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OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

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TO: Honorable Alicemarie H. Stotler, Chair
Standing Committee on Rules of Practice
and Procedure

FROM: Honorable Fern M. Smith, Chair
Advisory Committee on Evidence Rules

DATE: May 1, 1998

RE: Report of the Advisory Committee on Evidence Rules

I. Introduction

The Advisory Committee on Evidence Rules met on April 6th and 7th in New York City. At the meeting, the Committee approved three proposed amendments to the Evidence Rules, with the recommendation that the Standing Committee approve them for public comment.

The Evidence Rules Committee also discussed several proposals for amending other Evidence Rules. Specifically, the Committee considered: 1) whether the Evidence Rules should be revised to accommodate technological advances in the presentation of evidence; and 2) whether Evidence Rule 801(d)(1)(B) should be amended to provide a more expansive hearsay exception. The Committee also analyzed whether Civil Rule 44 should be abrogated in light of its apparent overlap with some of the Evidence Rules, and whether the Evidence Rules should be amended to include parent-child privileges. The Committee decided not to propose amendments on either of these subjects at this time.

The Committee considered three matters that do not relate directly to the Evidence Rules, but rather more broadly to the rulemaking process. These matters are: 1) whether comments on

the Rules should be received by e-mail; and 2) whether the rulemaking process should be shortened and, if so, how. Finally, the Evidence Rules Committee discussed and voted upon a suggested course for proceeding with the review of the proposed Rules of Attorney Conduct for the federal courts.

The discussion of these and other matters is summarized in Part III of this Report, and is more fully set forth in the draft minutes of the April meeting, which are attached to this Report.

II. Action Items

A. Rule 702.

The proposed amendment to Evidence Rule 702 is in response to the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, and it attempts to address the conflict in the courts about the meaning of *Daubert*. The proposal is also a response to bills pending in Congress that purport to "codify" *Daubert*, but that, in the Committee's view, raise more problems than they solve. The proposed amendment specifically extends the trial court's *Daubert* gatekeeping function to all expert testimony; requires a showing of reliable methodology and sufficient basis; and provides that the expert's methodology must be applied properly to the facts of the case. The Committee prepared an extensive Advisory Committee Note that will provide guidance for courts and litigants in determining whether expert testimony is sufficiently reliable to be admissible. Both the proposed amendment to Evidence Rule 702 and the Advisory Committee Note to the amendment are attached to this Report.

Recommendation: The Evidence Rules Committee recommends that the proposed amendment to Evidence Rule 702 be approved for public comment.

B. Rule 701

The proposal to amend Evidence Rule 701 seeks to prevent the practice of proffering an expert as a lay witness and thereby end-running both the reliability requirements of Rule 702 and the disclosure requirements pertaining to expert testimony. Under the amendment, testimony cannot be admitted under Rule 701 if it is based on scientific, technical or other specialized knowledge. The language of the amendment intentionally tracks the language defining expert testimony in Rule 702. Both the proposed amendment to Evidence Rule 701 and the Advisory

Committee Note to the amendment are attached to this Report. The proposed amendment does not prohibit lay witness testimony on matters of common knowledge that have traditionally been the subject of lay opinions.

Recommendation: The Evidence Rules Committee recommends that the proposed amendment to Evidence Rule 701 be approved for public comment.

C. Rule 703.

The proposal to amend Evidence Rule 703 would limit the disclosure to the jury of inadmissible information that is used as the basis of an expert's opinion. Under current law, litigants can too easily evade an exclusionary rule of evidence by having an expert rely on inadmissible evidence in forming an opinion. The inadmissible information is then disclosed to the jury in the guise of the expert's basis. The proposed amendment imposes no limit on an expert's opinion itself. The existing language of Evidence Rule 703, permitting an expert to rely on inadmissible information if it is of the type reasonably relied upon by experts in the field, is retained. Rather, the limitations imposed by the proposed amendment relate to the disclosure of this inadmissible information to the jury. Under the proposed amendment, the otherwise inadmissible information cannot be disclosed to the jury unless its probative value in assisting the jury to weigh the expert's opinion substantially outweighs the risk of prejudice resulting from the jury's possible misuse of the evidence. Both the proposed amendment to Evidence Rule 703 and the Advisory Committee Note to the amendment are attached to this Report.

Recommendation: The Evidence Rules Committee recommends that the proposed amendment to Evidence Rule 703 be approved for public comment.

III. Information Items

A. Issues the Committee Has Decided Not to Pursue

After discussion at the April meeting, the Evidence Rules Committee has decided not to pursue the following issues at this time:

1. Technological Advances in Presenting Evidence. The Evidence Rules Committee discussed whether the Evidence Rules must be amended to accommodate technological innovations in the presentation of evidence. The Committee studied the case law and determined that the Federal Rules are currently flexible enough to accommodate electronic evidence, and that courts and litigants have had little problem in applying the current rules to such evidence. For example, no case could be found in which computerized evidence was found inadmissible, where comparable non-computerized evidence would have been admitted, due to a limitation in the Rules. The Committee also found that any option for amending the Rules to more specifically cover computerized evidence would be problematic. Direct amendment of all the rules that refer to "paper"-type evidence would require the amendment of almost thirty rules--a prospect that should not be undertaken unless absolutely necessary. Indirect amendment of these rules--either by way of a freestanding definitions section, or by expanding the definitions section of the best evidence rule--presents substantial conceptual and practical problems as well. The Evidence Rules Committee resolved to continue to monitor case law and technological developments, and to reconsider the question of whether to amend the Rules should compelling circumstances dictate.

2. Rule 801(d)(1)(B): The Evidence Rules Committee considered a proposal to amend Evidence Rule 801(d)(1)(B) to provide a hearsay exemption for any prior consistent statement that would be otherwise admissible to rehabilitate a witness' credibility. Committee members generally agreed with the proposal on the merits, but resolved unanimously not to propose an amendment at this time. The Supreme Court, in *Tome v. United States*, recently construed Rule 801(d)(1)(B), and members wished to avoid the perception that the proposed amendment was designed to overrule *Tome*. Moreover, the Committee determined that the current Rule is not creating substantial problems in the federal courts. The Committee resolved to table the proposal, and will continue to monitor the post-*Tome* case law.

3. Civil Rule 44: The Evidence Rules Committee considered whether it should recommend that Civil Rule 44 be abrogated in light of its overlap with certain Evidence Rules. After substantial research and discussion, the Committee decided against such a recommendation. Civil Rule 44 does not completely overlap the Evidence Rules, and parties in certain types of cases rely on Civil Rule 44 as the sole means of authenticating official records. Since there is no indication of a problem in the cases, the Evidence Rules Committee found it inadvisable to propose any change in this area.

B. Parent-Child Privilege

Two bills are pending in Congress with respect to the possible amendment of the

Evidence Rules to include some form of parent-child privilege. The Senate Bill would require the Judicial Conference to report on the advisability of amending the Evidence Rules to include such a privilege. The House Bill would directly amend Evidence Rule 501 to provide a privilege for a witness to refuse to give adverse testimony, or relate confidential communications, concerning the witness' parent or child. The Evidence Rules Committee is unanimously opposed to amending the Evidence Rules to include any kind of parent-child privilege. If such a privilege were adopted, it would be the only codified privilege in the Federal Rules of Evidence--directly contrary to the common-law development of privileges that is the goal of Evidence Rule 501. Moreover, the Committee is convinced (along with the many federal courts that have considered the question) that children and parents do not rely on a confidentiality-based evidentiary privilege when communicating with each other. Nor has the case been made that the benefits of an adverse testimonial privilege outweigh the substantial cost to the search for truth that such a privilege would entail. The Evidence Rules Committee has prepared a draft statement in opposition to the House Bill, as well as a draft statement in response to the Senate Bill. Both of these statements recommend against an amendment of the Evidence Rules that would add a parent-child privilege. These draft statements are attached to this Report.

C. Proposed Rules of Attorney Conduct

The Evidence Rules Committee was directed, along with the other Advisory Committees, to consider and recommend an appropriate course of action with respect to the proposed Rules of Attorney Conduct. At its meeting, the Evidence Rules Committee noted that the Civil Rules Committee has resolved to recommend that an ad hoc committee, made up of representatives from the advisory committees, be formed to review the proposed Rules of Attorney Conduct. This review will consider the following questions:

- 1) Whether a "core" set of attorney conduct rules should be adopted for the federal courts, or whether the federal rule should be limited to a single choice of law provision.
- 2) Assuming that a core set of rules should be adopted, whether the rules as currently proposed fall within the core concern of the federal courts.
- 3) Whether the proposed rules or notes should be amended in any respect.
- 4) Whether the Attorney Conduct Rules should be established as a freestanding set of rules, or instead should be placed as an appendix to an existing body of Rules.

The Evidence Rules Committee strongly supports the proposal to establish an ad hoc committee to deal with these complex questions. The Evidence Rules Committee has already provided the Standing Committee's Reporter with extensive commentary and suggestions concerning each of the above issues, and hopes to continue its service by contributing to the work of the ad hoc committee.

D. E-mail Comments

The Standing Committee's Subcommittee on Technology has proposed a two-year trial period in which comments on the Rules could be made by e-mail. During this two-year period, Reporters would not be required to summarize individual comments; the Rules Support Office would acknowledge each comment by e-mail, and would post a generic explanation of action of the Advisory Committees in response to comments received. At its April meeting, the Evidence Rules Committee discussed the advisability of allowing e-mail comments, and unanimously resolved to support the proposal of the Technology Subcommittee.

E. Shortening the Rulemaking Process

At the request of the Standing Committee, the Evidence Rules Committee considered how and whether the rulemaking process could be shortened. The Committee unanimously agreed that the current process is too long, and that the length of the process encourages Congress to intervene with legislation rather than wait for the rulemaking process to come to its conclusion. The Committee recognized that much of the delay in the process is due to legislation specifying that the Supreme Court has until May 1 to transmit the rules to Congress, and that the Judicial Conference meetings are to be held in March and September. Yet even within those parameters, the Evidence Rules Committee thought it possible that changes could be adopted to shorten the process, without affecting the studied deliberation that is the hallmark of the rulemaking process. The Committee suggests that the Standing Committee might consider the following possibilities:

1. Shorten the six-month public comment period, at least with respect to changes that can reasonably be considered to be minimal or non-controversial.
2. Permit an Advisory Committee's proposal to be issued for public comment if the Standing Committee's only objections are on stylistic or drafting grounds. Any drafting problems could be corrected in the public comment process, thus shaving a year off what would be a four-year rulemaking process if the proposal were to be sent back to the Advisory Committee for redrafting. An alternative could be the approval of a policy permitting the Advisory Committee to respond to Standing Committee objections within 30 days of the Standing Committee meeting.
3. Permit the Advisory Committees to publish their proposals for public comment without the necessity of initial approval by the Standing Committee--while of course preserving the Standing Committee's ultimate authority to approve or disapprove a proposed rule after the

public comment period has concluded.

The Evidence Rules Committee agrees with the Standing Committee's self-study report that the current rulemaking process is too long, and the Committee is willing to participate in any suggestions or efforts to shorten the process.

IV. Minutes of the April, 1998 Meeting

The Reporter's draft of the minutes of the Evidence Rules Committee's April, 1998 meeting are attached to this report. These minutes have not yet been approved by the Evidence Rules Committee.

Attachments:

- Rules and Committee Notes
- Draft Statements Concerning Parent-Child Privileges
- Draft Minutes

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court in deciding whether the evidence is reliable and helpful. Consequently, the admissibility of all expert testimony is governed by the principles of Rule 104(a). Under that Rule, the proponent has the burden of establishing that the pertinent admissibility requirements are met by a preponderance of the evidence. See *Bourjaily v. United States*, 483 U.S. 171 (1987).

Daubert set forth a non-exclusive checklist for trial courts to use in assessing the reliability of scientific expert testimony. The specific factors explicated by the *Daubert* Court are: (1) whether the expert's technique or theory can be or has been tested--that is, whether the expert's theory can be challenged in some objective sense, or whether it is instead simply a subjective, conclusory approach that cannot reasonably be assessed for reliability; (2) whether the technique or theory has been subject to peer review and publication; (3) the known or potential rate of error of the technique or theory when applied; (4) the existence and maintenance of standards and controls; and (5) the degree to which the technique or theory has been generally accepted in the scientific community.

No attempt has been made to "codify" these specific factors set forth in *Daubert*. *Daubert* itself emphasized that the factors were neither exclusive nor dispositive. Other courts have recognized that not all of the specific *Daubert* factors can apply to every type of expert testimony. See *Tyus v. Urban Search Management*, 102 F.3d 256 (7th Cir. 1996) (noting that the factors mentioned by the Court in *Daubert* do not neatly apply to expert testimony from a sociologist). See also *Kannankeril v. Terminix Int'l, Inc.*, 128 F.3d 802, 809 (3d Cir. 1997) (holding that lack of peer review or publication was not dispositive where the expert's opinion was supported by "widely accepted scientific knowledge"). The standards set forth in the amendment are broad enough to require consideration of any or all of the specific *Daubert* factors where appropriate.

Courts both before and after *Daubert* have found other factors relevant in determining whether expert testimony is sufficiently reliable to be considered by the trier of fact. These factors include:

- (1) Whether experts are "proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying."

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Daubert v. Merrell Dow Pharmaceuticals, Inc., 43 F.3d 1311, 1317 (9th Cir. 1995).

(2) Whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion. See *General Elec. Co. v. Joiner*, 118 S.Ct. 512, 519 (1997) (noting that in some cases a trial court “may conclude that there is simply too great an analytical gap between the data and the opinion proffered”).

(3) Whether the expert has adequately accounted for obvious alternative explanations. See *Claar v. Burlington N.R.R.*, 29 F.3d 499 (9th Cir. 1994) (testimony excluded where the expert failed to consider other obvious causes for the plaintiff’s condition). Compare *Ambrosini v. Labarraque*, 101 F.3d 129 (D.C.Cir. 1996) (the possibility of some uneliminated causes presents a question of weight, so long as the most obvious causes have been considered and reasonably ruled out by the expert).

(4) Whether the expert “is being as careful as he would be in his regular professional work outside his paid litigation consulting.” *Sheehan v. Daily Racing Form, Inc.*, 104 F.3d 940, 942 (7th Cir. 1997). See also *Braun v. Lorillard Inc.*, 84 F.3d 230, 234 (7th Cir. 1996) (*Daubert* requires the trial court to assure itself that the expert “adheres to the same standards of intellectual rigor that are demanded in his professional work.”).

(5) Whether the field of expertise claimed by the expert is known to reach reliable results. See *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188 (6th Cir. 1988) (rejecting testimony based on “clinical ecology” as unfounded and unreliable).

All of these factors remain relevant to the determination of the reliability of expert testimony under the Rule as amended.

The Court in *Daubert* declared that the “focus, of course, must be solely on principles and methodology, not on the conclusions they generate.” 509 U.S. at 595. Yet as the Court later recognized, “conclusions and methodology are not entirely distinct from one another.” *General Elec. Co. v. Joiner*, 118 S.Ct. at 519. Under the

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amendment, as under *Daubert*, when an expert purports to apply principles and methods consistent with professional standards, and yet reaches a conclusion that other experts in the field would not reach, the trial court may fairly suspect that the principles and methods have not been faithfully applied. See *Lust v. Merrell Dow Pharmaceuticals, Inc.*, 89 F.3d 594, 598 (9th Cir. 1996). The amendment specifically provides that the trial court must scrutinize not only the principles and methods used by the expert, but also whether these principles and methods have been properly applied to the facts of the case. As the court noted in *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 745 (3d Cir. 1994): "any step that renders the analysis unreliable . . . renders the expert's testimony inadmissible. This is true whether the step completely changes a reliable methodology or merely misapplies that methodology."

Daubert involved scientific experts, and the Court left open whether the *Daubert* standards apply to expert testimony that does not purport to be scientifically-based. The inadaptability of many of the specific *Daubert* factors outside the hard sciences (e.g., peer review and rate of error) has led some courts to find that *Daubert* is simply inapplicable to testimony by experts who do not purport to be scientists. See *Compton v. Subaru of Am., Inc.*, 82 F.3d 1513 (10th Cir. 1996) (*Daubert* inapplicable to expert testimony of automotive engineer); *Tamarin v. Adam Caterers, Inc.*, 13 F.3d 51 (2d Cir. 1993) (*Daubert* inapplicable to testimony based on a payroll review prepared by an accountant). Other courts have held that *Daubert* is applicable to all expert testimony, while noting that not all of the specific *Daubert* factors can be applied readily to the testimony of experts who are not scientists. See *Watkins v. Telsmith, Inc.*, 121 F.3d 985, 991 (5th Cir. 1997), where the court recognized that "[n]ot every guidepost outlined in *Daubert* will necessarily apply to expert testimony based on engineering principles and practical experience", but stressed that the trial court after *Daubert* is still obligated to determine whether expert testimony is reliable; therefore, "[w]hether the expert would opine on economic evaluation, advertising psychology, or engineering," the trial court must determine "whether the expert is a hired gun or a person whose opinion in the courtroom will withstand the same scrutiny that it would among his professional peers."

The amendment does not distinguish between scientific and other forms of expert testimony. The trial court's gatekeeping

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function applies to testimony by any expert. While the relevant factors for determining reliability will vary from expertise to expertise, the amendment rejects the premise that an expert's testimony should be treated more permissively simply because it is outside the realm of science. An opinion from an expert who is not a scientist should receive the same degree of scrutiny for reliability as an opinion from an expert who purports to be a scientist. See *Watkins v. Telsmith, Inc.*, 121 F.3d 984, 991 (5th Cir. 1997) (“[I]t seems exactly backwards that experts who purport to rely on general engineering principles and practical experience might escape screening by the district court simply by stating that their conclusions were not reached by any particular method or technique.”). Some types of expert testimony will be more objectively verifiable, and subject to the expectations of falsifiability, peer review, and publication, than others. Some types of expert testimony will not rely on anything like a scientific method, and so will have to be evaluated by reference to other standard principles attendant to the particular area of expertise. The trial judge in all cases of proffered expert testimony must find that it is properly grounded, well-reasoned, and not speculative before it can be admitted. If there is a well-accepted body of learning and experience in the expert's field, then the expert's testimony must be grounded in that learning and experience to be reliable, and the expert must explain how the conclusion is so grounded. See, e.g., American College of Trial Lawyers, *Standards and Procedures for Determining the Admissibility of Expert Testimony after Daubert*, 157 F.R.D. 571, 579 (1994) (“Whether the testimony concerns economic principles, accounting standards, property valuation or other non-scientific subjects, it should be evaluated by reference to the ‘knowledge and experience’ of that particular field.”).

The amendment requires that the testimony must be the product of reliable principles and methods that are reliably applied to the facts of the case. While the terms “principles” and “methods” may convey one impression when applied to scientific knowledge, they remain relevant when applied to testimony based on technical or other specialized knowledge. For example, when a law enforcement agent testifies regarding the use of code words in a drug transaction, the principle used by the agent is that participants in such transactions regularly use code words to conceal the nature of their activities. The method used by the agent is the application of extensive experience to analyze the meaning of the conversations. So

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long as the principles and methods are sufficiently reliable, and so long as the proponent demonstrates that these principles and methods are applied reliably to the facts of the case, this type of testimony should be admitted.

If the witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached. The trial court's gatekeeping function requires more than simply "taking the expert's word for it." See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1319 (9th Cir. 1995) ("We've been presented with only the experts' qualifications, their conclusions and their assurances of reliability. Under *Daubert*, that's not enough."). The more subjective and controversial the expert's inquiry, the more likely the testimony should be excluded as unreliable. See *O'Conner v. Commonwealth Edison Co.*, 13 F.3d 1090 (7th Cir. 1994) (expert testimony based on a completely subjective methodology held properly excluded).

The amendment requires that expert testimony must be based upon reliable and sufficient underlying "facts or data." The term "data" is intended to encompass the reliable opinions of other experts. See the original Advisory Committee Note to Rule 703.

There has been some confusion over the relationship between Rules 702 and 703. The amendment makes clear that the adequacy of the basis of an expert's testimony is to be decided under Rule 702. Rule 702 sets forth the overarching requirement of reliability, and an analysis of the expert's basis cannot be divorced from the ultimate reliability of the expert's opinion. In contrast, the "reasonable reliance" requirement of Rule 703 is a relatively narrow inquiry. By its terms, Rule 703 does not regulate the basis of the expert's opinion per se. Rather, it regulates whether the expert can rely on information that is otherwise inadmissible. If the expert purports to rely on inadmissible information, Rule 703 requires the trial court to determine whether that information is of a type reasonably relied upon by other experts in the field. If so, the expert can rely on the information in reaching an opinion. However, the question of whether the expert is relying on a *sufficient* and reliable basis of information--whether admissible information or not--is governed by the reliability requirements of Rule 702.

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The amendment makes no attempt to set forth procedural requirements for exercising the trial court's gatekeeping function over expert testimony, such as are discussed in, e.g., Margaret Berger, *Procedural Paradigms for Applying the Daubert Test*, 78 Minn.L.Rev. 1345 (1994). Courts have shown considerable ingenuity and flexibility in considering challenges to expert testimony under *Daubert*, and it is contemplated that this will continue under the amended Rule. See, e.g., *Cortes-Irizarry v. Corporacion Insular*, 111 F.3d 184 (1st Cir. 1997) (discussing the application of *Daubert* in ruling on a motion for summary judgment); *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 736, 739 (3d Cir. 1994) (discussing the use of *in limine* hearings); *Claar v. Burlington N.R.R.*, 29 F.3d 499, 502-05 (9th Cir. 1994) (discussing the trial court's technique of ordering experts to submit serial affidavits explaining the reasoning and methods underlying their conclusions).

The amendment continues the practice of the original Rule in referring to a qualified witness as an "expert." This was done to provide continuity and to minimize change. The use of the term "expert" in the Rule does not, however, mean that a jury should actually be informed that a qualified witness is testifying as an "expert". Indeed, there is much to be said for a practice that prohibits the use of the term "expert" by both the parties and the court at trial. Such a practice "ensures that trial courts do not inadvertently put their stamp of authority" on a witness' opinion, and protects against the jury's being "overwhelmed by the so-called 'experts'." Hon. Charles Richey, *Proposals to Eliminate the Prejudicial Effect of the Use of the Word "Expert" Under the Federal Rules of Evidence in Criminal and Civil Jury Trials*, 154 F.R.D. 537, 599 (1994) (setting forth limiting instructions and a standing order employed to prohibit the use of the term "expert" in jury trials).

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Rule 701. Opinion Testimony by Lay Witnesses*

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, ~~and~~ (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue; and (c) not based on scientific, technical or other specialized knowledge.

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COMMITTEE NOTE

Lay witnesses have often been permitted to testify on complicated, technical subjects. This permissiveness has created a problematic overlap between lay and expert witness testimony. See, e.g., *Williams Enters. v. Sherman R. Smoot Co.*, 938 F.2d 230 (D.C. Cir. 1991) (insurance broker, who might have been qualified as an expert, was permitted to testify that the construction collapse at issue may have contributed to a substantial increase in the plaintiff's insurance premiums). Some courts have found it unnecessary to decide whether a witness is offering expert or lay opinion, reasoning that the proffered opinion would be admissible under either Rule 701 or 702. See *Malloy v. Monahan*, 73 F.3d 1012 (10th Cir. 1996) (the plaintiff's testimony as to future profits was admissible under either Rule 701 or Rule 702); *United States v. Fleishman*, 684 F.2d 1329 (9th Cir.1982) (whether the testimony was lay or expert opinion, it was permissible for an undercover agent to testify that a defendant was acting as a lookout). Other courts have held that a witness need

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

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not be qualified as an expert where the opinion is helpful and admissible under Rule 701. See, e.g., *United States v. Paiva*, 892 F.2d 148, 156 (1st Cir. 1989) (Rule 701 "blurred any rigid distinction that may have existed between" lay and expert testimony).

Rule 701 has been amended to eliminate the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing. Under the amendment, a witness' testimony must be scrutinized under the rules regulating expert opinion to the extent that the witness is providing scientific, technical, or other specialized information to the trier of fact. See generally *Asplundh Mfg. Div. v. Benton Harbor Eng'g*, 57 F.3d 1190 (3d Cir. 1995). By channeling testimony on scientific, technical and other specialized knowledge through the rules governing expert testimony, the amendment also ensures that a party will not evade the expert witness disclosure requirements set forth in Fed.R.Civ.P. 26 and Fed.R.Crim.P. 16 by simply calling an expert witness in the guise of a layperson. See Joseph, *Emerging Expert Issues under the 1993 Disclosure Amendments to the Federal Rules of Civil Procedure*, 164 F.R.D. 97, 108 (1996) (noting that "there is no good reason to allow what is essentially surprise expert testimony", and that "the court should be vigilant to preclude manipulative conduct designed to thwart the expert disclosure and discovery process"). See also *United States v. Figueroa-Lopez*, 125 F.3d 1241, 1246 (9th Cir. 1997) (law enforcement agents testifying that the defendant's conduct was consistent with that of a drug trafficker could not testify as lay witnesses; to permit such testimony under Rule 701 "subverts the requirements of Federal Rule of Criminal Procedure 16(a)(1)(E)").

The amendment does not distinguish between expert and lay witnesses, but rather between expert and lay testimony. Certainly it is possible for the same witness to provide both lay and expert testimony in a single case. See, e.g., *United States v. Figueroa-Lopez*, 125 F.3d 1241, 1246 (9th Cir. 1997) (law enforcement agents could testify that the defendant was acting suspiciously, without being qualified as experts; however, the rules on experts were applicable where the agents testified on the basis of extensive experience that the defendant was using code words to refer to drug quantities and prices). The amendment makes clear that any part of a witness' testimony that is based upon scientific, technical, or other specialized knowledge is governed by the standards of Rule 702 and the

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corresponding disclosure requirements of the Civil and Criminal Rules.

The phrase “scientific, technical or other specialized knowledge” is drawn from and is intended to have the same meaning as the identical phrase in Rule 702. See, e.g., *United States v. Saulter*, 60 F.3d 270 (7th Cir. 1995) (law enforcement agent was properly permitted to provide expert testimony on the process of manufacturing crack cocaine; his testimony was based on specialized knowledge). The amendment is not intended to affect the “prototypical example[s] of the type of evidence contemplated by the adoption of Rule 701 relat[ing] to the appearance of persons or things, identity, the manner of conduct, competency of a person, degrees of light or darkness, sound, size, weight, distance, and an endless number of items that cannot be described factually in words apart from inferences.” *Asplundh Mfg. Div. v. Benton Harbor Eng’g*, 57 F.3d 1190, 1196 (3^d Cir. 1995).

**Advisory Committee on Evidence Rules
Proposed Amendment: Rule 703**

Rule 703. Bases of Opinion Testimony by Experts*

1 The facts or data in the particular case upon which an expert
2 bases an opinion or inference may be those perceived by or made
3 known to the expert at or before the hearing. If of a type reasonably
4 relied upon by experts in the particular field in forming opinions or
5 inferences upon the subject, the facts or data need not be admissible
6 in evidence in order for the opinion or inference to be admitted. If the
7 facts or data are otherwise inadmissible, they shall not be disclosed
8 to the jury by the proponent of the opinion or inference unless their
9 probative value substantially outweighs their prejudicial effect.
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COMMITTEE NOTE

Rule 703 has been amended to emphasize that when an expert reasonably relies on inadmissible information to form an opinion or inference, it is the opinion or inference, and not the information, that is admitted as evidence. Courts have reached different results on how to treat otherwise inadmissible information that is reasonably relied upon by an expert in forming an opinion or drawing an inference. Compare *United States v. Rollins*, 862 F.2d 1282 (7th Cir. 1988) (admitting, as part of the basis of an FBI agent's expert opinion on the meaning of code language, the statements of an informant), with *United States v. 0.59 Acres of Land*, 109 F.3d 1493 (9th Cir. 1997) (error to admit hearsay offered as the basis of an expert opinion, without a limiting instruction). Commentators have also taken

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differing views. See, e.g., Ronald Carlson, *Policing the Bases of Modern Expert Testimony*, 39 Vand.L.Rev. 577 (1986) (advocating limits on the jury's consideration of otherwise inadmissible evidence used as the basis for an expert opinion); Paul Rice, *Inadmissible Evidence as a Basis for Expert Testimony: A Response to Professor Carlson*, 40 Vand.L.Rev. 583 (1987) (advocating unrestricted use of information reasonably relied upon by an expert).

When information is reasonably relied upon by an expert and yet is not independently admissible, a trial court applying this Rule must consider the information's probative value in assisting the jury to weigh the expert's opinion on the one hand, and the risk of prejudice resulting from the jury's potential misuse of the information on the other. If the trial court finds that the probative value of the information in assessing the expert's opinion substantially outweighs its prejudicial effect, the information may be disclosed to the jury, and a limiting instruction must be given upon request, informing the jury that the underlying information must not be used for substantive purposes. See Rule 105. In determining the appropriate course, the trial court should consider the probable effectiveness or lack of effectiveness of a limiting instruction under the particular circumstances. Furthermore, the trial court must keep in mind that disclosure of the inadmissible information is permitted only if the probative value of the information, in the manner that it is disclosed to the jury, substantially outweighs its prejudicial effect.

The amendment governs the use before the jury of otherwise inadmissible information reasonably relied on by an expert. It is not intended to affect the admissibility of an expert's testimony, nor to deprive an expert of the use of inadmissible information to form and propound an expert opinion or inference. Nothing in this Rule restricts the presentation of underlying expert facts or data when offered by an adverse party. See Rule 705.

The amendment provides a presumption against disclosure to the jury of otherwise inadmissible information used as the basis of an expert's opinion or inference, where that information is offered by the proponent of the expert. In a multi-party case, where one party proffers an expert whose testimony is also beneficial to other parties, each such party should be deemed a "proponent" within the meaning of the amendment.

Proposed Response to Senate Bill on Parent-Child Privilege Draft Judicial Conference Response

Date: April 7, 1998

The Federal Rules of Evidence should not be amended to include a parent-child privilege. An amendment would lead to uncertain application and inconsistent treatment of privileges, and would be costly to the search for truth.

Federal Rule of Evidence 501 provides that privileges "shall be governed by the principles of the common law as they may be interpreted in the light of reason and experience." The Rule gives the federal courts the primary responsibility for developing evidentiary privileges. Congress rejected a detailed list of privileges in favor of a common law, case-by-case approach. Given this background, it is not advisable to single out a parent-child privilege for legislative enactment. Amending the Federal Rules to include a parent-child privilege would create an anomaly: that very specific privilege would be the only codified privilege in the Federal Rules of Evidence. All of the other federally-recognized privileges would be grounded in the common law. The Judicial Conference believes that such an inconsistent, patchwork approach to federal privilege law is unnecessary and unwarranted, especially given the infrequency of cases involving testimony by parents against their children or children against their parents. Granting special legislative treatment to one of the least-invoked privileges in the federal courts is likely to result in confusion for both Bench and Bar. A specific legislative grant of a privilege might even be considered to create a negative inference that could limit judicial development of new privileges; such a negative inference would be directly contrary to the Supreme Court's directive that federal courts have the authority and obligation to create new privileges where warranted by reason and experience. *Jaffee v. Redmond*, 116 S.Ct. 812 (1996).

The adoption of a parent-child privilege would be contrary to both state and federal common law. All nine federal courts of appeals to consider the issue have rejected the parent-child privilege. See the cases collected in *In re Grand Jury*, 103 F.3d 1140 (3d Cir.), *cert. denied*, 117 S.Ct. 2412 (1997). Moreover, every state supreme court that has addressed the issue has rejected the privilege, and only four states have protected parent-child communications in some manner. *Id.* at 103 F.3d 1147-48. No state or federal law supports a privilege that would give a witness a right to refuse to give adverse testimony against their parent or child. This uniform authority counsels heavily against the legislative adoption of a parent-child privilege.

The Conference also notes that it would be difficult to define the appropriate contours of a parent-child privilege. Questions necessarily arise as to whether such a privilege should apply to protect adult children; grandparents; caretakers who have a "parental" relationship with a child; adoptive parents; or siblings. The difficulty in limiting the privilege counsels caution in adopting it.

For these reasons, the Judicial Conference recommends that the Federal Rules of Evidence not be amended to include a parent-child privilege. Sympathy alone is not enough to justify an unprecedented privilege that would, in many cases, prevent parties and the courts from reaching the truth. If family relationships are abused in an attempt to obtain evidence, "the remedy lies not in the adoption of an exclusionary rule, but instead in taking administrative or legal steps against those causing the abuse." David Schlueter, *The Parent-Child Privilege: A Response to Calls for Adoption*, 19 St. Mary's L.J. 35, 69 (1987).

Draft Statement in Response to H.R. 3577 Parent-Child Privilege

Date: April 7, 1998

H.R. 3577 would amend Federal Rule of Evidence 501 to provide for two privileges in the parent-child context. One privilege would protect a witness's refusal to testify against a parent or child of that witness. The other privilege would protect a witness's refusal to disclose the content of a confidential communication with a child or parent of that witness. We believe that the Federal Rules of Evidence should not be amended to include any kind of a parent-child privilege. An amendment would lead to uncertain application and inconsistent treatment of privileges, and would be costly to the search for truth.

Federal Rule of Evidence 501 provides that privileges "shall be governed by the principles of the common law as they may be interpreted in the light of reason and experience." The Rule gives the federal courts the primary responsibility for developing evidentiary privileges. Congress rejected a detailed list of privileges in favor of a common law, case-by-case approach. Given this background, it is not advisable to single out a parent-child privilege for legislative enactment. Amending the Federal Rules to include a parent-child privilege would create an anomaly: that very specific privilege would be the only codified privilege in the Federal Rules of Evidence. All of the other federally-recognized privileges would be grounded in the common law. We believe that such an inconsistent, patchwork approach to federal privilege law is unnecessary and unwarranted, especially given the infrequency of cases involving testimony by parents against their children or children against their parents. Granting special legislative treatment to one of the least-invoked privileges in the federal courts is likely to result in confusion for both Bench and Bar. A specific legislative grant of a privilege might even be considered to create a negative inference that could limit judicial development of new privileges; such a negative inference would be directly contrary to the Supreme Court's directive that federal courts have the authority and obligation to create new privileges where warranted by reason and experience. *Jaffee v. Redmond*, 116 S.Ct. 812 (1996).

The adoption of a parent-child privilege in any form would be contrary to both state and federal common law. All nine federal courts of appeals to consider the issue have rejected the parent-child privilege. See the cases collected in *In re Grand Jury*, 103 F.3d 1140 (3d Cir.), *cert. denied*, 117 S.Ct. 2412 (1997). Moreover, every state supreme court that has addressed the issue has rejected the privilege. Only four states have protected parent-child communications in some manner, and none as broadly as contemplated in H.R. 3577. *Id.* at 103 F.3d 1147-48. No state or federal law supports a privilege that would give a witness a right to refuse to give adverse testimony against their parent or child. This uniform authority counsels heavily against the legislative adoption of a parent-child privilege in any form.

We also note that the confidentiality-based privilege set forth in H.R. 3577 would be uncertain in application. The bill states that "a witness may not be compelled to disclose the

content of a confidential communication with a child or parent of the witness.” This means that it is up to the witness to declare the privilege; if the witness wishes to disclose a confidence related by a parent or child, the person who communicated the confidential information cannot invoke the privilege. Thus, a person deciding whether to communicate to a parent or child in confidence can never be assured that the communication will remain protected. This lack of certainty is antithetical to the very policy of confidentiality-based privileges, which is to encourage confidential communications by providing certainty to the communicating party. As the Supreme Court has stated, an uncertain privilege “is little better than no privilege at all.” *Upjohn Co. v. United States*, 449 U.S. 383 (1981).

The bill creates another anomaly by tying the parent-child privileges to the common-law development of the interspousal privileges. The privilege protecting confidential communications between spouses is controlled by the communicating spouse. A litigant has the right to invoke the privilege for confidential marital communications even if the witness wishes to disclose the communications. As discussed above, however, the confidentiality-based privilege for parent-child communications is, under H.R. 3577, controlled by the witness. If enacted, H.R. 3577 is therefore likely to create confusion and costly litigation by tying the parent-child confidential communications privilege to a purportedly “similar” privilege which is not in fact similar at all.

For these reasons, we recommend that the Federal Rules of Evidence not be amended to include a parent-child privilege. Sympathy alone is not enough to justify both an evasion of the Rules process and an unprecedented privilege that would, in many cases, prevent parties and the courts from reaching the truth. We are sympathetic to the concern that family relationships might be abused in the attempt to obtain evidence. However, if such abuse occurs “the remedy lies not in the adoption of an exclusionary rule, but instead in taking administrative or legal steps against those causing the abuse.” David Schlueter, *The Parent-Child Privilege: A Response to Calls for Adoption*, 19 St. Mary’s L.J. 35, 69 (1987).