumho Tire v. Carmichael*, 526 U.S. 137 (1999), although portions of *General Elec. Co. v. Joiner*, 522 U.S. 136 (1997) are also pertinent.

The Supreme Court's trilogy of decisions, as well as the Note, establish "a standard of evidentiary reliability". *Daubert* at 590; *Kumho Tire* at 149. This standard of "reliability"should, therefore, place Rules 702 and 803(8))(C) on essentially equal footing with regard to the type of "gatekeeper" scrutiny that public reports containing scientific, technical, or other specialized information must undergo. Consequently, the indicia of reliability that the Supreme Court and the Committee (and Congress, through approval of the revisions to Rule 702 in 2000) have found pertinent for establishing admissibility (as opposed to weight) under 702 should be compared with the standards in the information quality legislation and rules, and then contrasted with the case law on 803(8)(C) discussed above in section VI and Appendix B, which has held that certain of such factors or standards should not be considered in determining admissibility, but should only be

considered by the trier of fact in weighing the evidence.[24] Most of those cases either clearly or very arguably involved reports containing, or requiring for their preparation, scientific, technical, or other specialized knowledge.

Among the non-exclusive factors that the Court specified and applied in *Daubert*, *Joiner*, or *Kumho Tire* in order to determine reliability and admissibility were the following:

4. In general, the expert's opinion "must be supported by appropriate validation – *i.e.*, 'good grounds,' based on what is known." *Daubert* at 590 (emphasis added). This requires a sound, objective basis for opinion – "a reliable foundation". *Id.* at 597; *Joiner* at 145-46; Committee Note. *And see Montgomery County v. Microvote, Corp.*, 320 F.3d 440, 448-49 (3d Cir. 2003); *United States v. Fredette*, 315 F.3d 1235, 1239 (10th Cir. 2003); *Lantec, Inc. v. Novell, Inc.*, 306 F.3d 1003, 1026 (10th Cir. 2002); *Amorgianos v. Nat'l R.R. Passenger Corp.*, 303 F.3d 256, 269 (2d Cir. 2002); *Moore v. Ashland Chem. Co.*, 151 F.3d 269, 278-79 (5th Cir. 1998), *cert. denied*, 526 U.S. 1064 (1999); *Allen v. Pennsylvania Eng'g Corp.*, 102 F.3d 194, 198, 199 (5th Cir. 1996); *Bourne v. E.I. Dupont De Nemours and Co.*, 189 F.Supp.2d 482, 493-501 (S.D. W.Va. 2002); *Smith v. BMW North America, Inc.*, 308 F.3d 913, 921 (8th Cir. 2002); *Shreve v. Sears, Roebuck & Co.*, 166 F.Supp.2d 378, 395 (D. Md. 2001).

5. A key factor is whether the conclusions in the report "can be (and has been) tested". *Daubert* at 593 (emphasis added); Committee Note. This is equivalent to the reproducibility standard of the information quality rules, which requires that influential scientific and technical information be sufficiently transparent in its methodology and data that a qualified third party would be capable of attempting to substantially reproduce it.

6. At the outset, the trial judge must determine "whether the reasoning or scientific methodology underlying the testimony is scientifically valid" and whether it can be properly applied to the facts of the case. *Daubert* at 580 (emphasis added). It is reasonable for the trial judge to consider the reliability of 'the methodology employed by the expert in analyzing the data . . . and the scientific basis, if any, for such an analysis." *Kumho Tire* at 153.

7. Peer review will increase the likelihood that "substantive flaws in methodology will be detected". *Daubert* at 593 (emphasis added). This again depends to a large degree on the

---

[24] While Rule 702 uses the term "knowledge", which does not appear in 803(8), it is that term which the Court interpreted as establishing the standard of evidentiary "reliability" reflected in its decisions and the Note; and thus that difference in wording is not significant, since the case law on 803(8) consistently interprets "trustworthiness" as a term equivalent to "reliability". Rule 803(8)(C) also differs from 702 in that, under 803(8)(C), the burden is on the party opposing admission to raise a specific challenge based on lack of trustworthiness (reliability), whereas under 702, the burden is on the party offering the expert testimony. For purposes of this memorandum, however, that difference does not appear to matter; the principal issue is what factors the trial judge may, and should, consider, in considering whether the evidence is sufficiently reliable to go to the jury.

transparency and reproducibility required of influential scientific and technical information by the information quality rules.

8. "A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered." *Joiner* at 146. This goes to whether there is an adequate factual basis for the opinion. This is essentially the same factor as number 1, *supra.*

9. The facts in *Kumho Tire* regarding the expert testimony which was excluded show that one of the reasons for exclusion of the expert opinion (which was upheld) was that the tire expert failed to reconcile conflicting data. At 154; Committee Note ("[w]hether the expert has accounted for obvious alternative explanations.")

Federal cases discussed in section VI, *supra*, and Appendix B, which are in conflict with the specific factors for determining reliability under Rule 702 which are indicated in the Supreme Court's decisions, include the following:

Lack of a sound factual or scientific basis for opinion: *Blake* (1st Cir., cause of death on death certificate); *Moran* (3d Cir., opinion based on hearsay); *Vanderpoel* (E.D.Pa.), allegedly inaccurate accident measurements); *Eason* (5th Cir., lack of credible sources); *King Fisher Marine* (S.D. Tex., opinion allegedly based on non-credible witnesses); *Kehm* (8th Cir., report based in part on alleged statistical biases – could also be considered a methodological flaw); *Union Pacific R.* (8th Cir., report allegedly based on hearsay); *Walker* (D. Nev., alleged lack of scientific basis for tests used in aircraft accident report); *In re Korean Air Lines Disaster* (D.D.C., judge commented that report "might not be worth the paper it is printed on").

Lack of transparency as to methods and data to allow for testability/reproducibility: *Ellis* (4th Cir.); *Erickson* (N.D. Ill.). *Cf. Marsh v. W.R. Grace & Co.*, slip op. at 4 (4th Cir. 2003, unpublished, WL 22718177); *United States v. Rincon*, 28 F.3d 921, 924-25 (9th Cir.), *cert. denied*, 513 U.S.1029 (1994); *Pugliano v. United States*, 315 F.Supp.2d 197, 200-01 (D.Conn. 2004)

Methodological flaws: *Wolf* (D.N.J.); *Eason* (5th Cir.); *Kehm* (8th Cir.); *Nakijima* (D.D.C.).

Failure to analyze conflicting data and account for obvious alternative explanations: *Avondale* (E.D. La., failure to analyze conflicting accounts of incident); *Lohrenz* (D.D.C., alleged inconsistencies not addressed); *Gentile* (E.D.N.Y., alleged failure to address contradictory evidence).

In addition, there are a number of factors which have not been specifically articulated by the Supreme Court or Rule 702 as bearing on reliability, but which appear related to those which have been specified:

Lack of skill or experience on the part of the investigator, which appears obviously relevant to the reliability of an opinion on a scientific, technical, or otherwise specialized matter: *Sage* (D.N.H.); *Vanderpoel* (E.D. Pa.); *Walker* (D. Nev.).

Bias, which is relevant to whether there is a sound and objective foundation for an opinion: *Moss* (5th Cir.); *Coates* (E.D. La.); *Kehm* (8th Cir.); *Erickson* (N.D. Ill.). *Cf. Allen v. Pennsylvania Eng'g Corp, supra*, at 198 (commenting on the "preventive perspective" of health risk evaluations conducted by IARC [the International Agency for Research on Cancer], OSHA, and EPA)

Incompleteness, which is relevant to whether there is a sound foundation for the opinion: *Avondale* (E.D. La.); *Vanderpoel* (E.D. Pa.); *Complaint of Nautilus* (D.N.J.); *Moss* (5th Cir.); *School Dist. of Ferndale* (6th Cir.).

In summary, many federal courts have not scrutinized (upon challenge by an opponent) evidence proffered under 803(8)(C) in the manner of a "gatekeeper" for the reliability of scientific, technical, and other specialized information as is required for expert testimony under Rule 702. This appears inconsistent with the need to ensure the reliability of "expert" government reports under 803(8)(C) and the information quality legislation and rules.

X. Scholarly Commentary

We have not located any scholarly commentary addressing the specific subject matter of this memorandum. Some commentaries and digests have noted cases under 803(8)(C) distinguishing between admissibility and weight, but have not attempted to collect them in an organized fashion or comment on their validity. The information quality legislation and rules appear to be of too recent origin to have generated any commentary in connection with evidence rules.

It has been observed in general, however, that FRE 803(8)(C) "is probably the most controversial and widely used clause of the public records exception." Bennett, *Federal Rule of Evidence 803(8): The Use of Public Records in Civil and Criminal Cases*, 21 Am. J. Trial Advocacy 229, 242 (1997). The extent of case law under 803(8)(C) attests to its wide use, and also to the fact that it is routine for an opponent to challenge a proffer of a public record or report under that Rule as lacking trustworthiness.

Early on, it was also observed:

> Although judges must continue to exercise broad discretion to admit or exclude evidence under rule 803(8)(C), supplementary guidelines to direct that discretion should increase the consistency with which the rule is applied. Given the virtual absence of appellate review of evidentiary rulings, efforts to achieve consistency are particularly important in this context. It is therefore useful to consider some of the criteria that have been suggested and to evaluate the degree to which those criteria

> further the purposes of rule 803(8)(C) and conform to the overall design of the Federal Rules of Evidence. [Footnote omitted.]

Comment, *The Trustworthiness of Government Evaluation Reports under Federal Rule of Evidence 803(8)(C)*, 96 Harv. L. Rev.492, 499-500 (1982). The same article expressed the view that government reports should be treated like expert testimony under the Rules. *Id.* at 492-93.

On the subject of what factors can be considered, and should warrant exclusion of reports under 803(8)(C), some commentators have expressed the view that government reports can and should be excluded for lack of accuracy and other indicia of untrustworthiness which some federal courts have rejected as going only to the weight of the evidence, as discussed above:

- "The opponent of a party offering a public record should be prepared to demonstrate lack of trustworthiness, and the offering party should be prepared to defend the report's accuracy." R.C. Park, D.P. Leonard, and S. H. Goldberg, EVIDENCE LAW, 294 (1998).

- "For the objecting party to carry its burden of showing a record is untrustworthy, it must demonstrate that there is 'a particular serious risk that the record is inaccurate in an important way.' Thus, it is not necessary for the objecting party to prove that the record is wrong or inaccurate." Bennett, *supra*, at 253 (citing Mueller & Kirkpatrick, *infra*, § 458, at 600).

- "Methodological shortcomings, including serious failures to investigate leads, talk to witnesses or consider evidence, can show a report is untrustworthy. C.B. Mueller and L.C. Kirkpatrick, FEDERAL EVIDENCE, § 458(f) ("Trustworthiness Factor"), at 600 (2d ed. 1994).

XI. The Need to Obtain Comments from the Bench, Bar, Congress and Others

Rule 803(8)(C) is clearly a very frequently used hearsay exception, with potentially great impacts on important litigation, and the federal case law on application of the trustworthiness proviso is extensive. Presumably, state case law on a similar exception is even more extensive.

As demonstrated, there is a substantial degree on inconsistency among federal courts as to what factors they will allow to be considered in determining admissibility under 803(8)(C), as opposed to weight, and there is a conflict among the circuits on this matter. Many federal cases limiting the trial judge's discretion as to the factors that can be determined in ruling on admissibility, as opposed to weight, are clearly in conflict with the standards contained in the information quality legislation and rules regarding "objectivity".

The new legislation and rules on federal information quality have generated substantial and continuing interest from Members of Congress, the bar, and federal agencies. The suggested amendment proposed herein raises issues of Congressional primacy and the need to make a federal evidence rule consistent with an Act of Congress and government-wide federal rules implementing the specific directives in that legislation.

We believe it is also important to circulate this suggested amendment to the bench and bar because it is apparent that many pertinent court decisions on admissibility under 803(8)(C) are unpublished, and many more might never have been the subject of a written opinion, and might not have been appealed in view of the highly deferential review standard of "abuse of discretion" observed in all circuits. Even in the case of published or unpublished opinions available for review, the opinions often do not contain sufficient detail to ascertain the exact nature of the objection(s) to admission. It therefore appears that circulation of the suggestion with an explanation of the issue it would address is the only way to gauge fully the seriousness of the current inconsistencies in interpretation of the trustworthiness proviso of 803(8)(C) and the need for clarification.

In addition, this suggestion and supporting memorandum address only federal case law, and it would be valuable to obtain some idea of the extent to which inconsistent federal case law has influenced state case law. We have information indicating that federal agency reports – particularly reports relating to potential health hazards – are frequently used in personal injury litigation in state courts.

It does not appear that comments from the bench and bar on these subjects have ever been solicited by the Standing Committee. Indeed, when a suggestion to examine some related issues was received in 1996 (from Runnert, Esq. – see Appendix A), it appears that the issues were never researched and carefully explored.

We recommend that this suggestion be circulated for comment not only to the bench and bar and the legal academic community, but also to the Senate and House Committees on the Judiciary, the Senate Committee on Governmental Affairs, and the House Committee on Government Reform.

APPENDIX A

History of Consideration of Possible Amendments to Federal Evidence Rule 803(8)

Note: The following history is based on the dockets, minutes, and reports of the Advisory Committee since 1992, as posted on the Judicial Conference website at www.uscourts.gov/rules.

The first suggestion for possible amendment of 803(8)(C) occurred at the Advisory Committee meeting September 30-October 2, 1993 in response to a Department of Justice suggestion for a rules amendment to facilitate admission of an expert's report of an analysis of a substance, object, or writing. An alternative suggestion was made to limit the amendment to DEA and ballistics reports and add it to Rule 803(8). There was no action taken on either suggestion.

At its January 9-10, 1995 meeting, the Advisory Committee first began formal consideration of possible amendments to clarify 803(8) with regard to the use of routine law enforcement records against defendants in criminal trials. The meeting minutes state in pertinent part:

> Rule 803(8). Members of the Committee commented that the difference in wording between subdivisions (B) and (C) was unintended and that subdivision (B) should be amended. The rule was not intended to keep accused from offering business records [sic] of matters observed, and the government should not be prevented from offering records about routine matters. The Committee agreed that governmental findings should be admissible as held by the Supreme Court in Beach Aircraft v. Rainey [sic, 488 U.S. 153 (1988)].
>
> The overlap between Rule 803(5), 803(6) and 803(8). The Committee asked the Reporter to clarify at the next meeting the extent to which circuits admit evidence against an accused pursuant to Rules 803(5) or (6) that is barred by the specific provisions in Rule 803(8)(B), (C). The Committee wished to know if there was a split in the circuits. Judge Shadur was also concerned with possible motivational problems in §1983 cases in which law enforcement personnel have been charged.

The Committee disposed of this issue at its next meeting, May 4-5, 1995. Prior to the meeting, the Reporter had provided an analysis of the case law and the Rule and a potential amendment for consideration The minutes state:

> Rule 803(8). The Committee first discussed whether to amend the rule to state explicitly that evidence which would be barred by subdivisions (B) and (C) when offered against an accused may be admissible pursuant to another hearsay exception, or whether to adopt the reasoning of a Second Circuit opinion, United States v.

> Oates, 560 F.2d 45 (2d Cir. 1977), that barred such evidence absolutely. The Committee discussed the Reporter's memorandum about how the Circuits are handling this issue. It appears that routine evidence of governmental activity, such as recording license plate numbers, that falls literally within the prohibitions of subdivisions (B) and (C) is admitted by most circuits pursuant to Rule 803(5). Furthermore, the circuits also admit some evidence barred by Rule 803(8) pursuant to Rule 803(6) when the declarant is available to testify. These cases do not suggest that the courts are permitting the government to put in crucial aspects of its case through hearsay testimony. The Committee concluded that there was no need to amend the rule.
>
> The Committee then discussed whether Rule 803(8)(B) should be amended to permit a criminal defendant to offer against the government evidence which falls within the scope of the exception. Rule 803(8)(C) specifically provides that the evidence made admissible by that provision is admissible "against the Government in criminal cases." The omission in Rule 803(8)(B) may have occurred as a drafting error when Congress revised the rule. The few cases that have considered the issue have allowed the defendant to introduce evidence that otherwise satisfies subdivision (B). Consequently, the Committee saw no need to amend the provision.

Following the above meeting, the Advisory Committee advised the Standing Committee that it had tentatively decided not to propose amendments to a number of Rules, including all sections of Rule 803 except exception (24), and recommended that the Standing Committee circulate those tentative negative decisions for publication and comment.[25]

The Advisory Committee's docket shows that its tentative decisions not to amend the various Rules, including 803(8), were published for public comment in September 1995, with a comment deadline of March 1, 1996.

On January 4, 1996, attorney John A. K. Grunert wrote to the Advisory Committee on Evidence Rules to comment on certain of the above recommendations to the Standing Committee, apparently in response to the solicitation of comments by the Standing Committee on the tentative decision not to proceed with certain amendments to the hearsay exceptions.[26] Mr. Grunert's letter contained a detailed commentary on the practical difficulties in utilizing the trustworthiness proviso in 803(8)(C). He asserted that "a presumption that government officials will issue only accurate,

---

[25] Memorandum dated June 7, 1995, from Hon. Ralph K. Winter, Chair of the Advisory Committee on Evidence Rules, to Hon. Alicemarie H. Stotler, Chair, and Members of the Standing Committee on Rules of Practice and Procedure.

[26] Letter dated January 4, 1996 from John A. K. Grunert of the law firm of Campbell & Associates, Boston, Mass., to Hon. Ralph K. Winter, Chair, Advisory Committee on Evidence Rules. Designated as document 95-EV-14 and EV 1604-24.

objective documents is an obvious fiction", and that it was time to consider amending Rule 803(8)(C) to take account of the practical impossibility in many cases of developing evidence to support a showing of lack of trustworthiness. He noted that government officials who prepared reports submitted under 803(8)(C) were often unavailable for discovery purposes in order for an opposing party to learn whether they had the proper qualifications, what analytical methodology was used, and what political or other concerns might have influenced the wording or conclusions of the report. He also noted that in his experience this was a serious and growing problem, "permitting a great deal of facially persuasive but very poor quality evidence to go un-cross-examined to juries." Mr. Grunert did not propose specific amendatory language to correct the problem; he did, however, suggest the alternatives of either shifting the burden of proof on trustworthiness to the offering party or excluding the report upon a showing that the party opposing its admission "could not with due diligence obtain information reasonably necessary to evaluate its trustworthiness."

At its April 22, 1996 meeting, the Advisory Committee discussed the Grunert letter as a suggested amendment. The minutes state:

> Rules 803(8)(C), 801(d)(1)(A) and 804(b)(1). John A. K. Grunert, Esq. of Boston, Mass had suggesting [sic] amending Rule 803(8)(C) because practical obstacles make it impossible for an opponent to meet the burden of showing that a proffered official report is untrustworthy. He had suggested either shifting to the proponent the burden of proving trustworthiness, or providing that the report is not admissible upon a showing that the opponent "could not with due diligence obtain information reasonably necessary to evaluate its trustworthiness."
>
> The Committee discussed this proposal in light of police accident reports and administrative reports from agencies such as the National Transportation Safety Board and directed the Reporter to advise the Committee about the functioning of the trustworthiness requirement. . . .

Subsequent Advisory Committee minutes and reports do not reflect further consideration of the Grunert comments and suggestion or any Committee action. We requested the Rules support staff to search to see whether the Reporter had prepared a memorandum for the committee, and they reported that they were unable to locate such a memorandum. The Advisory Committee's docket shows that at its November 1996 meeting it "declined to take action" on a suggestion for amendment of Rule 803(8), and that the matter was regarded as completed.

At its November 12, 1996 meeting, the Advisory Committee advised the Standing Committee that it had concluded that 803(8)(B) as presently written did not pose any problems in cases where a criminal defendant sought to introduce a law enforcement report favorable to his defense.[27]

---

[27] Memorandum dated December 1, 1996 from Hon. Fern M. Smith, Chair of the Advisory Committee on Evidence Rules, to Hon. Alicemarie H. Stotler, Chair of the Standing Committee on Rules of Practice and Procedure.

At its April 19, 2002 meeting, the Advisory Committee again began consideration of possible amendments to Rule 803(8). This was done as part of the Committee's regular, systematic review of the Rules, and not in response to a specific suggestion for amendment. The minutes state:

> 26. *Rule 803(8):* Rule 803(8) provides a hearsay exception for public reports. Courts and commentator alike have noted that the Rule has several drafting problems. It is divided into three subdivisions, each defining admissible public reports, but the subdivisions are overlapping. Subdivisions (B) and (C) exclude law enforcement reports in criminal cases from the exception, but courts have held that these exclusions are not to be applied as broadly as they are written. The exceptions are intended to protect against the admission of unreliable public reports, but this concern might be better stated if the exception were written simply to admit a public report unless the court finds it to be untrustworthy under the circumstances. The Reporter informed the Committee that the Uniform Rules have departed from the Federal model, as have many States.
>
> The Committee directed the Reporter to prepare a report on Rule 803(8), to determine whether the Rule should be amended to clarify that a public report is admissible unless the court finds it to be untrustworthy under the circumstances.

The minutes of the Fall 2002 and Spring 2003 meetings of the Advisory Committee do not indicate any consideration of Rule 803(8). The minutes of the November 13, 2003 meeting contain essentially the same statement as quoted above with the addition of one sentence: "The Reporter stated that the report would be ready for the Spring 2004 meeting so that if the Committee did find it necessary to propose an amendment, the proposal could be placed with the rest of the package that would be submitted to the Standing Committee."

On March 8, 2004, The U.S. Supreme Court issued its decision in *Crawford v. Washington*. ___ U.S. ___, 124 S.Ct. 1354 (2004). The Court held that the introduction of evidence against an accused in a criminal trial (in this case, an out-of-court statement to the police by his wife), even though it came within an existing exception to the hearsay rule and appeared reliable, violated the Confrontation Clause of the Sixth Amendment if it was "testimonial" in nature, which the Court determined it to be. The Court stated in concluding its opinion:

> [W]e decline to mine the record in search of indicia of reliability. Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.

In view of its decision in *Crawford*, the Supreme Court returned to the Judicial Conference and the Advisory Committee for further consideration a recommended amendment to the hearsay exception in Rule 804(b)(3) ("Statement against interest") concerning indicia of reliability.[28]

---

[28] Letter dated March 23, 2004 from Chief Justice William H. Rehnquist to Hon. Leonidas Ralph Mecham, Secretary of the Judicial Conference of the United States.

The Supreme Court's action was perfectly understandable. The proposed amendment would have allowed admission, as an exception to the hearsay rule, of a statement against penal interest if the statement were found to have "particularized guarantees of trustworthiness". The proposal was based on an earlier Supreme Court decision which was abrogated by *Crawford*, with *Crawford* holding that admission of the type of "testimonial" statement at issue would be a violation of the Confrontation Clause of the Sixth Amendment, regardless of the reliability of the statement.

The materials prepared by the Reporter for the Advisory Committee's April 29-30, 2004 meeting contained extensive discussion of the *Crawford* decision and its impact on potential proposed amendments to hearsay exceptions 804(b)(3), 803(3), and 803(8). The gist of the Reporter's commentary and recommendations was that any further amendments to hearsay exceptions should await the development of case law which should clarify the meaning of "testimonial" hearsay. The Reporter's comments on potential amendments to Rule 803(3) in which he addressed the implications of the *Crawford* decision stated:

> The bottom line from *Crawford* is that "testimonial" hearsay statements cannot be admitted against an accused unless the declarant is unavailable *and* the accused has or had the opportunity to cross-examine the declarant. Unless these two requirements are met, the "testimonial" hearsay statement must be excluded *even if it is clearly reliable and even if it fits into a standard hearsay exception.* [Original emphasis.][29]

The Reporter's memorandum on proposed amendments to Rule 803(8) stated in part:

> [T]here is no way to predict with certainty how law enforcement reports will fare after *Crawford.* This is because the Court specifically declined to define the term "testimonial." The definition of that term must await a good deal of case law and perhaps an eventual resolution in the Supreme Court. Thus, even if admissibility of law enforcement reports ends up in exactly the same place as it is today, that will only occur after a few years of case law.[30]

On May 15, 2004, the Advisory Committee informed the Standing Committee of its views on the impact of the *Crawford* decision on potential amendments to clarify Rule 803(8)(C).[31] The Advisory Committee's Chair stated in the memorandum to the Standing Committee:

---

[29] Reporter's memorandum to the Advisory Committee dated April 2, 2004 regarding a proposed amendment to Rule 803(3), at 11.

[30] Reporter's memorandum to the Advisory Committee dated April 2, 2004 regarding a proposed amendment to Rule 803(8), at 9.

[31] Memorandum dated May 15, 2004 from Hon. Jerry E. Smith, Chair of Advisory Committee on Evidence Rules, to Hon. David F. Levi, Chair of Standing Committee on Rules of Practice.

4. *Rule 803(8):* The Committee considered a proposed amendment on Rule 803(8)--the hearsay exception for public reports. The possible need for amendment of Rule 803(8) arises from several textual anomalies in the Rule and a dispute in the courts about the scope of the Rule. The Committee noted (as with Rule 803(3)) that any amendment to a hearsay exception is premature in light of the Supreme Court's recent decision in *Crawford v. Washington*. The problem that the courts have had with the public records exception arises almost exclusively when a public record is offered against a criminal defendant. This is the very situation addressed by the Court in *Crawford*. The Committee resolved unanimously to defer consideration of any amendment to Rule 803(8).

APPENDIX B

Federal Circuit and District Court Decisions on Evidence Rule 803(8)(C) Which Distinguish between Admissibility and Weight

Notes: (1) These cases are arranged according to the numerical order of the circuits (with the D.C. Circuit at the end). Nothing should be implied from this arrangement regarding the relative importance of the case law in a particular circuit. (2) Due to the extensive case law under Rule 803(8)(C), the following summary does not purport to be exhaustive, although it is presented as reasonably comprehensive and representative.

1st Circuit

The recent decision in *Blake v. Pellegrino*, 329 F.3d 43 (1st Cir. 2003) stands for the proposition that a trial court cannot exclude from evidence on the basis of lack of trustworthiness a governmental report which the court concludes, based on hearing extensive evidence, is fundamentally inaccurate. In *Blake*, the district court initially admitted into evidence a death certificate prepared by a State medical examiner which stated the cause of death as "complications of asphyxia by choking"; however, the court, after almost 17 days of trial, then decided that the stated cause was clearly inaccurate and unreliable under 803(8), and redacted the cause of death from the certificate and instructed the jury to disregard it. The circuit court reversed and remanded. The circuit court evaluated the issue, not in terms of accuracy and reliability, but in terms of whether a trial judge can exclude evidence based on his opinion of its "persuasiveness" or "credibility". The circuit court stated:

> The question reduces, therefore, to whether, in the absence of special circumstances, see *supra* note 3, a trial judge has the authority to exclude evidence on the basis of his own belief as to the persuasiveness of that evidence. We conclude that, in a jury trial, no such authority exists. After all, the jury is the factfinder, and "the ultimate arbiter of the persuasiveness of the proof must be the factfinder, not the lawgiver." . . . In arrogating unto itself the power to evaluate the persuasiveness of the medical examiner's conclusion about the cause of death, memorialized in the death certificate, the district court adverted to Fed. R. Evid. 104(a) and Fed. R. Evid. 803(8) as the wellsprings of its authority. Neither of these rules adequately underpins the court's action.

329 F.3d at 47-48. The court's reference to its note 3, and the contents of that note, are particularly interesting. In that note, the court distinguished the death certificate situation from a situation in which a trial court could exclude expert testimony due to lack of credibility or lack of a "reliable foundation" under *Daubert* and Rule 702. As we observe in the accompanying memorandum in support of the suggestion for revision of Rule 803(8), although Rules 702 and 803(8) are technically separate, in a case such as this they both involve supposedly expert testimony regarding "scientific, technical, or other specialized knowledge", and both also allow exclusion of evidence based on the

trial court's determination of lack of reliability. In the case of 803(8)(C), however, a trial court's authority to determine reliability is even more important because the additional safeguard of cross-examination is often not available.

In *United States v. Davis*, 826 F.Supp. 617 (D.R.I. 1993), the district court appears to have taken a more supportable position on weight vs. admissibility. Essentially, that position is that in any given case under 803(8)(C) the facts might indicate sufficient trustworthiness to justify admissibility, but that factors bearing on lack of trustworthiness which the court assesses as "minor"are points that can be argued to the jury regarding the weight to be given the information. In *Davis,* the U.S. Environmental Protection Agency took remedial action against a company for contamination at a Superfund site. The action was based on a remedial investigation report (a "RI Report"). The defendants challenged the trustworthiness of the RI Report on a number of grounds, including alleged lack of quality control, conflicting results for identical soil samples, and an inadequate showing of chain of custody of soil samples. The district court held the RI Report was admissible under 803(8)(C), explaining:

> After careful review of the defendants' criticisms and the United States' responses, I find no one factor or combination of factors which indicate that the entire document is untrustworthy. The criticisms of the defendants as to **minor** errors and methodology do not impugn the overall reliability of the RI Report. In an investigation of the magnitude of the RI Report for the Davis Site, it was inevitable that some **minor** mistakes would be made. **Defendants may adequately address their concern about these mistakes at trial to attack the weight given to the Report.**

826 F.Supp. at 823-24 (emphasis added). The court did not state that matters bearing on overall accuracy such as the methodology employed could not be considered in ruling on trustworthiness.

Another district court case from the 1st Circuit appears to be in clear conflict with the intent of 803(8)(C). In *Sage v. Rockwell Int'l Corp.*, 477 F.Supp. 1205 (D.N.H. 1979), the district court declined to exclude from evidence a Judge Advocate General ("JAG") report on an aircraft accident on the basis that the investigator lacked special skill or experience. The court reasoned that "it [the lack of special skill or experience on the part of the investigator] **goes to the weight of his testimony, without denying the admissibility of the evidence.**" 477 F.Supp. at 1209 (emphasis added). The court specifically noted that its opinion on this point was in conflict with an opinion on the same JAG report in a related case brought in the Southern District of Ohio (within the 6th Cir.), *Fraley v. Rockwell Int'l Corp.*, 470 F.Supp. 1264 (S.D. Ohio 1979). In *Fraley*, the court found that the JAG investigator was inexperienced and the matter investigated was highly complex, and the court therefore excluded the JAG report. The Ohio district court cited the special skill or experience of the official who conducted the investigation as a factor to be considered in making a decision on admissibility explicitly recommended by the Committee Notes on Rule 803(8)(C). 470 F.Supp. at 1267.

2d Circuit

There is some indication of confusion about the weight v. admissibility issue in the 2d Circuit. In *Rosario v. Amalgamated Ladies' Garment Cutters' Union*, 605 F.2d 1228 (2d Cir. 1979), *cert. denied*, 446 U.S. 919 (1980), the court ruled admissible as a business record under Rule 803(6) a citizen complaint report made out at a police station. Admission was objected to on grounds of lack of reliability. The court stated that the complaint was admissible because it was prepared in the regular course of the business of the police department, and that "[i]ts weight and the credibility to be extended to it were matters for the jury, which might be (and were) explored on cross-examination." 605 F.2d at 1250-51. No case law precedent was cited by the circuit court and no express finding of trustworthiness or reliability was made. Rule 803(6) contains language somewhat similar to 803(8) permitting exclusion for lack of trustworthiness.[32]

In *Bradford Trust Co. v. Merrill Lynch, Pierce, Fenner and Smith, Inc.*, 805 F.2d 49 (2d Cir. 1986), the court cited *Rosario* (with a "See") in stating (in what is apparently a dictum) that the trial court, in a bench trial, erred in according no weight to FBI fingerprint reports after admitting them under 803(8)(6). The court stated that "weight and credibility extended to government reports admitted as exceptions to the hearsay rule are to be determined by the trier of fact." 805 F.2d at 54.

In the district court decision in *Gentile v. County of Suffolk*, 129 F.R.D. 435 (E.D.N.Y. 1990), the defendants objected to admission under 803(8) of a State investigatory commission report on the County's practice of countenancing police misconduct. A jury trial was held. The objections were based on the Commission's alleged failure to address contradictory evidence in its report. The objections were apparently intended to allege bias and incompleteness in the Report for the purpose of challenging its trustworthiness. The district court found that the Commission's defense of its report (in court testimony, outside the report) was credible and persuasive, and stated that it would not credit contrary testimony. 129 F.R.D. at 454. Later in the same opinion, the district court held that "**[t]he credibility of a government report and the weight attached to it are matters to be decided by the trier of fact.**" 129 F.R.D. at 461 (emphasis added) (citing *Bradford Trust* and *Rosario*).

When the district court decision in *Gentile* was appealed, the 2d Circuit reiterated the position that there was a distinction in this case between trustworthiness and credibility. The defendants, who objected to admission of the State investigatory report, argued that the judge's statements that he would address trustworthiness at the close of the proceedings discouraged them from introducing evidence during the trial to contest trustworthiness. The court stated: "We find that defendants' argument is without merit both on conceptual and factual grounds. First, **defendants fail to distinguish between a trustworthiness determination, which is made by the trial court to decide whether certain evidence (e.g., a government report) is admissible, and a credibility determination, which is made by the trier of fact to decide exactly what weight to accord to evidence that has been admitted.**" 926 F.2d at 149 (emphasis added).

---

[32] But see the discussion of the differences in section V, *supra*.

3d Circuit

An early and influential case containing the distinction between weight and admissibility is *Moran v. Pittsburgh-Des Moines Steel Co.*, 183 F.2d 467 (3d Cir. 1950). Although decided before original enactment of the Federal Rules of Evidence in 1975, it is cited in the Advisory Committee Notes for 803(8)(C) as an example of cases holding that government "evaluative" reports are admissible as exceptions to the hearsay rule. The Advisory Committee's recognition of the relevance of *Moran* is significant, since the decision was based not on federal rules of evidence but on the federal business records statute, 28 U.S.C. § 1732, as it existed in 1950. As noted by the court in *Moran*, the federal statute at that time contained an express provision providing for admissibility of records prepared in the regular course of business, with all other circumstances going to weight rather than admissibility.[33] However, the Notes do not observe that the provision concerning admissibility v. weight which was relied on by the court to allow admissibility was repealed when the federal rules were promulgated, and the rules substituted the "lack of trustworthiness" language in both the business records hearsay exception in Rule 803(6) and the government records and reports exception in Rule 803(8)(C) (albeit with possibly significant differences between the provisos in the two rules). In *Moran*, the court held admissible a report by the federal Bureau of Mines on the cause of a gas tank failure. The court stated: "The report is no less admissible because it contains conclusions of experts which are based upon hearsay evidence as well as upon observation. **These circumstances, by virtue of express statutory provision [in 28 U.S.C. § 1732, as then in force], go to weight rather than to admissibility.**" 183 F. 2d at 472-73 & n.6 (emphasis added.)

There is nothing in the Notes or the legislative history to indicate the reasoning for discarding the § 1732 distinction between admissibility and weight and substituting the "lack of trustworthiness" language of the Rules; however, the change appears to speak for itself: Such a distinction was no longer to be observed; rather, the court was to base its decision concerning admissibility on "trustworthiness", which apparently could now encompass circumstances other than how the record or report was prepared and which previously might have been regarded as "other circumstances" which bore on weight rather than admissibility.

In *Wolf v. Procter & Gamble Co.*, 555 F.Supp. 613 (D.N.J. 1982), the defendants objected to admission of epidemiologic studies concerning "toxic shock syndrome" ("TSS") conducted by the federal Centers for Disease Control and several State health departments. The defendants argued that the studies were not trustworthy because they were "hastily conducted and suffered from serious methodological flaws." The district court dismissed these arguments on the basis that "**these considerations bear on the weight to be given the evidence by the jury rather than on its admissibility.**" 555 F.Supp. at 625 (emphasis added). The court characterized the defendants' arguments as going to the "accuracy" of the reports, and it indicated that it found the studies

[33] This statutory provision which was deleted when the Federal Rules of Evidence were enacted in 1975 stated: "All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility."

"persuasive" because they had been prepared by public health agencies, because they consistently found an association between tampon use and TSS, and because the studies had been published in respected journals.

In *Vanderpoel v. A-P-A Transport Co.*, 36 Fed. R. Evid. Serv. 247 (E.D. Pa. 1992, WL 158426), the court ruled that a police accident report was admissible under 803(8)(C). The defendant had challenged the trustworthiness of the report on a number of grounds, including alleged lack of expertise of the investigator and inaccurate skid measurements. In dismissing these allegations, the district court relied heavily on the 5th Circuit's decision in *Moss v. Ole South Real Estate, Inc.*, 933 F.2d 1300 (5th Cir. 1991), and focused on the issue of admissibility v. credibility or weight. The district court stated:

> **In determining the trustworthiness of a report, the court should not focus on the report's credibility, but on its reliability.** *Moss*, 933 F.2d at 1307. The Fifth Circuit explains, **"[C]ourts should not focus on questions regarding the accuracy or completeness of the document's conclusions."** ***Id.*** **"Whether a conclusion is correct and whether the bases for that conclusion are complete and accurate are issues of credibility."** Instead, the court should analyze the report's reliability, meaning that "the trial court is to determine primarily whether the report was compiled or prepared in a way that indicates that its conclusion can be relied upon. Id., In other words, "reliability focuses on the methodology behind the report." *Id.* at 1308.

At 2 (emphasis added.)[34]

In *Complaint of Nautilus Motor Tanker Co.*, 862 F.Supp. 1251 (D.N.J. 1994), the district court also relied on *Moss v. Ole South Real Estate, Inc.*, 933 F.2d 1300 (5th Cir. 1991), as well as the 2d Circuit's decision in *Bradford Trust v. Merrill Lynch, Pierce, Fenner, and Smith, Inc.*, 805 F.2d 49 (2d Cir. 1986), in disposing of factual assertions regarding untrustworthiness of a Coast Guard accident report. The plaintiff disputed the skill of the investigator and asserted that he left out various pieces of relevant information (*i.e.*, that the report was incomplete). To these arguments the court responded:

> In determining admissibility, the Court must **only** consider whether the report was compiled in a way that indicates that its conclusions could be relied upon, not whether the Court agrees with the conclusions. *Moss v. Ole South Real Estate Inc.*, 933 F.2d at 1307. In doing so, the Court should permit the conclusions to be used as evidence by the trier of fact in determining the ultimate weight and credibility which should be attached to them. *Bradford Trust*, 805 F.2d at 54.

862 F.Supp. at 1255 (emphasis added).

---

[34] The court had previously issued another version of its decision the day before. 1992 WL 158418. That opinion does not differ in substance on the point discussed here; it appears to differ mainly in its discussion of *Beech Aircraft v. Rainey* and the factual basis for the defendant's trustworthiness challenges.

4th Circuit

In *Ellis v. Int'l Playtex, Inc.*, 745 F.2d 292 (4th Cir. 1984), the defendant opposed introduction into evidence of studies by the federal Centers for Disease control and three State health agencies concerning toxic shock syndrome on grounds that the methodology was flawed. The court emphasized the presumption of government reliability under 803(8)(C) and stated that the defendant's concern with the methodology "should have been addressed to the relative weight accorded the evidence and not its admissibility." 745 F.2d at 303. The court reasoned that this approach – emphasizing the jury's role – "permits admission without sacrificing scrutiny" and "avoids many of the problems that have plagued courts which have adhered to the traditional rule that the judge sit [sic] in judgment on scientific data." *Id.* The defendant also objected to admission of the CDC and State studies because there was no information available, in the studies or through testimony, concerning the actual methodology used to gather the data. The court responded that the burden rested on defendant to show that the methodology was flawed, and whether the investigator was available to testify concerning the methodology, or whether the report stated its methodology, were not reasons to exclude the studies. 745 F.2d at 302. *Ellis* thus illustrates a disparity in treatment between "expert" government information considered for admission into evidence under 808(8)(C) and expert testimony under Rule 702 and *Daubert*, and conflict with the information quality legislation and rules, particularly in a situation where information is not capable of being substantially reproduced.

5th Circuit

The leading case on credibility and weight v. admissibility in the 5th Circuit is *Moss v. Ole South Real Estate, Inc.*, 933 F.2d 1300 (5th Cir. 1991). *Moss* has also been cited extensively in other circuits on this issue. *Moss* addressed admissibility under 803(8)(C) of two reports, one by the Air Force and one by HUD, on possible racial discrimination in housing. The district court found that the Air Force report should be denied admissibility due to reliance on biased witnesses, because there was no indication of the skill of the investigators, and because there were conflicts in the report. The district court also found that the HUD report should be excluded for lack of trustworthiness because of bias (lack of objectivity), and because the investigation was not thorough (was incomplete) and misleading. The circuit court reversed and remanded, holding that the district court abused its discretion in excluding both reports because it applied a flawed legal analysis by making determinations of credibility rather than trustworthiness. The circuit court explained:

> The magistrate did not limit himself to determining whether the reports were trustworthy. Instead he made several determinations that witnesses in the report were not credible, and as a result the reports were not *credible* and therefore were untrustworthy. Credibility is not the focus of the trustworthiness inquiry. The magistrate looked broadly at credibility in ruling on both reports. For example, the magistrate found that the HUD report's resolution of certain disputed facts was incorrect and that "many of the findings appear to be incomplete and misleading as they fail to consider all the relevant evidence." **Whether a conclusion is correct and**

> **whether the bases for that conclusion are complete and accurate are issues of credibility.** He also found that the Air Force and HUD relied on "biased" witness. Again, this is an issue of credibility–whether certain witnesses are believable and accurate. [Footnote omitted.] In making determinations of credibility, the magistrate overstepped his role. The court must allow the jury to make credibility decisions and to decide what weight to afford a report's findings. The magistrate's complaints are similar to the ones addressed in *Matador Drilling Co. v. Post*, 662 F.2d 1190, 1199 (5th Cir. 1981). In that case we noted that the appellant's "general complaint that the reports are incomplete and inaccurate are matters going to the weight of this evidence and not its admissibility." *See also Crompton Richmond Co., Factors v. Briggs*, 560 F.2d 1196, 1202 n.12 (5th Cir. 1977) . . . . **In making the trustworthiness determination required by Rule 803, courts should not focus on questions regarding the accuracy or completeness of the document's conclusions.** [Footnote omitted.] It follows that in determining trustworthiness under Rule 803(8)(C), credibility of the report itself or the testimony in the report are not the focus, instead the focus is the report's *reliability*.

933 F.2d at 1306-07 (italics as in original; bold emphasis added). It is noteworthy that *Matador Drilling Co.* and *Crompton Richmond Co.*, the two other 5th Circuit cases cited, were cases decided under 803(6), the business records exception. As we have noted, the line of 803(6) cases appear to be incorrectly influenced by reliance on the pre-1975 version of the federal business records statute, 28 U.S.C. § 1732, which expressly stated that circumstances other than whether the record was prepared in the ordinary course of business should be regarded as going to the weight of the evidence, not its admissibility. It should also be noted, however, that the 5th Circuit in *Moss* hedged the pertinent portions of its opinion to a minor extent with a number of qualifying footnotes. It stated, in note 3, that it did not suggest that bias may never render a report unreliable under 803(8)(C); and it stated in notes 4 and 5 that in unusual circumstances, where a report was so inaccurate that reasonable jurors could not accept its conclusions, it should not be admitted. After ruling that the HUD report was admissible under 803(8)(C) applying the above principles, the circuit court nevertheless held that the report should be excluded because it was not prepared in a timely manner and because a key witness had not been interviewed. The court did not explain why failure to interview a key witness was not a matter of completeness.

In *Eason v. Fleming Cos., Inc.*, (5th Cir. 1993, unpublished, WL 13015208), the court relied on *Moss* in upholding the district court's admission into evidence of an EEOC employment discrimination report.[35] The plaintiff challenged the report on the basis that it used an unreliable investigative methodology, was incomplete, lacked credible sources, and was compiled by non-investigative personnel. The circuit court held that these challenges were "not substantive enough", and that the challenges were based more upon the report's alleged lack of completeness rather than its trustworthiness. Citing *Moss*, the court stated that "the party opposing the admissibility of a

[35] The court's preface to its opinion states that it will not be published because it is "based upon well-settled principles of law".

government report must demonstrate that it was compiled utilizing methods that cannot be relied upon; general complaints that the report is incomplete or inaccurate go to the weight afforded the report rather than its admissibility." At 3.

In *Coates v. AC and S, Inc.*, 844 F.Supp. 1126 (E.D. La. 1994), the district court found admissible under 803(8)(C) EPA and OSHA published "position papers" on the health effects of asbestos. The defendants objected on the basis that "OSHA Position paper and EPA regulations are not required to be scientifically accurate and both OSHA and EPA are permitted to 'over protect' and thus, exaggerate their findings". 844 F.Supp at 1132. The court sidestepped the above issue, stating: "Defendants do not attack the skill of those making the investigations at issue, but rather, obliquely suggest that the studies are politically influenced and thus, not based upon objective and impartial scientific research." *Id.* The court then found that the reports were issued only after lengthy and thorough hearings and found the reports admissible. 844 F. Supp. at 1132-33.

In *Avondale Indus., Inc. v. Bd. of Comm'rs of the Port of New Orleans* (E.D. La. 1996, unpublished, WL 280787), the defendants challenged admissibility under 803(8)(C) of a Coast Guard investigatory report of an incident in which a vessel collided with a bridge. Much of the original investigative file had been lost, and the defendant's arguments included that the report lacked any critical analysis of conflicting factual accounts, that the Coast Guard failed to interview at least four impartial eyewitnesses; and that all notes, photographs, and other documentation referred to in the report were missing and could not be reviewed or challenged at trial. The court found the report admissible as trustworthy, relying principally on *Moss v. Ole South Real Estate, Inc.* It stated that trustworthiness is determined by applying the four non-exclusive factors set out in the Committee Notes and in *Beech Aircraft v. Rainey*, and declined to exclude the report on additional grounds, stating:

> [D]efendants' argument is not supported in law. Since the Supreme Court's decision in *Beech Aircraft Corp.*, the Fifth Circuit has made it clear that trustworthiness simply means "that the trial court is to determine whether the report was compiled or prepared in a way that indicated that its conclusions can be relied upon . . . ." *Moss*, 933 F.2d at 1307. **The trial court is not to focus on the accuracy or completeness of the document's conclusions or the credibility of witnesses involved.** *Id.* Other safeguards built into the Federal Rules of Evidence, such as those dealing with relevance and prejudice, provide the means to exclude inadmissible portions of reports covered by Rule 803(8)(C). *Beech Aircraft Corp.*, 488 U.S. at 167-68. And, as recognized by the Supreme Court, the ultimate safeguard to the admission of a report containing conclusions is "the opponent's right to present evidence tending to contradict or diminish the weight of those conclusions." *Id.* at 168. . . . It is hardly disputed that the Report was prepared in a manner that qualifies as trustworthy under 803(8)(C). However, defendants' right to object to specific portions of the Report on such grounds as provided by the Federal Rules of Evidence is specifically reserved for trial.

At 2-3 (emphasis added).

In *King Fisher Marine Serv., Inc. v. M/V SOCOL* (S.D. Tex. 2001, unreported, WL 1911437), the district court excluded a report by a State investigatory board on a collision between a vessel and dredging equipment. As in *Moss*, the circuit court, in reversing, relied on the 5th Circuit 803(6) business records case of *Matador Drilling Co. v. Post*, 662 F.2d 1190 (5th Cir. 1981). The court stated:

> In determining whether a record or report is trustworthy, a court must look to reliability rather than credibility. [Citing *Moss.*] Credibility speaks to the substance of the report's findings. For example, do the conclusions of the report appear accurate; were the witnesses credible? Such questions related to the weight of the evidence, not its admissibility. [Citing See *Matador.*] Reliability, on the other hand looks to the procedures employed in compiling the record or report.

At 4. As in *Moss*, however, the court excluded the report as unreliable and untrustworthy because it concluded that there was too much delay in conducting the investigation and because the State board failed to interview a key witness.

6th Circuit

The 6th Circuit diverges from the other circuits in its willingness to consider all factors – including accuracy, completeness, credibility of witnesses, reliability of underlying data, investigator expertise, and ability to verify findings – in determining lack of trustworthiness under 808(8)(C). While at least two opinions from the late 1970s mention a distinction between weight or credibility and admissibility, its later opinions do not contain such distinctions, and they recognize the likelihood that case law decided under the federal business records statute, 28 U.S.C. § 1732, when it contained the provision stating that circumstances outside preparation of the record go only to weight rather than admissibility, has incorrectly influenced some 803(8)(C) cases.

In *United States. v. School Dist. of Ferndale, Mich.*, 577 F.2d 1339 (6th Cir. 1978), the circuit court reversed the district court's exclusion of an HEW report on education discrimination. The circuit court characterized the lower court's concerns with unavailability of certain procedural powers during the HEW investigation as ones which "only suggest a possible lack of completeness in the HEW proceedings which can be remedied by the school district in this proceeding . . . ." 577 F.2d at 1355. The party objecting to use of the HEW report also argued that there was no showing that the hearing examiner had special expertise, but the circuit court found that this factor (and apparently also the factor bearing on lack of completeness) "[p]erhaps . . . affect the weight given to the [HEW] findings, but not their admissibility." *Id.*

In *United States v. 478.34 Acres of Land*, 578 F.2d 156 (6th Cir. 1978), the court ruled that a Government statistical survey of the prices paid for land in the county was not admissible under 803(8)(C) because "[t]here was no way for the landowner to test the accuracy or reliability of the data." 578 F.2d at 159.

In *Baker v. Elcona Homes Corp.*, 588 F.2d 551 (6th Cir. 1978), the plaintiffs objected to admission of a police accident report. It appears that the only factor plaintiffs were able to raise as bearing on lack of trustworthiness was the lack of a formal hearing, which is a factor listed as relevant in the Committee Notes, but which the circuit court considered to be of marginal, if any, relevance in this case. The court stated that "plaintiffs' objections go not so much to admissibility as to weight and credibility, matters which are essentially for the jury to consider." 588 F.2d at 558-59.

In *Fraley v. Rockwell Int'l Corp.*, 470 F.Supp. 1264 (S.D. Ohio 1979), the district court held inadmissible under 803(8)(C) a Navy JAG report on the cause of an airplane crash. The court found that the JAG report was prepared by an inexperienced investigator in a highly complex field of investigation, and therefore lacked the necessary reliability. 470 F. Supp. at 1267.

In *Dallas & Mavis Forwarding Co. v. Stegall*, 659 F.2d 721 (6th Cir. 1981) the district court held that a police accident report lacked trustworthiness under 803(8)(C), and the circuit court agreed. The court found that the police report was not based on any physical evidence, but mainly on the eyewitness account of an employee of the plaintiff. The court therefore concluded that the report had "possible motivational problems" in relying on a biased witness, and therefore was rightly excluded. 659 F.2d at 722.

In *Miller v. Caterpillar Tractor Co.*, 697 F.2d 141 (6th Cir. 1983), the 6th Circuit upheld exclusion of an investigative report by a U.S. Bureau of Mines mining engineer on the cause of an injury which occurred when a truck rolled out of control at a mining site. The district court's finding of lack of trustworthiness was based on findings that (1) the sources of information relied on in the report were "suspect as to hearsay", (2) the investigator was "not facially qualified" in the subject matter, and (3) the report "included a conclusion as to the cause of the accident which was not independently verifiable". The circuit court held that these considerations were sufficient to exclude the report for lack of trustworthiness. Plaintiffs sought to rely on the decisions in *Baker* and *Moran v. Pittsburgh-Des Moines Steel Co.*, but the circuit court decided that the present case was more similar to *Dallas v. Mavis Forwarding Co.* (The court also examined its decision in *School District of Ferndale*, but did not comment on it.) With regard to *Moran* (a 3d Circuit case), the court expressly noted the problem with relying on a case decided under the federal business records statute before its weight v. admissibility provision was repealed by enactment of the evidence rules:

> Miller submits *Moran v. Pittsburg-Des Moines Steel Co*, 183 F.2d 467 (3d Cir. 1950) in support of admission of the Stanius Report [the mining engineer's report]. In *Moran*, the Third Circuit adjudged that a Bureau of Mines report which contained a conclusion as to the cause of a tank explosion (which was the ultimate jury issue) was admissible, stating:
>
> > The report is no less admissible because it contains conclusions of experts which are based upon hearsay evidence as well as upon observation. These circumstances, by virtue of express statutory provision, go to weight rather than to admissibility.

> *Id.* at 473. **The precedential value of *Moran* is suspect, however, since the Court was interpreting 28 U.S.C. § 1732, the business report statute and predecessor of FRE 803(8), which expressly stated at that time: "All other circumstances of the making of such writing or record including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility." *Id.* at 473. FRE 803(8) contains no such similar statement.**

697 F.2d. at 144 n.1 (emphasis added).

Subsequent decisions by the 6th Circuit have continued to uphold exclusion of public reports under 803(8)(C) due to lack of trustworthiness where there was good reason to suspect the reliability of the information underlying the report. In *Bright v. Firestone Tire & Rubber Co.*, 756 F.2d 19 (6th Cir. 1984), the circuit upheld exclusion of a Congressional subcommittee report which relied extensively on consumer complaint data to find that the tire which allegedly caused an accident was known to be a "problem tire". The court found that the "unverified nature of the evidence relied on by the [Congressional] Committee" was sufficient reason to exclude it as not trustworthy. 756 F.2d at 22-23. In *United States v. Jackson-Randolph*, 282 F.3d 369 (6th Cir. 2002), the circuit upheld exclusion of a report by the Michigan Department of Education on possible fraud in seeking reimbursements under a school food program. The court found that the principal witness relied on by the State's hearing examiner was not trustworthy because she was originally a co-defendant, and later accepted a plea bargain, and therefore "had a significant motive to lie about the falsity of food program claims." Since this witness' testimony was unreliable, the hearing examiner's report relying on it was likewise unreliable. 282 F.2d at 381.

7th Circuit

In *United States ex rel. Collins v. Welborn*, 49 F.Supp. 597 (N.D. Ill. 1999), *aff'd in part, rev'd in part sub nom Bracy v. Schomig*, 286 F.2d 406 (7th Cir. 2002), the district court held admissible under 803(8)(C) a government summary of a judge's bribery offenses and related conduct, prepared in connection with sentencing of the judge, (referred to as the "Government Version") in a habeas corpus proceeding brought by an inmate convicted by the judge. The Government Version was challenged as a biased, adversarial document. The court held that the report was admissible, stating: "**It** is an adversarial document, and therefore **may be slanted** to support the government's position. **But that goes to the weight to be accorded the document; it does not make it untrustworthy.**" 49 F.Supp. at 605 (emphasis added). The court did not cite any case authority.

In *Erickson v. Baxter Healthcare, Inc.*, 151 F.Supp.2d 952 (N.D.Ill. 2001), the widow of a hemophiliac brought suit against a medical equipment manufacturer after he died of liver disease allegedly brought on by a blood-borne virus. Plaintiff sought to introduce under 803(8)(C), and defendants opposed introduction of, a report on contaminated blood products prepared by the Institute of Medicine, a quasi-public entity operating under the National Academy of Sciences. Defendants submitted questions to the IOM on how the report was prepared, and the editors refused

to answer. However, the questions, the court said, went to the identity of those who prepared the report and their choice of language, rather than the methodology used. The court interpreted defendants' objection to the report as pertaining to political bias, and held the report admissible, stating that "[p]olitical bias goes to the weight of the report as evidence, not its admissibility, and it may be explored on cross-examination." [Citing *Ellis v. Int'l Playtex* (4th Cir. 1984) with a "*See*"] (It was not clear who would appear as a witness to be cross-examined.) Defendants also argued that a conclusion in the report concerning ability to develop safer alternatives had been rejected by experts in the field, and the court also concluded that "that is evidence a jury is entitled to weigh." 151 F.Supp.2d at 967.

Also worthy of note is *White v. Godinez*, 301 F.3d 796 (7th Cir. 2002), although it concerned evidence which the circuit court characterized as admissible as business records under 803(6). The case was an appeal from a grant of a writ of habeas corpus. The decision indicates that the State "questioned" the district court's reliance on certain county jail visitation records because they were incomplete. (Such records should, it appears, have been proffered under 803(8)(C)). The circuit court stated that "[w]e agree with the district court . . . that the state's arguments about incompleteness implicate the weight, and not the admissibility, of the records." 301 F.2d at 801.

8th Circuit

In *Kehm v. Procter & Gamble Mfg. Co.*, 724 F.2d 613 (8th Cir. 1983), the defendants sought to block admission of apparently the same CDC and State epidemiologic studies that were at issue in *Wolf v. Procter & Gamble Co.*, 555 F.Supp. 613 (D.N.J. 1982). The defendant argued that the studies were untrustworthy because they reflected numerous statistical biases. The court rejected the defendant's objection, observing that "Procter & Gamble . . . presented expert testimony of its own challenging the methodology of the government reports and evidence rebutting the conclusions of those reports. . . . The jury was therefore fully aware of the parties' conflicting assessments of the report and, we believe, fully capable of evaluating the evidence on both sides. 724 F.2d at 618-19.

In *Union Pacific R. Co. v. Kirby Inland Marine, Inc. of Mississippi*, 296 F.3d 671 (8th Cir. 2002), the circuit court upheld admission under 803(8)(C) of a Coast Guard report containing an evaluation on whether a bridge should be altered because it posed an unreasonable obstruction to navigation. The plaintiff opposed admission of the report as untrustworthy on grounds that the Coast Guard relied on hearsay to reach its conclusions. The circuit court, relying extensively on *Moss*, found that such a factor was not sufficient to call into question the report's trustworthiness because "in considering whether a report is trustworthy, the court should not consider whether the report is credible, but rather should consider whether the report is reliable." "The Rule 803 trustworthiness requirement", it stated, quoting *Moss*, "means that the trial court is to determine primarily whether the report was compiled or prepared in a way that indicates that its conclusions can be relied upon." There is no further analysis in the opinion as to whether reliance primarily on hearsay does not impugn reliability. 296 F.3d at 679-80.

9th Circuit

In *Walker v. Fairchild Indus., Inc.*, 554 F.Supp. 650 (D.Nev. 1982), the court upheld admission of an Air Force aircraft accident investigation report under 803(8)(C). The defendant objected that the report was untrustworthy because some of the simulation tests on which the report was based were performed by persons who were not qualified. The court noted that both persons who performed the tests "admitted that there was no scientific basis for the tests and that neither was an expert" in the subject of the tests. Nevertheless, the court found that the issue of qualifications of the investigators went more to the weight and credibility of the evidence than its admissibility. 554 F.Supp. at 654-55. The court did not specifically address the issue of lack of scientific basis.

In *Hedgepeth v. Kaiser Found. Health Plan of the Northwest* (9th Cir. 1996, unpublished, WL 29252) the court rejected as untrustworthy a State labor bureau report which found substantial evidence of age discrimination against the plaintiff. The court found that since the State investigator conceded that he was unable to fully investigate the claim, the report was untrustworthy. Surprisingly, the court cited *Moss* for the principle that "[t]he role of the court in determining untrustworthiness is not to assess the report's credibility, but to evaluate whether the report was compiled or prepared in a way that indicates its reliability." At 1. In *Moss*, the court determined that incompleteness was a matter of credibility rather than reliability.

10th Circuit

The 10th Circuit appears to have avoided generalities about credibility v. reliability, or weight v. admissibility, and has limited its rulings to the evidence in the individual case. *See Perrin v. Anderson*, 784 F.2d 1040, 1047 (10th Cir. 1986) (police internal investigation of shooting was not necessarily biased and report would not be excluded absent specific evidence of bias -- trial court is first and best judge of trustworthiness and reliability); *In re Air Crash Disaster at Stapleton International Airport, Denver, Colo.*, 720 F.Supp. 1493, 1498 (D.Colo. 1989) (fact that an agency preparing a report has an interest in its conclusions goes to weight, not admissibility, absent specific evidence of bias).

11th Circuit[36]

The 11th Circuit, much like the 10th Circuit, has not drawn a distinction between credibility, accuracy, and completeness v. reliability or trustworthiness, and has apparently given trial courts substantial discretion to decide whether a particular factor bearing on reliability should go to weight rather than admissibility.

---

[36] The 11th Circuit, encompassing the States of Georgia, Alabama, and Florida, was carved out of the 5th Circuit in 1980, leaving the Fifth Circuit to encompass Texas, Louisiana, and Mississippi. Fifth Circuit cases decided prior to October 1, 1981, are considered binding precedent within the 11th Circuit. Consequently, the 5th Circuit's leading case distinguishing between credibility (including accuracy and completeness) and reliability, *Moss v. Ole South Real Estate, Inc.*, decided in 1991, and its progeny, are not precedent in the 11th Circuit.

In *Harris v. Birmingham Bd. of Educ.*, 537 F.Supp. 716 (W.D. Ala. 1982), *aff'd in part, rev'd on other grounds*, 712 F.2d 1377 (11th Cir. 1983), an employment discrimination case, the court, sitting without a jury, initially admitted an EEOC report under 803(8)(C), but later decided that the report was prepared in disregard of certain evidence, contained numerous erroneous and slanted statements, and was prepared in contemplation of litigation, and therefore should not be given any weight.

In *Baker v. Firestone Tire & Rubber Co.*, 793 F.2d1196, 1199 (11th Cir. 1986), the circuit court excluded the same Congressional report that was excluded by the 6th Circuit in *Bright v. Firestone Tire & Rubber Co.* on the basis that it did not contain findings from an "objective" investigation.

In *Hines v. Brandon Steel Decks*, 886 F.2d 299 (11th Cir. 1989), the circuit court held that an OSHA investigator's lack of expertise in a particular area involved in a report sought to be admitted under 803(8)(C) might be considered by the district court to go either to admissibility or to weight. 886 F.2d at 303.

D.C. Circuit

The D.C. Circuit appears to take a position consistent with the majority of the other circuits in providing great latitude to district courts to admit reports under 803(8)(C) which admittedly have trustworthiness problems, although its position is not firmly articulated.

In the case of *In re Korean Air Lines Disaster of Sept. 1, 1983*, 932 F.2d 1475 (D.C. Cir.), *cert. denied*, 502 U.S. 994 (1991), KAL objected to the introduction of portions of a governmental report (the ICAO [the International Civil Aviation Organization] report, with a Soviet report appended) on the incident, in which a civilian airliner was shot down by a Soviet fighter plane, but the court's opinion does not specify the objections that were ruled upon by the district court. The circuit court upheld the district court's admission of the report with the following commentary:

> **The district court decided that KAL's trustworthiness objections were more properly addressed to the jury for purposes of evaluating the weight to be accorded the Secretary General's conclusions: "[Y]ou might convince the jury that it is not worth the paper it is written on, but I am not going to throw the whole report out just because they might believe that in this particular case."** Not surprisingly, the transcript of the district court's decision from the bench lacks the clarity of a written opinion. In hindsight, we would rather the court had made explicit preliminary findings, preferably *in limine*, as to the trustworthiness of each challenged portion of the ICAO Report. But mindful that the burden was and is on KAL, we are not convinced that the court failed to carry through on its duties under Rules 104(a) and 803(8) or abused its discretion when it admitted the ICAO Report.

932 F.2d at 1483 (emphasis added). The court's opinion indicates a viewpoint that the trial court does not have a duty under 803(8) to examine the evidence carefully when trustworthiness objections are raised and act as a gatekeeper to keep from the jury material which it determines is not trustworthy. Instead, the trial court was apparently allowed to leave the matter to the jury. The decision also reflects how the "abuse of discretion" standard of review on appeal results in little scrutiny being given to dubious district court rulings under 803(8)(C).

The U.S. District Court for the District of Columbia made a similar ruling also lacking in detail and showing a preference for admissibility employing a weight-v.-admissibility distinction in *Nakijima v. General Motors Corp.*, 857 F.Supp. 100 (D.D.C. 1994). This was a products liability suit involving inadvertent opening of the rear doors of buses, and plaintiffs sought to exclude a National Highway Traffic Administration ("NHTSA") technical investigation report on such incidents which contained a statement indicating that prior incidents were technically dissimilar. The district court admitted the NHTSA report under 803(8)(C), ruling:

> Although the NHTSA did not consider all prior incidents involving passenger ejections from defendant's RTS-II rear door systems, the Court finds the Report sufficiently trustworthy. **Questions about the methodology by which prior incidents were selected as part of the investigation goes to its weight rather than its admissibility.**

857 F.Supp. at 102 n. 4 (emphasis added). No case precedents were cited for this ruling.

A recent decision by the U.S. District Court for the District of Columbia on weight v. admissibility contains more detail and indicates a more pronounced tendency to abdicate judicial responsibility for rulings on trustworthiness and leave such decisions to the jury. In *Lohrenz v. Donnelly*, 223 F.Supp.2d 25 (D.D.C. 2002), *aff'd on other grounds*, 350 F.3d 1272 (D.C. Cir. 2003), *cert. denied*, 124 S.Ct. 2167 (2004), the plaintiff, a female Navy fighter pilot, sued a public policy organization for libel and slander regarding statements that she was not qualified and had been given preferential treatment. Defendant submitted as evidence a Field Naval Aviators Evaluation Board ("FNAEB") Report under 803(8)(C), and plaintiff opposed use of the report on trustworthiness grounds. The plaintiff's trustworthiness objections were based on a subsequent report by the Navy Inspector General which concluded that the FNAEB report was tainted by "inconsistencies, inaccuracies and emotionalism". In addition, the FNAEB convening officer issued a statement admitting that he had not adequately reviewed the plaintiff's training records, and after reviewing such records, he wished to repudiate his approval of the FNAEB report. Despite these strong indications of untrustworthiness, the court admitted the FNAEB report into evidence. The court stated:

> Although the Court certainly notes that both the Navy Inspector General and the officer who approved the FNAEB have both criticized the FNAEB Report, **these concerns appear to ultimately drive more at the weight the FNAEB Report should be accorded, not its admissibility.**

The court decided that the parties could contest the validity of the FNAEB report before the jury. 223 F.Supp.2d at 38 (emphasis added). The court apparently considered the plaintiff's trustworthiness objections as presenting "possible motivational problems" within the meaning of the Committee Notes to 803(8). Despite apparently conceding that there were such motivational problems, it admitted the report. No case precedents were cited for this ruling.

FORDHAM
University School of Law

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

Daniel J. Capra
Philip Reed Professor of Law

Phone: 212-636-6855
e-mail:dcapra@law.fordham.edu
Fax: 212-636-6899

Memorandum To: Advisory Committee on Evidence Rules
From: Dan Capra, Reporter
Re: Federal Case Law Development After *Crawford v. Washington*
Date: December 15, 2004

At its last meeting, the Evidence Rule Committee resolved to defer the consideration of any amendments to the hearsay exceptions of the Federal Rules of Evidence, at least insofar as an amendment would affect the admissibility of a hearsay statement offered against a criminal defendant. The reason for deferral was the Supreme Court's decision in *Crawford v. Washington. Crawford* overruled in part the previous Confrontation Clause jurisprudence— the *Roberts* test — which had held that hearsay satisfies the Confrontation Clause if it is reliable. Under *Crawford*, if hearsay is "testimonial", it cannot be admitted against a criminal defendant in the absence of cross-examination, even if it is otherwise reliable.

The Committee directed the Reporter to keep it apprised of case law developments after *Crawford*. This memo is intended to fulfill that function. The memo describes the federal case law that discusses the impact of *Crawford* on the Federal Rules of Evidence. The cases are divided along two topics, approximating the open questions left by *Crawford.* First, when is a hearsay statement "testimonial" within the meaning of *Crawford*? Second, if a hearsay statement is not testimonial, what requirements does the Confrontation Clause place on its admissibility? Within those topics, the cases are arranged by circuit.

Cases Defining "Testimonial" Hearsay After Crawford

Statement admissible under the state of mind exception is not testimonial: *Horton v. Allen,* 370 F.3d 75 (1st Cir. 2004): Horton was convicted of drug-related murders. At his state trial, the government offered hearsay statements from Christian, Horton's accomplice. Christian had told a friend that he was broke; that he had asked a drug supplier to front him some drugs; that the drug supplier declined; and that he thought the drug supplier had a large amount of cash on him. These statements were offered under the state of mind exception to show the intent to murder and the motivation for murdering the drug supplier shortly thereafter. The defendant argued that the admission of the hearsay statements violated his right to confrontation, but the Court rejected this argument. The Court held that Christian's statements were not "testimonial" within the meaning of *Crawford*. The Court explained that the statements "were not ex parte in-court testimony or its equivalent; were not contained in formalized documents such as affidavits, depositions, or prior testimony transcripts; and were not made as part of a confession resulting from custodial examination. . . .In short, Christian did not make the statements under circumstances in which an objective person would reasonably believe that the statement would be available for use at a later trial."

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

The *Lopez* court probably had an easier way to dispose of the case. Both before and after *Crawford*, an accused has no right to confront himself. If the solution to confrontation is cross-examination, as the Court in *Crawford* states, then it is silly to argue that a defendant has the right to have his own statements excluded because he had no opportunity to cross-examine himself.

Statement admissible as a declaration against penal interest, after *Williamson*, is not testimonial: *United States v. Saget,* 377 F.3d 233 (2d Cir. 2004): The defendant's accomplice spoke to an undercover officer, trying to enlist him in the defendant's criminal scheme. The accomplice's statements were admitted at trial as declarations against penal interest under Rule 804(b)(3), as they tended to implicate the accomplice in a conspiracy. Under *Williamson v. United States,* statements made by an accomplice to a law enforcement officer while in custody are not admissible under Rule 804(b)(3), because the accomplice may be currying favor with law enforcement. But in the instant case, the accomplice's statement was not barred by *Williamson.* because it was made to an undercover officer—the accomplice didn't know he was talking to a law enforcement officer and therefore had no reason to curry favor by implicating the defendant. For similar reasons, the

statement was not testimonial under *Crawford*—it was not the kind of formalized statement to law enforcement, prepared for trial, such as a "witness" would provide. The court elaborated on the *Crawford* test in the following passage:

> Although the Court declined to "spell out a comprehensive definition of 'testimonial,'" it provided examples of those statements at the core of the definition, including prior testimony at a preliminary hearing, previous trial, or grand jury proceeding, as well as responses made during police interrogations. With respect to the last example, the Court observed that "[a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." Thus, the types of statements cited by the Court as testimonial share certain characteristics; all involve a declarant's knowing responses to structured questioning in an investigative environment or a courtroom setting where the declarant would reasonably expect that his or her responses might be used in future judicial proceedings.
>
> By denominating these types of statements as constituting the "core" of the universe of testimonial statements, the Court left open the possibility that the definition of testimony encompasses a broader range of statements. See id. at 1370 (citing Richard D. Friedman, Confrontation: The Search for Basic Principles, 86 Geo. L.J. 1011, 1039-43 (1998) (advocating that any statement made by a declarant who "anticipates that the statement will be used in the prosecution or investigation of a crime" be considered testimony)). Because the Court declined to delineate a more concrete definition of the outer limits of the concept of testimonial statements, however, it is unclear which of the characteristics listed above are determinative of whether a given statement constitutes testimony. The statements at issue in this case present an example of a situation not falling squarely within any of the *Crawford* examples. Beckham's statements were elicited by an agent of law enforcement officials, but without his knowledge, and not in the context of the structured environment of formal interrogation. The question, therefore, is whether Beckham served as a "witness" who bears testimony within the meaning of the Clause, despite the fact that he was unaware that his statements were being elicited by law enforcement and would potentially be used in a trial.
>
> *Crawford* at least suggests that the determinative factor in determining whether a declarant bears testimony is the declarant's awareness or expectation that his or her statements may later be used at a trial. The opinion lists several formulations of the types of statements that are included in the core class of testimonial statements, such as "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." All of these definitions provide that the statement must be such that the declarant reasonably expects that the statement might be used in future judicial proceedings. Although the Court did not adopt any one of these formulations, its statement that "[t]hese formulations all share a common nucleus and then define the Clause's coverage at various levels of abstraction around it" suggests that the Court would use the reasonable expectation of the declarant as the anchor of a more concrete definition of testimony. If this is the case, then Beckham's statements

would not constitute testimony, as it is undisputed that he had no knowledge of the CI's connection to investigators and believed that he was having a casual conversation with a friend and potential co-conspirator.

We need not attempt to articulate a complete definition of testimonial statements in order to hold that Beckham's statements did not constitute testimony, however, because *Crawford* indicates that the specific type of statements at issue here are nontestimonial in nature. The decision cites Bourjaily v. United States, 483 U.S. 171 (1987), which involved a co-defendant's unwitting statements to an FBI informant, as an example of a case in which nontestimonial statements were correctly admitted against the defendant without a prior opportunity for cross-examination. In *Bourjaily*, the declarant's conversation with a confidential informant, in which he implicated the defendant, was recorded without the declarant's knowledge. The Court held that even though the defendant had no opportunity to cross-examine the declarant at the time that he made the statements and the declarant was unavailable to testify at trial, the admission of the declarant's statements against the defendant did not violate the Confrontation Clause. *Crawford* approved of this holding, citing it as an example of an earlier case that was "consistent with" the principle that the Clause permits the admission of nontestimonial statements in the absence of a prior opportunity for cross-examination. Thus, we conclude that a declarant's statements to a confidential informant, whose true status is unknown to the declarant, do not constitute testimony within the meaning of *Crawford*. We therefore conclude that Beckham's statements to the CI were not testimonial, and *Crawford* does not bar their admission against Saget.

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

The court did not discuss whether the Confrontation Clause imposed requirements on the admissibility of this non-testimonial hearsay.

Grand jury testimony and plea allocution statement are both testimonial: ***United States v. Bruno,*** 383 F.3d 65 (2d Cir. 2004): The court held that a plea allocution statement of an accomplice was testimonial, even though it was redacted to take out any direct reference to the defendant. It noted that the Court in *Crawford* had taken exception to previous cases decided by the Circuit that had admitted such statements as sufficiently reliable under *Roberts*. Those prior cases have been overruled by *Crawford.* The court also held that grand jury testimony was testimonial, and therefore improperly admitted against the defendant.

Statements that are not hearsay are also not testimonial: ***United States v. Trala,*** 386 F.3d 536 (3d Cir. 2004): An accomplice made statements to a police officer that misrepresented her identity and the source of the money in the defendant's car. While these were accomplice statements to law enforcement, they did not violate *Crawford*, as they were not admitted for their truth. In fact the statements were admitted because they were false. Under these circumstances, cross-examination of the accomplice would serve no purpose.

Statement admissible as co-conspirator hearsay is not testimonial: ***United States v. Robinson***, 367 F.3d 278 (5th Cir. 2004): The Court affirmed a drug trafficker's murder convictions and death sentence. It held that coconspirator statements are not "testimonial" under *Crawford* as they are made under informal circumstances and not for the purpose of creating evidence.

State of mind statement not testimonial: ***United States v. Dorman,*** 106 Fed.Appx. 228 (6th Cir. 2004): At a murder for hire trial, the government introduced a statement from one of the accomplices expressing an intent to go to Alabama to do a "job"; the inference created was that the job was a killing. The court found that the accomplice's statement was admissible under Rule 803(3) as a statement of intent to do an act in the future. The court held that the statement was not testimonial within the meaning of *Crawford,* as it was an informal statement to an associate, and law enforcement was in no way involved.

Accomplice confession to law enforcement is testimonial: ***United States v. Jones,*** 371 F.3d 363 (7th Cir. 2004): An accomplice's statement to law enforcement was offered against the defendant, though it was redacted to take out any direct reference to the defendant. The court found that even if the confession, as redacted, was admissible as a declaration against interest, its admission would violate the Confrontation Clause after *Crawford.* The court noted that even though redacted, the confession was testimonial, as it was made during interrogation by law enforcement. And since the defendant never had a chance to cross-examine the accomplice, "under *Crawford*, no part of Rock's confession should have been allowed into evidence."

Non-custodial interview with law enforcement is testimonial: ***United States v. Saner,*** 313 F.Supp.2d 896 (S.D.Ind. 2004): The government sought to admit statements made by the defendant's accomplice in an interview with a law enforcement agent. The interview was conducted at the accomplice's home and the accomplice was not under arrest. The government argued that the non-custodial circumstances rendered the statements non-testimonial. But the court disagreed. It emphasized that both the accomplice and the defendant were targets of a criminal investigation at the time the statement was taken. It noted that the *Crawford* Court used the term "interrogation" colloquially, not in the *Miranda* sense. It was clear that the statement was made as part of law enforcement preparing evidence for a criminal trial.

Statements made to fraud investigators are testimonial, statements made to friends are not: ***United States v. Mikos,*** 2004 U.S. Dist. Lexis 13650 (N.D.Ill. 2004): The defendant was charged with health care fraud and murder. He received health insurance monies for, among other things allegedly performing a number of surgeries on a Mrs. Brannon. HHS investigators interviewed Mrs. Brannon and she told them that the defendant had in fact never performed surgery on her. Mrs. Brannon's statements to the investigators were held testimonial under *Crawford.* The court declared that HHS Agents interviewed Brannon as part of a formal healthcare fraud investigation. "Their purpose was to gather information for potential use against Mikos at trial, thus, the Court finds that Brannon's statements to the HHS Agents fall within the realm of testimonial statements." In contrast, Mrs. Brannon also made statements to friends and acquaintances revealing that the defendant had called her and asked her to lie for him about the operations. The court declared that "there was no government involvement in these conversations, therefore they are not testimonial in nature and *Crawford* does not apply."

Accomplice confession to law enforcement is testimonial: ***United States v. Rashid,*** 383 F.3d 769 (8th Cir. 2004): The court held that an accomplice's confession to law enforcement officers was testimonial and therefore inadmissible against the defendant, even though the confession did not specifically name the defendant and incriminated him only by inference.

Statements of a victim's state of mind and statements made for medical treatment are not testimonial: ***Evans v. Luebbers,*** 371 F.3d 438 (8th Cir. 2004): The defendant was tried for murdering his wife. The prosecution admitted hearsay statements of the victim, indicating that she feared that the defendant would hurt her or murder her. Most of these statements were admitted under the state of mind exception, to rebut the defendant's contention that the victim committed suicide. Others were admitted as made for medical treatment. The court found that none of the victim's hearsay statements were testimonial as they did not fit the specific kinds of hearsay statements listed as testimonial by the Court in *Crawford*, i.e., "to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations."

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

Statements by a coconspirator during the course and in furtherance of the conspiracy are not testimonial: *United States v. Lee,* 374 F.3d 637 (8th Cir. 2004): The court held that statements admissible under the coconspirator exemption from the hearsay rule are by definition not testimonial. As those statements must be made during the course and in furtherance of the conspiracy, by definition they are not the kind of formalized, litigation-oriented statements that the Court found to be testimonial in *Crawford.* The court reached the same result on co-conspirator hearsay in ***United States v. Reyes,*** 362 F.3d 536 (8th Cir. 2004)

Accomplice statement to law enforcement is testimonial: *United States v. Nielsen,* 371 F.3d 574 (9th Cir. 2004): Nielsen resided in a house with Volz. Police officers searched the house for drugs. Drugs were found in a floor safe. An officer asked Volz who had access to the floor safe. Volz said that she did not but that Nielsen did. This hearsay statement was admitted against Nielsen at trial The court found this to be error, as the statement was testimonial under *Crawford.* The court noted that even the first part of Volz's statement — that she did not have access to the floor safe — violated *Crawford* because it provided circumstantial evidence that Nielsen did have access.

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

> Although the question is close, we do not believe that Elg's statements are of the kind with which *Crawford* was concerned, namely, testimonial statements. While the *Crawford* Court left "for another day any effort to spell out a comprehensive definition of 'testimonial,'" it gave examples of the type of statements that are testimonial and with which the Sixth Amendment is concerned — namely, "prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and . . . police interrogations." We do not think that Elg's

> statements to the police she called to her home fall within the compass of these examples. Elg, not the police, initiated their interaction. She was in no way being interrogated by them but instead sought their help in ending a frightening intrusion into her home. Thus, we do not believe that the admission of her hearsay statements against Leavitt implicate the principal evil at which the Confrontation Clause was directed: the civil-law mode of criminal procedure, and particularly its use of ex parte examinations as evidence against the accused.

Thus, the *Leavitt* court holds that some hearsay statements are non-testimonial even though made to law enforcement.

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

Accusatory statements in a victim's diary are not testimonial: ***Parle v. Runnels***, 387 F.3d 1030 (9th Cir. 2004): In a murder case, the government offered statements of the victim that she had entered in her diary. The statements recounted physical abuse that the victim received at the hand of the defendant. The defendant argued that the admission of the diary violated his right to confrontation. The court held that even if *Crawford* were retroactive, it would not help the defendant. The victim's diary was not testimonial, as it was a private diary of daily events. There was no indication that it was prepared for law enforcement or that it was prepared for trial.

Statement by illegal alien during custodial interrogation is testimonial: ***United States v. Gonzalez-Marichal,*** 317 F.Supp.2d 1200 (S.D.Cal. 2004): In an alien smuggling case, the government sought to admit a hearsay statement from one of the aliens that was made during custodial interrogation. The statement was about her alienage. The court found that the statement was testimonial and therefore inadmissible. It relied on the explicit statement in *Crawford* that statements pursuant to interrogation by law enforcement are testimonial. The government argued that the statement was not a "core" testimonial statement because it referred only to alienage and not to smuggling, and did not mention the defendant. But the court found that the statement was incriminating, as it proved an element of the crime, and so it did not matter that there was no reference to smuggling or to the defendant.

Cases Discussing the Impact of the Confrontation Clause on Non-Testimonial Hearsay After Crawford

Non-testimonial hearsay evaluated under the *Roberts* test: *Horton v. Allen,* 370 F.3d 75 (1st Cir. 2004): The Court declared hearsay statements offered under the state of mind exception were not testimonial. It further held that non-testimonial hearsay should be evaluated under the *Ohio v. Roberts* test to determine whether it violates the defendant's right to confrontation. The Court found that the state of mind exception was "firmly-rooted" and therefore the admission of the statements under that exception satisfied the *Roberts* test.

Non-testimonial hearsay is governed by the *Roberts* test: *United States v. Saget,* 377 F.3d 233 (2d Cir. 2004): As discussed above, an accomplice's statement to an undercover agent was admitted as a declaration against penal interest, and the court found it to be non-testimonial. It noted that the *Crawford* Court was critical of the *Roberts* reliability test as a way to evaluate hearsay under the Confrontation Clause, and that this critique might well be applicable to non-testimonial hearsay. In the end, however, the court observed that *Crawford* did not explicitly overrule *Roberts* insofar as non-testimonial hearsay was concerned. The court therefore evaluated the admissibility of the accomplice's statement under the *Roberts* test.

The court noted that it had not yet held that declarations against penal interest were firmly rooted under *Roberts*. The question, therefore, was whether the statement carried particularized guarantees of trustworthiness. The court declared as follows:

> Under our precedents, Beckham's statements to the CI were made in circumstances that confer adequate indicia of reliability on the statements. In United States v. Sasso, 59 F.3d 341 (2d Cir. 1995), we explained that "[a] statement incriminating both the declarant and the defendant may possess adequate reliability if . . . the statement was made to a person whom the declarant believes is an ally," and the circumstances indicate that those portions of the statement that inculpate the defendant are no less reliable than the self-inculpatory parts of the statement. Thus, in *Mathews* we concluded that the declarant's statements to his girlfriend were sufficiently reliable to be introduced against the defendant, given the unofficial setting in which the remarks were made and the declarant's friendly relationship with the listener. See *Matthews*, 20 F.3d at 546. Beckham's statements were made under circumstances almost identical to those at issue in *Mathews*, as Beckham believed that he was speaking with a friend - their conversations involved discussions of personal issues such as child support as well as details of the gun-running scheme - in a private setting. See also *Sasso*, 59 F.3d at 349-50 (finding that declarant's statements to his girlfriend were reliable because they were not made in response to questioning or in a coercive atmosphere). Moreover, because Beckham was describing his and Saget's method of buying and transporting the guns, the majority of his statements were descriptions of acts that he and Saget had jointly committed. Thus, Beckham does not appear to have been attempting to

shift criminal culpability from himself to Saget. The statements therefore contained sufficient guarantees of trustworthiness to be introduced against Saget.

See also United States v. Savoca, 335 F.Supp.2d 385 (S.D.N.Y. 2004) (accomplice's statement is admissible as a declaration against penal interest under *Williamson*, is non-testimonial under *Crawford*, and carries particularized guarantees of trustworthiness under *Roberts*, all for the same reasons: it was made under informal circumstances to a trusted person, and the declarant was not attempting to shift blame or to curry favor with the authorities).

Note: If the *Saget* analysis turns out to be correct, then the proposed amendment to Rule 804(b)(3) might be revived. That amendment, as written, would cover only non-testimonial statements because after *Williamson* these are the only kind that can be admisssible under the exception. And if such statements are still covered by *Roberts*, and the exception remains not firmly-rooted, then the government must make a showing of particularized guarantees of trustworthiness to satisfy the Confrontation Clause. That is precisely what the proposed amendment required. The amendment would still be necessary to assure that the exception (which currently imposes no trustworthiness showing on the government) will not be unconstitutional as applied.

Statement admitted under the residual exception is analyzed under *Roberts*: *United States v. Mikos,* 2004 U.S. Dist. Lexis 13650 (N.D.Ill. 2004): The defendant was charged with health care fraud and murder. He received health insurance monies for, among other things allegedly performing a number of surgeries on a Mrs. Brannon. Shortly before being murdered, Mrs. Brannon reported to various friends and acquaintances that the defendant had asked her to lie for him when testifying before a grand jury, but she had told him that she was going to tell the truth. The court held, as discussed above, that these statements were not testimonial as they were not made to government officials. The court then analyzed the admissibility of Mrs. Brannon's statements under the *Roberts* test. The statements were proffered under the residual exception, which of course is not firmly rooted in *Roberts* terms. But the court found sufficient particularized guarantees of trustworthiness to satisfy both the residual exception and the *Roberts* test for non-firmly rooted hearsay. The court analyzed the trustworthiness question as follows:

> There is no serious question as to Brannon's character for honesty and truthfulness. Brannon lived and worked at a church. She was not under investigation and had no apparent reason to lie about her conversation with Mikos or her intended testimony. Moreover, despite the defense's vague assertion, no one has suggested any conduct on Brannon's part that might implicate her in the fraud scheme or jeopardize her nurse's license. Brannon's relationship with the defendant is that of a former patient. Neither party has indicated why the doctor-patient relationship terminated, and there is no reason to believe that it ended badly or that Brannon had an axe to grind against Mikos for any reason. Brannon told the same story regarding Mikos from the time she was first contacted by HHS Agents until the day she was

murdered. Moreover, the statements to her sister and Individual B were not elicited by law enforcement officers or government officials but were taken from conversations Brannon initiated with her sister and trusted friends because she wanted to talk about what had just happened. These conversations occurred shortly after she hung up with Mikos, so there was little or no time for reflection, embellishment or fabrication. Finally, the testimony the government is seeking to admit is based on Brannon's personal knowledge of the phone call from Mikos and the treatments she received from him while under his care. None of the statements pass judgment or seek to blame Mikos, to the contrary, it appears that Brannon was simply relaying what had just transpired. The Court finds Brannon's alleged conduct and statements are consistent with those of a disinterested third party who was simply cooperating with the authorities and was bent on telling the truth because it was the right thing to do. While Brannon's statements were not given under oath or subject to cross examination, the Court finds that the circumstances set forth above and the consistency of the statements renders them trustworthy.

Accusatory statements in a victim's diary were properly admitted under the *Roberts* analysis: *Parle v. Runnels*, 387 F.3d 1030 (9th Cir. 2004): In a murder case, the government offered statements of the victim that she had entered in her diary. The statements recounted physical abuse that the victim received at the hand of the defendant. The defendant argued that the admission of the diary violated his right to confrontation. As discussed above, the court held that the diary entries were not testimonial. The Court applied the *Roberts* analysis to the diary entries. The diary was admitted under a hearsay exception that is something like a residual exception for statements made by victims—called colloquially the "O.J. exception." The court found that the exception was not firmly rooted because it was based on a general trustworthiness standard rather than categorical admissibility requirements. The question therefore was whether the diary entries carried particularized guarantees of trustworthiness. The court found sufficient guarantees to exist. The diary entries were private, they discussed intensely personal and embarrassing information, and so there was no motive to falsify. The diary was regularly kept and recounted parts of the victim's life other than her relationship with the defendant. The court found it "entirely reasonable for the state court to find that Mary's diary was trustworthy because she kept it regularly and in it recorded the everyday experiences of her life."

Summary of the Crawford Case Law So Far:

It is fair to state that the federal courts have applied *Crawford* narrowly. The definition of "testimonial" hearsay has generally been limited to the specific statements mentioned by the *Crawford* Court as being classic examples of "testimony": grand jury and other prior testimony, plea allocutions, and statements made pursuant to interrogation by law enforcement officials. There has been little attempt to provide a broader definition on the basis of some of the definitions floated in *Crawford*: i.e., it could be testimonial whenever law enforcement is involved, or it could be testimonial whenever it appears to be prepared for a trial. These definitions, while clearly covering the classic cases of grand jury, plea allocution, and custodial interrogation, could also apply to other kinds of statements as well, e.g., statements made as part of a call to the police–as in *Leavitt*— or a record prepared by an individual, without police involvement, that appears intended for trial. It remains to be seen whether some courts will embrace these broader definitions.

If the hearsay statement is not testimonial, the federal courts so far have been uniform in holding that the hearsay must satisfy the *Roberts* reliability test.

If the courts continue on this course, the law of confrontation, though altered by *Crawford*, will end up to be relatively straightforward. The only thing changed from the *Roberts* will be that a few types of statements previously found sufficiently reliable will be excluded nonetheless because they are testimonial. And those statements would be clearly defined as: 1) grand jury testimony; 2) prior testimony; 3) guilty plea allocutions; and 4) statements made to interrogating officers.

But it is probably too early to make any judgments. There are not that many decided cases. There are few or no cases discussing, for example, law enforcement reports, records prepared by individuals for trial but without law enforcement involvement, 911 calls, statements made to treating doctors who are going to report to law enforcement, etc., etc.

The Reporter will keep the Committee apprised of *Crawford* developments and it will be for the Committee to determine when, if ever, the law is settled enough that it would be appropriate to propose any amendment to the hearsay exceptions.

FORDHAM
University School of Law

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

Daniel J. Capra
Philip Reed Professor of Law

Phone: 212-636-6855
e-mail:dcapra@law.fordham.edu
Fax: 212-636-6899

Memorandum To: Advisory Committee on Evidence Rules
From: Dan Capra, Reporter
Re: Materials on the Attorney-Client Privilege
Date: December 15, 2004

The Evidence Rules Committee is engaged in a long-term project on the privileges. The goal of the project is to publish a report on the federal common law of privileges. For each of the major privileges, the report will contain a "survey rule"; a "comment" on the survey rule that will describe the pertinent federal case law; and a "future developments" section that points out open questions and case conflicts, and provides a prediction on how those questions and conflicts will be addressed.

The Committee has already been presented with, and tentatively approved, the materials prepared on the psychotherapist-patient privilege. Professor Ken Broun, the consultant to the Committee, has since been working on the attorney-client privilege.

Attached to this memorandum is Ken's work thus far on the attorney-client privilege. The material consists of: 1) a survey rule that is slightly amended from the one previously reviewed by the Committee; 2) a list of issues to be covered in the future developments section; 3) the draft of the future developments section as it relates to three topics: government attorneys, preliminary drafts, and the crime-fraud exception; and 4) the proposed commentary to the attorney-client privilege survey rule, which was reviewed by the Committee at the April 2004 meeting and is included here for background and for the benefit of new members.

I am most grateful to Ken for his outstanding work on this project.

ATTORNEY-CLIENT PRIVILEGE SURVEY RULE

(a) Definitions. As used in this rule:

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

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

Deleted: person

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

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

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

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

(b) General Rule of Privilege.

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

(c) Who May Claim the Privilege.

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

(d) Standards for Organizational Clients

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

communication that

(1) is otherwise privileged within this rule;

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

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

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

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

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

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

Deleted: deceased

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

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

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

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

attesting witness;

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

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

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

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

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

ISSUES TO BE COVERED IN FUTURE DEVELOPMENTS SECTION OF ATTORNEY-CLIENT PRIVILEGE SURVEY RULE

Following is a list of some of the issues that might be covered in a future development section of the commentary on the attorney-client privilege Survey Rule.

1. Should all lawyer to client communications be privileged or only those that reflect the client's communications?

2. The applicability of the privilege to governmental entities.

3. What are the precise circumstances under which a non-client will be held to be an agent of the attorney or the client?

4. Are preliminary drafts of documents ultimately disclosed publicly privileged?

5. Dual purpose communications, e.g., where the lawyer is also an accountant. \

6. May the personal representative waive the privilege for a deceased client?

7. Communications between joint clients outside the presence of their attorneys.

8. Various issues under the crime/fraud exception:

    A. The need for actual fulfillment of the criminal purpose

    B. Is only the client's intent relevant?

    C. To what extent is tortious conduct within the exception?

    D. Does the intent to commit the crime have to exist at the time of the consultation?

9. The applicability of the privilege where there is a a retaliatory discharge claim.

10. Is the *Garner* doctrine viable? Should it be limited to derivative actions?

Government Attorneys

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

Restatement (Third) of the Law Governing Lawyers § 74 extends the privilege to communications between government officials and their attorneys. Uniform Rule of Evidence 502 also covers such communications but with a significant limitation discussed below.

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

A. Civil cases

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

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

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

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

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

possibility of privilege with regard to communications by a British government agency to its attorneys).

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

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

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

The articulation of the privilege in a governmental context may be best stated in Uniform Rule of Evidence 502. Uniform 502 broadly defines client in a way that would include government officials and their lawyers. Rule 502(a)(1) states:

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

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

> as to a communication between a public officer or agency and its lawyers unless the communication concerns a pending investigation, claim or action and the court determines that disclosure will seriously impair the ability of the public officer or agency to act upon the claim or conduct a pending investigation, litigation, or proceeding in the

public interest.

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

.

Criminal Cases – Grand Jury Subpoenas

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

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

received relating to violations of the law be reported to the Attorney General. 158 F.3d at 1274 The court also noted that much of the communications concerned the possibility of the impeachment of the president. The court finds impeachments to be "fundamentally a *political* exercise"[emphasis by the court] rather than a legal one. 158 F.3d at 1277.

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

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

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

One case has extended the *Lindsey* and *In re Grand Jury Subppoena* cases beyond their application to President Clinton's legal problems and, indeed, beyond the context of the federal government. In *In re A Witness Before Special Grand Jury 2000-2,* 288 F.3d 289 (7th Cir. 2002) the court considered the application of the privilege to communications between a state official and a state government lawyer., The lawyer had been subpoenaed to testify before a grand jury concerning the activities of future Governor George Ryan when he was Illinois Secretary of State. The court held that the privilege did not apply, relying heavily on the *Lindsey* and *In re Grand Jury Subpoena* cases. The court stated (288 F.3d at 294):

> In the final analysis, reason and experience dictate that the lack of criminal liability for

government agencies and the duty of public lawyers to uphold the law and foster an open and accountable government outweigh any need for a privilege in this context.

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

Cases have not come up in most circuits and it is certainly possible that other courts will view the issue differently than the courts in the D.C., Eighth and Seventh Circuits. Although the Seventh Circuit decision in *In re Witness Before Special Grand Jury 2000-2* did not involve President Clinton's legal problems, the cases from the other circuits were tied closely to all of the issues involved in that extended and explosive controversy. Both of the other cases also clearly involved the office of the Presidency and the relationship between the attorney-client privilege and the executive privilege outlined in *United States v. Nixon.* An argument certainly can be made that the public interest requires no different test for communications with a president's lawyers as opposed to his other advisors. Arguably, all such communications should be viewed under the balancing test set forth in *Nixon.* But the balancing test applied by reason of the Executive Privilege to presidential consultations does not apply with regard to other government officials.

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

As expressed in the *Lindsey* and *In re Grand Jury Subpoena* cases, there are certainly valid reasons for refusing to recognize the privilege as against a grand jury subpoena. The fact that the information is being sought by another branch of the same government is at least a significant consideration. An even stronger policy consideration is the fact that the government attorney has an obligation to the government generally, rather than to a particular public agency or official. Certainly, that obligation is particularly strong where the government lawyer has learned of criminal wrongdoing. Arguably, the obligation to the public to disclose the information should supersede an obligation to the government client.

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

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

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

Information Intended to be Divulged and Preliminary Drafts

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

A client may provide information to an attorney for the purposes of obtaining the attorney's assistance in preparing a document to be publicly disseminated, for example, a prospectus or a tax return. Most federal cases broadly hold that no privilege attaches to information given for such a purpose because the client does not intend the information to remain confidential. *See, e.g., United States v. Hubbard,* 16 F.3d 694, 697 (6th Cir. 1994) (information communicated to attorney to be conveyed to bankruptcy trustee and court via written pleading); *In re Grand Jury Proceedings,* 33 F.3d 342 (4th Cir. 1994) (information used by counsel to prepare SEC filings); *In re Grand Jury Proceedings*, 727 F.2d 1352 (4th Cir. 1984) (communications with attorney for purpose of private placement of limited partnership interests; fact that attorney never acted on information not controlling); *United States v. Cote,* 456 F.2d 142 (8th Cir. 1972) (information contained in working papers later transcribed into tax returns). *See also,* Christopher B. Mueller & Laird C. Kirkpatrick, Evidence §5.13 at 371 (2d ed. 1999).

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

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

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

to third parties.

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

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

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

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

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

At least one court has followed the precedent of the *Schenet* case in a limited way, holding that privilege may attach to preliminary drafts but only "if they were prepared or

circulated for the purpose of giving or obtaining legal advice and *contain information or provisions not included in the final version.*" (Emphasis added) Andritz Sprout-Bauer, Inc. v. Beazer East, Inc. 174 F.R.D. 609, 633 (MD. Pa. 1997).

The result in *Andritz* is criticized by one author, Paul R. Rice, Attorney-Client Privilege in the United States, § 5:13 (2d Ed.), who states:

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

Professor Rice and others strongly support the position of courts in cases like *Schenet* providing privilege protection for drafts of those documents. Professor Rice comments(Attorney-Client Privilege in the United States, § 5.13 at 99:

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

Rice would extend the protection even to drafts prepared by a client for review by the attorney, so long as the attorney's communication with the public does not reveal that the information contained in it was communicated to the attorney by the client. *See also,* Paul R. Rice, Attorney-Client Privilege: Continuing Confusion About Attorney Communications, Drafts, Pre-existing Documents, and the Source of Facts Communicated, 48 Am. U.L.Rev. 967, 996-1005 (1999).

Professor Edward J. Imwinkelried, in The New Wigmore, Evidentiary Privileges, § 6.8.2 b, at 703 (2002) also supports the protection of preliminary drafts.

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

The view most limiting the application of the privilege in the preliminary draft situation seems to be confined to the courts in the Fourth Circuit. The prevailing view seems to be more receptive to the application of the privilege, at least to the extent that the drafts differ from the final form or the information conveyed is not ultimately disclosed.

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

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

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

Crime-Fraud Exception

Several issues remain to be resolved in the federal courts with regard to the crime-fraud exception.

A. The Need for the Client to have Carried Out the Crime or Fraud

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

The issue seems to be in doubt only in the District of Columbia Circuit. In *In re Sealed Case,* 107 F.3d 46, 49 (D.C. Cir. 1997), the court stated that the client must have carried out the crime or fraud, citing the Comment to the Restatement arguing that to hold otherwise would "penalize a client for doing what the privilege is designed to encourage – consulting a lawyer for the purpose of achieving law compliance." (Restatement of the Law Governing Lawyers § 142, comment c at 461 (Proposed Final Draft No. 1, 1996))[1]

It should noted that in *In re Sealed Case,* there was no question that the crime had in fact been committed by a corporate vice-president. The only issue was whether the corporation itself had consulted its counsel for a criminal purpose and the court found the evidence insufficient to support the invocation of the crime-fraud exception under these circumstances.

---

[1]The Comment to the Restatement section continues:
By the same token , lawyers might be discouraged from giving full and candid advice to clients about legally questionable courses of action. On the other hand, a client may consult a lawyer about a matter that constitutes a criminal conspiracy but that is later frustrated – and in that sense, not later accomplished . . . – or similarly, about a criminal attempt. Such a crime is within the exception stated in the Section if its elements are established.

The dicta in *In re Sealed Case* has been repeated only in the D.C. Circuit. *See In re Sealed Case,* 223 F.3d 775 (D. C. Cir. 2000)*; Neuder v. Battelle Pac. Northwest Nat'l Lab.* 194 F.R.D. 289 (D. D.C.2000).

The current restatement continues the statement of the rule referred to by the court in *In re Sealed Case* and repeats the comment language. The applicable section is now The Restatement (Third) of the Law Governing Lawyers § 82, which states:

> The attorney-client privilege does not apply to a communication occurring when a client:
> (a) consults a lawyer for the purpose, *later accomplished*, of obtaining assistance to engage in a crime or fraud or aiding a third person to do so, or
> (b) regardless of the client's purpose at the time of consultation uses the lawyer's advice or other services to engage in or assist a crime or fraud. (Emphasis added)

Uniform Rule of Evidence 502(d)(1) contains no requirement that the criminal purpose have been accomplished. The Rule provides that there is no privilege

> (1)if the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known was a crime or fraud;

The reasoning of the Restatement and of the court in *In re Sealed Case* is not without merit. Choices involving the attorney-client privilege are often based to especially large extent on the balancing of policies. In the case of the privilege, the policies are the promotion of a free flow of information between an attorney and a client as opposed to the need for information in the pursuit of justice. One can make an argument that the protecting communications where an attorney has talked the client out of a criminal act is a worthy goal, perhaps worthy enough to protect the initial communication even if made with criminal intent.

Nevertheless, the majority of the decisions on the question, rejecting a requirement that the criminal purpose have been accomplished, would seem likely to be the forerunner of a unanimous view by the federal courts. The crime-fraud exception exists for several reasons, not the least of which is that the client is not seeking professional service, but in essence asking the lawyer to participate in a conspiracy. *See* John W. Strong, et. al, McCormick on Evidence § 95 at 380 (5th ed. 1999). Participation in a conspiracy does not require the ultimate completion of the act. The agreement of the parties and an intent to achieve a criminal objective is all that is required. *See* Wayne R. LaFave, Substantive Criminal Law, § 12.2 (2004). The public policy that finds it a perversion of the privilege to extend it to the client who seeks advice to aid him in carrying out an illegal or fraudulent scheme would apply even though the client decides even with the advice of counsel not to commit the act.

COMMENTARY ON ATTORNEY-CLIENT PRIVILEGE SURVEY RULE

(a) Definitions. As used in this rule:

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

The definition in part (a) (1) is taken from the Restatement (Third) of the Law Governing Lawyers § 69 (2000).

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

Confining the privilege to "expressions" is consistent with the federal cases. For example, a client's appearance is not regarded as a communication, *see United States v. Kendrick,* 331 F.2d 110, 113-114 (4th Cir. 1964); *Provenzano v. Singletary,* 3 F.Supp. 2d 1353, 1367 (M.D. Fla. 1997) *aff'd,* 148 F.3d 1327 (11th Cir. 1998), nor is his or her demeanor, *In re Walsh,* 623 F.2d 489 (7th Cir. 1980). A characterization of a client as a "sly fox" is not a communication protected by the privilege. *United States v. Sayan,* 968 F.2d 55, 64 (D.C. 1992). There is some authority that the mental competency of a client is within the privilege, *see Gunther v. United States,* 230 F.2d 222, 223-224 (D.C. Cir. 1956), but this is clearly a minority position. *See* Edward J. Imwinkelried, The New Wigmore §6.7.1 (2002). Even in the *Gunther* case, the court does not quarrel with the definition of a communication as an expression, but rather expresses concern that testimony with regard to competency would necessarily open the inquiry into the "factual data," *i.e.*, the actual communications between lawyer and client.

The federal courts have consistently held that the identity of a client is not itself a communication. *E.g., United States v. Blackman,* 72 F.3d 1418, 1425 (9th Cir. 1995); *Lefcourt v. United States,* 125 F.3d 79, 86 (2d Cir.1997); *In re Shargel,* 742 F.2d 61, 62 (2d Cir. 1984). Whether the revelation of identity is tantamount to the disclosure of a communication is another question and is addressed in the commentary to part (b).

The definition recognizes that a communication need not be oral, but may be contained in a record intending to convey information between lawyer and client. *See* 1 John W.Strong, et al. McCormick on Evidence, § 89 at 359 (5th ed. 1999). This does not mean that any information contained in a document passed between lawyer and client is a communication. Indeed, the courts have consistently held that a preexisting document does not become privileged simply because it is passed from client to lawyer. *See, e.g., Fisher v. United States,* 425 U.S. 391, 404 (1976); *United States v. Robinson,* 121 F.3d 971, 975 (5th Cir. 1997). Rather, the record itself must be an expression of information from the client to the lawyer or vice versa.

The definition does not distinguish between communications coming from the client and communications coming from the lawyer. A communication meets the definition so longs as it is between privileged persons – defined later in the rule as both lawyer and client – regardless of which one is speaking. Some federal cases take a narrow view of the privilege and confine its application either to expressions made by the client or to attorney communications that reveal client confidences. *See, e.g., In re Fischel,* 557 F.2d 209, 212 (9th Cir. 1977)*; Potts v. Allis-Chalmers Corp.,* 118 F.R.D. 597, 602 (N.D. Ind. 1987). The court in *Potts* criticized the extension of the privilege to all communications from the attorney as "contrary to the expressed intention of the Seventh Circuit to confine the privilege to the narrowest limits consistent with the privilege's purpose."

However, there is also support in the federal cases for the broad extension of the privilege to all communications from lawyer to client. *Sprague v. Thorn Americas, Inc.,* 129 F.3d 1355, 1369-70 (10th Cir. 1997); *United States v. Amerada Hess Corp.,* 619 F.2d 980, 986 (3d Cir. 1980). *See also* Timothy P. Glynn, Federalizing Privilege, 52 Amer.U.L.Rev. 59, 100-101 (2002). The Court in the *Sprague* case gives the topic extended discussion, setting forth the rationale for both the narrow and the broad approach to the issue. In deciding upon a broad application of the rule, the Court relies upon the reasoning of the district court in *In re LTV Securities Litigation,* 89 F.R.D. 595, 605 (N.D. Tex. 1981). In *LTV*, the court rejected the narrower view, emphasizing that predictability of confidence is central to the role of the attorney and that "[a]doption of such a niggardly rule has little to justify it and carries too great a price tag." The court also relied upon an earlier Tenth Circuit case, *Natta v. Hogan,* 392 F.2d 686, 692-93 (10th Cir. 1968) where the court noted: "The recognition that privilege extends to statements of a lawyer to a client is necessary to prevent the use of the lawyer's statements as admissions of the client." The operation of the privilege to protect communications going both from the lawyer and from the client is also consistent with proposed Federal Rule 503 and Uniform Rule of Evidence 502.

Thus, despite some authority to the contrary, the Survey Rule adopts the broader approach to the definition of communications.

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

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

The definition is in accord with the law generally, *see* 1 Strong, McCormick on Evidence, *supra* at § 88 (5th ed. 1999). The federal cases confirm that the payment of a fee is not essential. *United States v. Costanzo,* 625 F.2d 465, 469 (3d Cir. 1980). However, the consultation must be for legal services, not as a friend, *Modern Woodmen of America v. Watkins,* 132 F.2d 352, 354 (5th Cir. 1942), as a business advisor, *United States v. United Shoe Machinery Corp.,* 89 F.Supp. 357, 360 (D. Mass. 1950), or as an accountant, *Olender v. United States,* 210 F.2d 795, 866-67 (9th Cir. 1954). The court in *Modern Woodman*, stated (132 F.2d 352):

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

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

This definition is consistent with Proposed Federal Rule 503(a)(1), Uniform Rule 502 and Restatement (Third) of the Law Governing Lawyers § 73-74 (2000), although none of those sources contain a separate definition of organization.

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

The applicability of the privilege to governmental entities has also been recognized by the federal courts. *See Town of Norfolk v. Corps of Engineers,* 968 F.2d 1438, 1457-58 (1st Cir. 1992) (Army Corps of Engineers); *Coastal Corp. v. Duncan,* 86 F.R.D. 514, 520 (D.Del. 1980) (Department of Energy, *dictum*). Again, some writers have argued against such an extension of the privilege. *See* 24 Wright & Graham *supra,* at § 5477. This is not to say that the privilege applies to communications between federal officials and government attorneys in all instances. For example, in the context of grand jury subpoenas, the courts have held that the privilege will not apply where one federal government arm, *i.e.,* the grand jury, seeks information from counsel for another federal government agency. *See In re Grand Jury Subpoena Duces Tecum,* 112 F.3d 910, 915-16 (8th Cir. 1997); *In re Lindsey,* 158 F.3d 1263, 1278 (D.C. Cir. 1998). *Also see* the discussion in connection with the Standard for Organizations Clients, part (d).

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

This definition is based upon Proposed Federal Rule of Evidence 503(a)(2) and Uniform Rule of Evidence 502(a)(3).

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

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

A question related to the application of the privilege to persons authorized to practice law in foreign jurisdictions is the issue of whether the court's should recognize as privileged communications with non-lawyers who are covered by a comparable privilege in other countries. However, this question is more appropriately viewed as a choice of law problem. The question is whether the foreign privilege should be recognized, not whether the federal attorney-client privilege should apply. *See, e.g., Golden Trade, S.r.L. v. Lee Apparel Co.* 143 F.R.D. 514, 518-19 (S.D.N.Y. 1993)(communications between attorney and foreign patent agent assisting him come within ambit of the privilege); *SmithKline Beecham Corp. v. Apotex Corp.,* 193 F.R.D. 530, 535-36 (N.D. Ill. 2000) (question was the application of the privilege by law of the United Kingdom).

There is also the related issue of the application of the privilege to communications with United States patent agents. A number of cases have held that communications between a patent

agent and a client may be privileged where the proceeding is before the patent office and the agent is registered with that office. *See, e.g., In re Ampicillin Antitrust Litigiation,* 81 F.R.D. 377, 391 (D.D.C. 1978); Daiske Yoshida, Note, The Applicability of the Attorney-Client Privilege to Communications with Foreign Legal Professionals, 66 Fordham L.Rev. 209 (1997). There are certainly instances in which a patent agent is acting as the agent either of an attorney or the client and the communications are privileged under the usual application of the attorney-client privilege. *See Foseco Int'l Ltd. v. Fireline, Inc.* 546 F.Supp. 22, 25 (N.D. Ohio 1982); *see also* discussion in connection with definition (a) (5). However, some courts, such as in both *Ampicillin* and *Foseco,* have the recognized the existence of privileged communications beyond the situation where the patent agent is acting for the attorney. The definition in this Survey Rule would not recognize such an extension. However, the exclusion of patent agents from the definition of attorney within the rule does not mean that such communication are not privileged. There may well be a separate privilege governing patent agents subject to its own rules and limitations. It is simply not the attorney-client privilege and thus not covered by this Survey Rule.

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

This definition is based upon Restatement (Third) of the Law Governing Lawyers § 70 (2000). It is also consistent with both Proposed Federal Rule 503 and Uniform Rule 502.

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

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

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

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

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

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

The party claiming the privilege has the burden of showing that the person with whom the

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

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

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

This definition is based on Restatement (Third) of the Law Governing Lawyers § 71 (2000), although it differs from the Restatement section as discussed below. It is also consistent with both Proposed Federal Rule 503 and Uniform Rule 502.

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

In the first scenario, the presence of a third person will not destroy confidentiality where the other person is an agent of either the lawyer or the client for the purpose of assisting in the rendering of legal services. *See* discussion in the commentary to part (a)(5). *Compare Kevlik v. Goldstein,* 724 F.2d 844, 849 (1st Cir. 1984) (confidentiality not destroyed by presence of client's father) *with Cafritz v. Kolslow,* 167 F.2d 749 (D.C. Cir. 1948) (presence of client's sister destroyed confidentiality where no sufficient reason shown for her presence). *See also Cavallaro v. United States,* 284 F.3d 236, 247 (1st Cir. 2002) (presence of accountants who were not acting to aid in obtaining legal advice destroyed confidentiality of the communications); Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence, § 183, 186 (2d ed. 1994).

The phrase "reasonably believe that no one except a privileged person will learn the contents of the communication" is consistent with federal cases holding that reasonable precautions must be taken to assure confidentiality. *United States v. Gann,* 732 F.2d 714, 723 (9th Cir. 1984) (no privilege where statement made by client to attorney on telephone within hearing of law enforcement personnel); *United States v. Waller,* 581 F.2d 585, 585-86 (6th Cir. 1978) (leaving notepad in prominent place in a public courtroom was not consistent with a claim of confidentiality). *But see Gomes v. Vernon,* 255 F.3d 1118, 1133 (9thCir. 2001) (prisoners did all as they could to secure documents' confidentiality within the context of a prison situation).

The second situation in which confidentiality is in doubt is where the client may have intended the communication to be communicated to another person. Under the definition, if the communication is made with the intention of it being conveyed publicly, there is no confidentiality. This result is consistent with a great number of federal cases. *See, e.g., In re Grand Jury Proceedings,* 33 F.3d 342, 355 (4th Cir. 1994) (matters were communicated to attorneys for use in connection with public disclosures); *United States v. Oloyede,* 982 F.2d 133 (4th Cir. 1992) (information intended for use in citizenship applications); *Colton v. United States,* 306 F.2d 633, 638 (2d Cir. 1962) (information given for inclusion in tax return not confidential).

Federal cases have held that matters communicated to an attorney where the client is seeking advice on the possibility of disclosure may still be privileged. *In re Grand Jury Proceedings,* 33

F.3d 342, 354 (4th Cir. 1994); *United States v. (Under Seal),* 748 F.2d 871, 878 (4th Cir. 1984). However, these same cases conclude that once there is a decision to disclose the privilege no longer exists. Furthermore, as stated in *Under Seal,* all of the details underlying the data which was to be published is outside the privilege. The court noted (748 F.2d at 875, n. 7):

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

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

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

The Survey Rule definition of "in confidence" does not deal directly with this split in authority. The language can be interpreted as supporting either line of case authority.

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

(b) General Rule of Privilege.

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

The general rule of privilege set out in Section (b) is derived from several sources including Restatement (Third) of the Law Governing Lawyers § 67 (2000), Proposed Federal Rule of Evidence 503 and Uniform Rule of Evidence 502. However, the second sentence of the section, dealing with identity and fee, is not contained in any of those sources and is intended to reflect and emphasize the prevailing holdings of federal cases.

The first sentence of the rule draws upon the definitions contained in Section (a)(1)-(6). The discussions in this commentary concerning the case law supporting those definitions is also pertinent to the general rule. Thus, cases such as *United States v. Ostrer,* 422 F.Supp. 93, 98 (S.D.N.Y. 1976) (reasonable belief that lawyer was extending legal, rather than simply friendly, advice) support the general rule as well as the definition of "attorney" in Section (a)(4). *See generally* 1 John W. Strong, et al., McCormick on Evidence § 88 (5th ed. 1999).

Other significant federal cases ruling on whether a communication was for the purpose of obtaining or providing legal assistance include: *Simon v. G.D. Searle & Co.,* 816 F.2d 397, 402-04 (8th Cir. 1987)(documents intended to apprise lawyers of business matters will be privileged only if they embody an implied request for legal advice based on the documents); *United States v. Tedder,* 801 F.2d 1437, 1442-43 (4th Cir. 1986) (communications not privileged where lawyer consulted as a friend and not for legal advice); *United States v. Wilson,* 798 F.2d 509, 513 (1st Cir. 1986) (no privilege where lawyer's services sought as a negotiator or messenger rather than as a lawyer); *United States v. Johnston,* 146 F.3d 785, 794 (10th Cir. 1998) (no privilege where lawyer was acting as a messenger for drug dealers rather than as a lawyer); *United States v. Knoll,* 16 F.3d 1313, 1322 (2d Cir. 1994) (papers relating solely to business transactions not privileged); *United States v. Aramony,* 88 F.3d 1369, 1387-90 (4th Cir. 1996) (executive's communications to internal investigators and corporate counsel were not privileged where executive did not seek legal advice on his own behalf).

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

use both in preparing tax returns and for use in litigation, stating (182 F.3d at 501-02):

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

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

Although there do not seem to be federal cases directly on point, the modern trend, adopted by this section of the Survey Rule, is that the client may assert the privilege against an eavesdropper, provided that reasonable precautions were taken to preserve the confidentiality of the communication. *See* Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence, § 186 (2d ed. 1994). *See also Lively v. Washington County Dist. Court,* 747 P.2d 320, 321 (Okla. 1987)(phone conversation with attorney secretly videotaped). Both Proposed Federal Rule 503 and Uniform Rule 502 take this position.

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

A view at odds with this sentence of the rule was at least suggested by language in *Baird v. Koerner,* 279 F.2d 623, 632 (9th Cir. 1960). In that case, an attorney had paid back taxes on behalf of an undisclosed client. The court held that the disclosure of the client's identity would necessary convey information that would be conceded to be part of the usual privileged comunication between attorney and client. The *Baird* case has been cited as creating what has come to be known as a "last

link" rule, *i.e.,* that where "a strong probability exists that disclosure of such information would implicate the client in the very criminal activity for which legal advice was sought" the privilege will attach. *United States v. Hodge and Zweig,* 548 F.2d 1347, 1353 (9th Cir. 1977). *See also* discussion in 1 John W. Strong, et al., McCormick on Evidence § 90 (5th ed. 1999).

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

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

See also In re Grand Jury Proceedings, 791 F.2d 663, 665 (8th Cir. 1986) (court rejects "last link" analysis); *Clarke v. American Commerce Nat'l Bank,* 974 F.2d 127 (9th Cir. 1992) (identity not privileged where records did not reveal communications); *Vingelli v. United States,* 992 F.2d 449, 452 (2d Cir. 1992) (same). Several federal cases refusing to protect the identity of clients involved situations where a lawyer seeks to shield the name of clients making fee payments in excess of $10,000 in cash. *See, e.g., Lefcourt v. United States,* 125 F.3d 79, 86 (2d Cir. 1997); *United States v. Leventhal,* 961 F.2d 936, 941 (11th Cir. 1992).

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

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

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

(c) Who May Claim the Privilege.

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

This section of the Survey Rule is based on Restatement (Third) of the Law Governing Lawyers § 86 (2000), Proposed Federal Rule of Evidence 503 (c) and Uniform Rule of Evidence 502(c).

The section is fully consistent with federal law. All authorities agree that the privilege is that of the client, not the attorney. *See* 1 John W. Strong, et al., McCormick on Evidence § 92 (5th ed. 1999); Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence § 200 (2d ed. 1994). *See also In re Grand Jury Subpoena,* 220 F.3d 406, 408 (5th Cir. 1967) (in-house counsel had no right to assert privilege waived by corporate client). The attorney may raise the privilege on behalf of the client, *Fisher v. United States,* 425 U.S. 391, 402 n. 8 (1976), and the attorney is duty bound to assert the privilege in the client's absence. *Republic Gear Co. v. Borg-Warner Corp.*, 381 F.2d 551, 556 (2d Cir. 1967).

Although there seem to be no specifically articulating that the attorney has implicit authority to invoke the privilege, the language in this section providing for implicit authority is consistent with general law, *see* Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence, § 200 (2d ed. 1994), as well as with Proposed Federal Rule 503(c) and Uniform Rule 502(c). These sources all provide that an attorney's authority is presumed in the absence of evidence to the contrary.

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

The language of this section providing that the privilege may be claimed by "a person succeeding to the interest of a client" is consistent with these cases, although it does not elaborate on the issue.

As set forth in this section, a personal representative of an incompetent or deceased may claim the privilege. There is no longer any doubt that, in the federal court, the privilege survives the death of the client. *Swidler & Berlin v. United States,* 524 U.S. 399, 405-06 (1998). The privilege

in that case was claimed by the attorney on behalf of the deceased client. Because the issue was not raised in the case, there was no discussion of the question of who can raise the privilege on behalf of the deceased person and, perhaps more controversially, who, if anyone, would have the ability to waive it.

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

(d) Standards for Organizational Clients

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

(1) is otherwise privileged;

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

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

Section (d) is not contained in this form in any of the standard sources. It is derived in part from Restatement (Third) of the Law Governing Lawyers §§ 73-74 (2000), but differs from the Restatement in at least two important respects. First, unlike Restatement §73, the Survey Rule requires, consistent with *Upjohn Corp. v. United States,* 449 U.S. 383 (1981), that the communication concern a legal matter "within the scope of the agent's agency or employment." Section (d) also differs from the Restatement in that it provides, through its definition of organization in Section (a) (3), that communications between attorneys and agents of private organizations and governmental are to be analyzed under the same test. Specific problems in connection with the application of the privilege in the governmental context are discussed below.

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

The language of this section is an attempt to articulate the Supreme Court's holding in the *Upjohn* case. As stated in 1 John W. Strong, et al., McCormick on Evidence § 87.1 at 349 (5th ed. 1999), the basic principles of the holding are that information communicated by corporate agents to an attorney or representative of an attorney will be privileged if (1) it is communicated for the express purpose of securing legal advice for the corporation; (2) it relates to the specific corporate duties of the communicating employee; and (3) it is treated as confidential within the corporation itself. *Upjohn Corp. v. United States, 449 U.S. at 394.* Although the Court in *Upjohn* cautioned that it was not stating a rule for all cases, the court's opinion in that case has been widely regarded as doing so. The rule is firm in the federal courts. *See, e.g., Admiral Ins. Co. v United States Dist. Court,* 881 F.2d 1486, 1492-93 (9th Cir. 1989) (employee's communications to lawyer concerning matters within the scope of his employment even though the company planned to terminate the employee after the interview); *James Julian, Inc. v. Raytheon Co.,* 93 F.R.D. 138, 141- 42 (D. Del.

1982) (privilege upheld against claim that corporation did not adequately maintain confidentiality); *Leucadia, Inc. v. Reliance Ins. Co.,* 101 F.R.D. 674, 678 (S.D.N.Y. 1983)(communications between employees of predecessor company made in confidence for the purpose of legal advice were privileged).

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

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

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

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

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

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

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

Section (e) is based on Restatement (Third) of the Law Governing Lawyers §§ 75-76 (2000), although it is modified in some respects. It is also consistent with Proposed Federal rule 503((b) and Uniform Rule 502(b).

The portion of the rule covering situations where two or more clients consult a single lawyer or law firm, has not been the subject of much controversy in the federal or state courts. Communications among the lawyer and joint clients are privileged as against the rest of the world; they are not privileged as between or among the parties. *See Grand Trunk Western R. Co. v. H.W. Nelson Co.,* 116 F.2d 823, 835 (6th Cir. 1941); 1 John W. Strong, et al., McCormick on Evidence § 91 (5th ed. 1999).

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

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

The common interest privilege applies whether or not a litigated matter is involved, *see In re Regents of Univ. of California,* 101 F.3d 1386, 1389-90 (Fed. Cir. 1996) (patent application) and to plaintiffs in litigation as well as defendants, *see Schachar v. American Academy of Ophthalmology, Inc.,* 106 F.R.D. 187, 191 (N.D. Ill. 1985) (plaintiffs involved in different lawsuits). However, the rule makes clear, as do the cases that the communications must otherwise be privileged. Thus, information supplied by the client must be shown to be communicated for the purpose of obtaining legal advice. If not, it is not privileged, irrespective of the existence of a joint defense or common interest. *See United States v. Bay State Ambulance & Hosp. Rental Serv.,* 874 F.2d 20, 29 (1st Cir. 1989) (client failed to show that communication was for purposes involving the joint defense).

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

The last sentence of the Survey Rule, dealing with communications between clients or their agents outside the presence of an attorney or her agent is not found in the Restatement, Proposed Federal Rule 503 or Uniform Rule 502. Although there is no direct authority on the point, by way of dictum, the court in *United States v. Gotti,* 771 F. Supp. 535, 545 (E.D.N.Y. 1991) stated that such communications would not be protected. *See also* Stephen A. Saltzburg, Michael M. Martin, Daniel J. Capra, Federal Rules of Evidence Manual, § 501[5][e] at 501-33 (8th ed. 2002)

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

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

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

> No direct authority has been found for giving effect to agreements among co-clients that the privilege shall be preserved in subsequent adverse proceedings between them. The approach taken [in the Restatement section and Comment] is consistent with the theory of the co-client privilege and with the basis for removing the privilege in subsequent adverse proceedings, the presumed intent of the co-clients and fairness considerations. [citation omitted] The result is similar to that which would obtain if the parties contracted on other matters. Perhaps most obviously, the result is the same that would be reached if, during litigation itself, adversary parties agreed to a confidentiality obligation as part of an effort to expedite pretrial discovery or for other reasons.

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

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

This subsection is taken from Restatement (Third) of the Law Governing Lawyers § 81 (2000). A similar provision is found in Proposed Federal Rule 503(d)(2) and Uniform Rule 502(d)(2).

The provision is supported by cases from a number of jurisdictions. *See* John W. Strong, et al, McCormick on Evidence, § 94 at 379 (5th ed. 1999). The Supreme Court, while deciding that the privilege generally survives the death of the client, noted the existence of this exception. *Swidler & Berlin v. United States,* 524 U.S. 399, 404 (1998). Indeed, the Court looked to cases applying the testamentary exception as affirming the survival of the privilege under other circumstances. In addition to a number of state cases, the Court also cites *Glover v. Patten,* 165 U.S. 394 (1897) for its recognition fo the testamentary exception in the federal courts. In *Glover*, the Court stated (165 U.S. at 406):

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

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

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

This exception is based on the language of Restatement (Third) of the Law Governing Lawyers § 82 (2000), with one significant difference. Restatement § 82 requires that the criminal or fraudulent purpose for which a client seeks assistance be "later accomplished." The exception set forth in (f)(1) is also consistent with Proposed Federal Rule 503(d)(1) and Uniform Rule 502(d)(1). Neither of these rules contain the requirement that the crime or fraud actually take place.

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

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

By requiring that the consultation be "for the purpose of obtaining assistance to engage in a crime or fraud," the exception set out in this subsection takes into account the federal cases that state that communication must be made "in furtherance of" a crime or fraud. *See, e.g., In re BankAmerica Corp. Securities Litigation,* 270 F.3d 639, 642 (8th Cir. 2001) ("legal advice was obtained in furtherance of the fraudulent activity and was closely related to it"); *In re Spalding Sports Worldwide, Inc.,* 203 F.3d 800, 808 (Fed. Cir. 2000)(communication not "in furtherance" where disputed conduct actually lowered the chance of fraud). *See also* Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence, § 195 (2d ed. 1994). A statement that is merely relevant to a criminal or fraudulent act, and not in furtherance of it, is not within the exception. *In re Richard*

Roe, Inc. 68 F.3d 38, 40 (2d Cir. 1995) (lower court improperly used relevancy test). Again, the crime or fraud need not actually have been completed so long as the client intended the communications to be in its furtherance. *E.g., In re Grand Jury Subpoena Duces Tecum (Marc Rich & Co., A.G.),* 731 F.2d 1032, 1039 (2d Cir. 1984).

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

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

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

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

that is not objectionably vague."

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

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

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

This Survey Rule as a whole does not deal with any of the procedural aspects of the attorney-client privilege. For example, questions such as when the privilege must be asserted, what the standard of proof for its application and the appealability of rulings with regard to its application or non-application are not covered. Questions with regard to waiver are covered in a separate Survey Rule. However, some procedural aspects of the application of the crime/fraud exception have been the subject of considerable federal court attention and should be mentioned briefly. The Supreme Court has held that a court, in its discretion, may hold an *in camera* review of the evidence to determine the existence of a crime/fraud exception to the privilege. *United States v. Zolin,* 491 U.S. 554, 572 (1989). The Court in *Zolin* held that the judge may review documents *in camera* where there is a "factual basis adequate to support a good faith belief by a reasonable person" that such an inspection may reveal evidence to establish the existence of the exception.

The Court in *Zolin* did not address the standard of proof for determining the existence of the exception. Various courts, including various federal courts, have expressed it differently. *See discussion in In re Grand Jury Subpoenas,* 144 F.3d 653, 660 (10th Cir. 1998). The essence of the test most commonly applied is that there must be evidence from which the existence of an unlawful purpose could reasonably be found. *See* John W. Strong, et al, McCormick on Evidence, § 95 at 382 (5th ed. 1999); Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence, § 195 at 373-74 (2d ed. 1994)

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

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

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

Although not specifically covered by this section, the language of the section, as well as section (f) (4), limiting revelations to those relevant and reasonably necessary to resolve the dispute would make such case appropriate for protective orders limiting the dissemination of the information. *See, e.g., Siedle v. Putnam Investments, Inc.*, 147 F.3d 7, 10 (1st Cir. 1998) (documents that may be subject to attorney-client privilege properly sealed against public revelation).

This subsection does not definitively resolve the issue of whether the exception should apply in an action brought by corporate counsel for retaliatory discharge. Although the issue raised in such instances is ordinarily confidentiality under the applicable Rules of Professional Conduct, questions of privilege may also arise. The few cases considering the issue are split on the issue as to whether a retaliatory discharge complaint is the kind of dispute between lawyer and client as to compensation or reimbursement that will give rise to the exception. *Compare Willy v. Costal States Management Co.*, 939 S.W.2d 193, 196-200 (Tex. Ct. App. 1996) (discharge claim may not be brought where proof of the claim would necessarily reveal confidential communications) *with Kachmer v. SunGard Data Systems, Inc.*, 109 F.3d 173, 178 (3d Cir. 1997) (possibility of revelation of confidential communications did not preclude retaliatory discharge action). *See also Siedle v. Putnam Investments, Inc.* 147 F.3d 7, 11 (1st Cir. 1998) (lawyer may not use confidential information as a sword to make out a claim of defamation against client). The language used in the subsection leaves the question of whether instances of retaliatory discharge or similar claims involve compensation.

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

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

The exception as set forth is consistent both with the general law, *see* John W. Strong, et. al, McCormick on Evidence, § 91 at 367-68 (5th ed. 1999), and the federal cases, *see* Stephen A. Saltzburg, Michael M. Martin, Daniel J. Capra, Federal Rules of Evidence Manual, §§ 501.02([l][i], 501.03 [i][ii] (8th ed. 2002). Cases dealing with the exception include *Tasby v. United States,* 504 F.2d 332, 336 (8th Cir. 1974) (privilege inapplicable where ineffective assistance of counsel alleged); *In re National Mtg. Equity Corp. Mtg. Pool Certificates Secs. Litig.,* 120 F.R.D. 687, 691-92 (C.D. Cal. 1988) (attorney-client privilege did not prevent attorney from revealing client confidences to defend against third-party allegations of fraud against the attorney); *First Fed. Sav. & Loan v. Oppenheim, Appel, Dixon & Co.,* 110 F.R.D. 557 (S.D.N.Y. 1986) (attorney entitled to disclose information to defend himself against charges brought by a third party, although exception would be limited to protect against unnecessary violation of the client's interest). *See also United States v. Ballard,* 779 F.2d 287 (5th Cir. 1986) (exception recognized but court holds that bringing of malpractice action against attorney did not operate as a waiver of the privilege in subsequent criminal action against client).

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

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

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

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

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

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

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

Subsection (6) is based upon Restatement (Third) of the Law Governing Lawyers § 84 (2000).

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

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

Professor Imwinkelried states the rationale somewhat differently and less dependently on the theory that the fiduciary acts for the beneficiary in communicating with the attorney. He states simply that "the rationale for overriding the fiduciary's privilege is that the fiduciary's duty to the beneficiary is paramount to the fiduciary's right to the privilege." Edward J. Imwinkelried, The New Wigmore, §6.13.2 at 960 (2002).

Whatever is the best articulation of the rationale for the rule, the rule as set forth in this subsection is consistent with the federal cases. *See In re Occidental Petroleum Corp.*, 217 F.3d 293 (2000) (no privilege where breaches of fiduciary duty relating to Employee Stock Ownership Plan alleged); *In re Long Island Lighting Co.*, 129 F.3d 268, 271, 273 (2d Cir. 1997)(employer, as fiduciary under employee benefit plan covered by ERISA, could not claim privilege as to matters concerning the administration of the plan); United States v. Evans, 796 F.2d 264, 265-66 (9th Cir. 1986) (no privilege as between pension trustee and attorney advising the trustee with regard to administration of the trust).

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

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

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

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

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

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

This subsection is based on Restatement (Third) of the Law Governing Lawyers § 85 and the case of *Garner v. Wolfinbarger,* 430 F.2d 1093 (5th Cir. 1970). The rationale of this exception is similar to that articulated in support of the fiduciary doctrine: management of an organization acts for the benefit of the organization's shareholders or other constituents or, to paraphrase Professor Imwinkelried's statement in connection with the fiduciary doctrine, management's duty to the shareholders is paramount to management's right to the privilege.

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

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

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

> There are many indicia that may contribute to a decision of presence or absence of good cause, among them the number of shareholders and the percentage of stock they represent; the bona fides of the shareholders; the nature of the shareholders' claim and whether it is

obviously colorable; the apparent necessity or desirability of the shareholders having the information and availability of it from other sources; whether, if the shareholders' claim is of wrongful action by the corporation, it is of action criminal, or illegal but not criminal, or of doubtful legality; whether the communication related to past or to prospective actions; whether the communication is of advice concerning the litigation itself; the extent to which the communication is identified versus the extent to which the shareholders are blindly fishing; the risk of revelation of trade secrets or other information in whose confidentiality the corporation has an interest for independent reasons.

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

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

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

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

Ass'n, 144 F.R.D. 68 (E.D. Va. 1992) (labor union).

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

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

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

Other writers are critical of the exception generally as inhibiting the free flow of information between management and corporate counsel. *See, e.g.,* Stephen A. Saltzburg, Michael M. Martin, Daniel J. Capra, Federal Rules of Evidence Manual, § 501.02[5]([l][ii] (8th ed. 2002). The authors of that text state that if *Garner* is to apply at all, it should be limited to shareholders derivative litigation. One of the authors of that text, Stephen A. Saltzburg, took a somewhat different position in a law review article, Stephen A. Saltzberg, Corporate Attorney-Client Privilege in Shareholder Litigation and Similar Cases: *Garner* Revisited, 12 Hofstra L. Rev. 817 (1984). In that article, Saltzburg is critical of the doctrine as inhibiting the flow of information from corporate officers to the corporation's attorney. However, he is also critical of the limitation of the doctrine to derivative cases, arguing that the rationale should be the same whether the shareholders sue on behalf of the corporation or in their own right.

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

The argument that the *Garner* doctrine creates a qualified privilege, bringing in a balancing test and thus created uncertainty in the application of the privilege certainly raises a valid concern. However, one could also look at the exception not as creating a balancing test for the application of the privilege but rather as applying the exception unless the shareholder fails to bring himself or

herself within the policy of the exception. In other words, the exception is absolute once the shareholder demonstrates that the cause of action he or she brings and their status entitle them to it. Similarly, although the argument that the exception should be limited to derivative actions has some appeal, one could argue that the analogy to the fiduciary doctrine is such that the shareholder himself or herself is entitled to the benefit of the communications, whether or not the suit is brought on behalf of the corporation.

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

Revised Privacy Template

Date: November 19, 2004.[1]

Rule [ ] Privacy in Court Filings[2]

(a) Limits on Information Disclosed in a Filing. Unless the court orders otherwise,[3] an electronic or paper filing[4] made with the court[5] that includes a social security number or tax identification number,[6] a minor's name, a person's birth date, [or] a financial account number [or

---

[1] This latest version of the template responds to comments made at the fall meetings of the Appellate, Bankruptcy, Civil and Criminal Rules Committees. It also incorporates suggestions of the Standing Committee's Subcommittee on Style. Edits shown in this draft are the result of discussions among various interested parties and found necessary to address a few questions that were raised and not resolved at the Advisory Committee meetings.

[2] The Appellate Rules Committee has tentatively determined that it will seek to draft and approve a "piggy-back" version of the template. The piggy back version will provide that if a filing has been made with the lower court, the rules of the lower court would continue to apply to the filing in a court of appeals. With respect to first-time filings in the court of appeals, the parties will have to comply with e-privacy rule that would have been applicable had the filing been made in the district court. Accordingly, this template provides the basis for the e-privacy projected e-privacy provision in the Bankruptcy, Civil and Criminal Rules.

[3] The subcommittee determined that flexibility should be added to the rule by allowing the court to excuse the redaction requirements in a particular case.

[4] The subcommittee rejected an option that would apply the redaction requirement only to filings made by parties: "If a party includes any of the following identifiers in an electronic or paper filing with the court, the party is limited to disclosing:"

[5] Ed Cooper suggests striking the language "made with the court". Dan Capra suggests that the language be retained to make it clear that only filings with the court are covered by the rule — as is the case with the model local rule approved by CACM. Otherwise there might be a concern about some other filing that is not made with the court. Ed replies that at least the Civil Rules apply only to the District Courts. See FRCP 1.

[6] The advisory committees may wish to consider whether to cover other private "numbers" such as driver's license, alien registration card, and the like. CACM considered the merits of covering more information (such as driver's licenses) and decided that "the line had to

the home address of a person][7] may include only [8]

(1) the last four digits of the social-security number and tax-identification number[9];

(2) the minor's initials;

(3) the year of birth; [and]

---

be drawn somewhere". CACM approved a comment to its privacy policy that would warn litigants that information such as driver's license numbers in court filings would be published on the internet, and concerned parties should seek a sealing order. The Committee Note, infra, provides similar comment.

[7] The coverage of home address is for the Criminal Rules Committee only. The other Advisory Committees have decided that it is unnecessary, and perhaps problematic, to delete the full address from court filings. In criminal cases, however, there may be special concerns for protecting victims and witnesses from disclosure of a complete address. The model local rule prepared by CACM imposes a redaction requirement for addresses in criminal cases only.

The Criminal Rules Committee will consider whether the redaction requirement for addresses should be narrowed to cover only the addresses of alleged victims and prospective witnesses. CACM's model rule contains no such narrowing, but it is fair to state that CACM did not consider the possibility of limiting the protection to victims and witnesses.

[8] The stylistic revision of the opening clauses of subdivision (a) deletes the use of the term "identifiers" in the text of the rule. Some of those present at the Bankruptcy Committee meeting found it confusing to refer to "identifiers" that were not specifically identified in the body of the rule.

[9] The subcommittee determined that tax identification numbers raise the same privacy concerns as social security numbers; for many individuals, those numbers are the same.

(4) the last four digits of the financial account[10] number.[11] [and]

[(5) the city and state of the home address.]][12]

(b) Unredacted Filing Under Seal. A party making a redacted filing under (a) may also file an unredacted copy under seal. The unredacted copy must be retained by the court as part of the record.[13]

---

[10] The subcommittee rejected language that would limit the protection of financial accounts to those accounts that were personal; to active accounts; and to asset accounts. The subcommittee concluded that the risk of identity theft was significant with respect to *any* financial account number available over the internet.

[11] Ed Cooper suggests that financial account numbers be grouped with social security numbers and tax identification numbers, as all of these numbers are to be redacted in the same way — leaving only the last four numbers. Dan Capra suggests that financial account numbers be left to treatment by a separate subclause. Financial account numbers are different conceptually from social security and tax identification numbers, and including a separate subclause arguably provides a useful emphasis.

[12] The redaction requirement for home addresses is to be included, if at all, only in the Criminal rule. See note 7.

Ed Cooper suggests an addition to subdivision (a). He explains as follows:

> Shouldn't we have an explicit provision that allows the court to order redaction of other information? Home address is a familiar example. A driver' s license number is another. One way to do this would be to make present (a) paragraph (a)(1), adding a new paragraph (2):
>
> > (2) The court may order redaction of any other information to protect privacy or security interests.
>
> This approach would have the further advantage of bringing "security" into the rule. The Act suggests that security be protected, albeit without any clear indication whether it is thinking of security of private information, the personal security of individuals (see the redaction of names in the Criminal Rules), or national security.

[13] The subcommittee rejected the following language that was proposed by the Justice Department:

> Where a document is filed under seal solely to comply with this rule, the seal does not

(c) Reference List. A filing that contains information redacted under (a) may be filed together with a reference list that identifies each item of redacted information and specifies an appropriate identifier that uniquely corresponds to each item of redacted information listed. The reference list must be filed under seal and may be amended as of right. Any references in the case to an identifier included in the reference list will be construed to refer to the corresponding item of information.[14]

(d) Exemptions from the Redaction Requirement. The redaction requirement of Rule [ ] (a) does not apply to the following:

> **(1)** in a civil or criminal forfeiture proceeding, a financial-account number that identifies the property alleged to be subject to forfeiture;
>
> **(2)** the record of an administrative-agency proceeding;[15]
>
> **(3)** the official record of a state-court proceeding in an action removed to federal court; [16]
>
> **(4)** the record of a court or tribunal whose decision is being reviewed, if that record was not subject to (a) when originally filed;[17] [and]
>
> **[(5)** a filing made in an actions brought under 28 U.S.C. section 2241, section

---

prohibit the disclosure of the document to the parties, their counsel, their agents, law enforcement officers, and triers of fact, nor the disclosure by those persons when appropriate to the performance of their official duties.

[14] This language tracks the amendment to the E-Government Act that permits the filing of a registry list as an alternative to an unredacted document under seal.

[15] Ed Cooper questions whether the term "administrative-agency" proceeding is broad enough to cover all of the kinds of administrative-type proceedings that should be exempt from the redaction requirements.

[16] The subcommittee rejected an exception for "a certified copy of a document filed with the court." The subcommittee determined that a redaction could be indicated on a certified copy where necessary to protect an identifier.

[17] Some subcommittee members suggested that the exemption apply to "the records of a court or tribunal whose decision is being reviewed, if those records were not subject to subdivision (a) of this rule when originally ***created.***"

2254 or section 2255, unless the action is otherwise covered by (e).][18]

[**(6)** a filing in any court in relation to a criminal matter or investigation that is prepared[19] before the filing of a criminal charge or that is not filed as part of any docketed criminal case;

(7) an arrest warrant;

(8) a charging document—including an indictment, information, and criminal complaint—and an affidavit filed in support of any charging document; and

(9) a criminal case cover sheet.][20]

[(e) Social Security Appeals and Immigration Cases; Limitations on Remote Access to Electronic Files. In an action for benefits under the Social Security Act, and in an action under Title 8, United States Code relating to an order of removal, release from removal, or immigration benefits or detention, access to an electronic file is authorized as follows, unless the court orders otherwise:

---

[18] The Criminal Rules Committee has determined, at least preliminarily, that filings in habeas actions should be exempt from the redaction requirement. Civil Rules may wish to consider whether to include a reference to habeas actions in the text of its rule, or otherwise in the Committee Note.

There might be a problem exempting Section 2241 actions and then providing special treatment for immigration cases in subdivision (e). Some immigration cases are brought under section 2241. The rule as written would therefore provide that an immigration proceeding brought under section 2241 would be exempt from the redaction requirement but would not be available to non-parties by remote access. The underlined material attempts to write in an exception that would give uniform treatment to immigration cases.

[19] Ed Cooper wonders whether "filed" should be substituted for "prepared." DOJ has suggested that the word "prepared" is accurate. It is for the Criminal Rules Committee to determine the scope of this exemption.

[20] Bracketed subdivisions 6-9 are to be included, if at all, in the Criminal Rule only. DOJ has agreed to provide more information on the character of, and the necessity for exemption of, criminal case cover sheets.

(1) the parties and their attorneys may have remote electronic access to any part of the case file, including the administrative record;

(2) all other persons may have electronic access to the full record at the courthouse, but may have remote electronic access only to:

(A) the docket maintained under Rule [relevant civil or appellate rule]; and

(B) an opinion, order, judgment, or other disposition of the court, but not any other part of the case file or the administrative record.][21]

(f) Court Orders. In addition to the redaction requirement of (a), a court may by order in a case[22] limit or prohibit non-parties' remote electronic access to a document filed with the court. The court must be satisfied that a limitation on remote electronic access is necessary to protect against widespread disclosure of private or sensitive information that is not otherwise protected under (a).[23]

(g) Waiver of Protection of Identifiers. A party waives the protection of (a) as to the party's own information by filing that information without redaction.

(h) Sealing at Time of Filing. The court may order that a filing be made under seal without redaction. If the court later orders that the filing be unsealed, the person who made the

---

[21] This subdivision (e) is intended to be included, if at all, in the Civil Rules only. The Criminal Rules Committee has determined that there is no need for such an exception in the Criminal Rules, and there would appear to be no need for the exception in the Bankruptcy Rules.

The special treatment for immigration cases was added to the template at the request of the Justice Department and tentatively approved by the Civil Rules Committee. See note 17, however, for the anomaly created by the Rule when an immigration case is brought as a habeas action. Language is suggested in (d)(5) to correct this anomaly.

[22] The "in a case" limitation was suggested by the Criminal Rules Committee.

[23] Ed Cooper suggests that the text of this subdivision can be shortened as follows:

If necessary to protect against widespread disclosure of private or sensitive information that is not otherwise protected under (a), a court may by order limit or prohibit remote access by nonparties to a document filed with the court.

filing must then file a redacted copy as provided by this rule unless the court orders otherwise.[24]

Revised Template Committee Note

The rule is adopted in compliance with section 205(c)(3) of the E-Government Act of 2002, Public Law 107-347. Section 205(c)(3) requires the Supreme Court to prescribe rules "to protect privacy and security concerns relating to electronic filing of documents and the public availability . . . of documents filed electronically." The rule goes further than the E-Government Act in regulating paper filings even when they are not converted to electronic form. But the number of filings that remain in paper form is certain to diminish over time. Most districts scan paper filings into the electronic case file, where they become available to the public in the same way as documents initially filed in electronic form. It is electronic availability, not the form of the initial filing, that raises the privacy and security concerns addressed in the E-Government Act.

The rule is derived from and implements the policy adopted by the Judicial Conference in September 2001 to address the privacy concerns resulting from public access to electronic case files. See http://www.privacy.uscourts.gov/Policy.htm The Judicial Conference policy is that documents in case files generally should be made available electronically to the same extent they are available at the courthouse, provided that certain "personal data identifiers" are not included in the public file.

While providing for the public filing of some information, such as the last four digits of an account number, the rule does not intend to establish a presumption that this information never could or should be protected. For example, it may well be necessary in individual cases to prevent remote access by nonparties to any part of an account number or social security number. It may also be necessary to protect information not covered by the redaction requirement — such as driver's license numbers and alien registration numbers — in a particular case. In such cases, the party may seek protection under subdivision (f) or (h).[25]

---

[24] This subdivision has been added to the template in response to the suggestions of some members of the Advisory Committees that the rule should clarify that redaction is not required for filings that are going to be made under seal in the first instance. The second sentence of the subdivision has been suggested by Judge Levi, to cover the problem of filings that are sealed as an initial matter and unsealed subsequently.

[25] This paragraph was added at the suggestion of the Civil Rules Committee, to clarify that the redaction requirement does not establish a presumption that information not redacted should always be exposed to public access.

Parties must remember that any personal information not otherwise protected by sealing or redaction will be made available over the internet. Counsel should notify clients of this fact so that an informed decision may be made on what information is to be included in a document filed with the court.

Subdivision (b) allows a party who makes a redacted filing to file an unredacted document under seal. This provision is derived from section 205(c)(3)(iv) of the E-Government Act. Subdivision (c) allows parties to file a register of redacted information. This provision is derived from section 205(c)(3)(v) of the E-Government Act, as amended in 2004.

In accordance with the E-Government Act, subdivision (c) of the rule refers to "redacted" information. The term "redacted" is intended to govern a filing that is prepared with abbreviated identifiers in the first instance, as well as a filing in which a personal identifier is edited after its preparation.

The clerk is not required to review documents filed with the court for compliance with this rule. The responsibility to redact filings rests with counsel and the parties.

[Subdivision (e) provides for limited public access in Social Security cases and immigration cases. Those actions are entitled to special treatment due to the prevalence of sensitive information and the volume of filings. Remote electronic access by non-parties is limited to the docket and the written dispositions of the court. The rule contemplates, however, that non-parties can obtain full access to the case file at the courthouse, including access through the court's public computer terminal.] [26]

Subdivision (g) allows a party to waive the protections of the rule as to its own personal information by filing it in unredacted form. A party may wish to waive the protection if it determines that the costs of redaction outweigh the benefits to privacy. If a party files an unredacted identifier by mistake, it may seek relief from the court.

Trial exhibits are subject to the redaction requirements of Rule [ ] to the extent they are filed with the court. Trial exhibits that are not initially filed with the court must be redacted in accordance with the rule if and when they are filed as part of an appeal. [27]

---

[26] This paragraph of the Note is for the Civil Rules only.

[27] This paragraph of the Note was added to clarify the treatment of exhibits. Exhibits need not be treated in the text of the rule, because if exhibits are filed, they must be redacted in the same way as any other filing. Treatment in the note was considered useful, however, because an

The Judicial Conference Committee on Court Administration and Case Management has issued "Guidance for Implementation of the Judicial Conference Policy on Privacy and Public Access to Electronic Criminal Case Files" (March 2004). This document sets out limitations on remote electronic access to certain sensitive materials in criminal cases. It provides in part as follows:

> The following documents shall not be included in the public case file and should not be made available to the public at the courthouse or via remote electronic access:
>
> - unexecuted summonses or warrants of any kind (e.g., search warrants, arrest warrants;
> - pretrial bail or presentence investigation reports;
> - statements of reasons in the judgment of conviction;
> - juvenile records;
> - documents containing identifying information about jurors or potential jurors;
> - financial affidavits filed in seeking representation pursuant to the Criminal Justice Act;
> - ex parte requests for authorization of investigative, expert or other services pursuant to the Criminal Justice Act; and
> - sealed documents (e.g., motions for downward departure for substantial assistance, plea agreements indicating cooperation)

The privacy concerns attendant to the above documents in criminal cases can be accommodated under the rule through the sealing provision of subdivision (h). [28]

---

exhibit that is not initially filed may be filed later as part of the record on appeal. In that case, the exhibits must be redacted accordingly.

[28] The underlined material is a new addition to the Committee Note that addresses a CACM commentary concerning certain documents that might be filed but should not be made part of the "criminal case file." The term "criminal case file" is not defined, and it is difficult to mesh with the E-Government Act and the template, both of which presume that if a document is filed with the court it is subject to remote electronic access. The paragraph tries to solve this disconnect by stating that such documents — even though filed and thus subject to remote access — can be sealed by the court.