Advisory Committee on Evidence Rules

Minutes of the Meeting of April 22-23

New York, New York

The Judicial Conference Advisory Committee on the Federal Rules of Evidence (the "Committee") met on April 22nd and 23rd, 2010.

The following members of the Committee were present:

Hon. Robert L. Hinkle, Chair
Hon. Anita B. Brody
Hon. Joan N. Ericksen.
Hon. Andrew D. Hurwitz
Marjorie A. Meyers, Esq.,
Elizabeth J. Shapiro, Esq., Department of Justice

Also present were:

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

I. Opening Business

The Committee approved the Minutes of the Fall 2009 meeting. Judge Hinkle then reported on the January 2010 Standing Committee meeting. The Evidence Rules Committee had no action items at that meeting.

II. Restyling of the Evidence Rules

A. Introduction

At its Spring 2007 meeting, the Committee voted unanimously to begin a project to restyle the Evidence Rules. The Committee agreed upon a protocol and a timetable for the restyling project. Over the next two years, the Committee prepared restyled versions of all the Evidence Rules. The restyled rules were approved for publication by the Standing Committee and submitted for public comment. The public comment period ended on February 15, 2010.

The first draft of the restyled Rules was prepared by Professor Kimble. The Evidence Rules Committee has reviewed each Rule to determine whether any proposed change was one of substance rather than style — with "substance" defined as changing an evidentiary result or method of analysis, or changing language that is so heavily engrained in the practice as to constitute a "sacred phrase." Under the protocol for the restyling project, if a significant minority of Evidence Rules Committee members agree that the proposed change is substantive, then that change should not be implemented.

At its Fall 2009 meeting, the Committee considered comments that it had received to that point on the restyled rules issued for public comment. The Committee tentatively approved some minor changes to the Restyled Rules. Then, after all the public comments were received, the Reporter reviewed them and provided recommendations to the Committee. The Style Subcommittee also reviewed the public comments and adopted certain changes.

At its Spring 2010 meeting, the Advisory Committee considered the public comments and the changes made by the Style Subcommittee. Each member also conducted a final, independent review of all the Restyled Rules. The goal of the Committee at the meeting was to prepare a final package of Restyled Rules, with the recommendation that they be approved by the Standing Committee and referred to the Judicial Conference.

The Advisory Committee approved a final package of Restyled Rules, and the Committee unanimously recommended that the restyling amendments be approved by the Standing Committee and referred to the Judicial Conference.

These minutes chronicle the Advisory Committee's review of the Restyled Rules as issued for public comment, the public comment received, and the determinations and suggestions of the Style Subcommittee and Professor Kimble. (The Style Subcommittee met by conference call after the

Advisory Committee's meeting to review changes. The Style Subcommittee's review and determination will be included in these minutes under the discussion of individual rules.)

Given the scope of the project, the number of issues, and the fact that much work on the restyled rules had been done before the meeting, the Committee adopted the following protocol for its Spring 2010 meeting:

1) a public comment suggesting a style change that had been rejected by the Style Subcommittee would not be discussed at the meeting unless a Committee member affirmatively raised it;

2) if the Reporter determined, in his memo to the Committee, that a public comment called for a substantive change, it would not be discussed at the meeting unless a Committee member affirmatively raised it;

3) all changes adopted by the Style Subcommittee to the rules as issued for public comment (most of them being changes proposed by members of the public) would be considered and voted upon at the meeting;

4) any new change proposed by a Committee member to the rules as issued for public comment would require discussion and a vote at the meeting;

5) any change that had been tentatively approved by the Committee at the Fall 2009 meeting would be deemed finally adopted unless an objection was raised by a Committee member;

6) any public comment received after the Fall 2009 meeting that raised an issue already considered and voted upon by the Committee would not be discussed at the meeting unless a Committee member affirmatively raised it; and

7) any rule issued for public comment that received no public comment was deemed approved (as it had been approved in order to be so issued) unless a Committee member raised a concern about that rule at the meeting.

II. Consideration of Individual Rules

These minutes will set out, in side-by-side form, the original rule and the rule as issued for public comment, with the changes tentatively approved at the Fall 2009 Committee meeting in blackline. The Committee Notes to the respective rules will be set forth at the end of these minutes as they were separately considered by the Advisory Committee.

ARTICLE I. GENERAL PROVISIONS Rule 101. Scope	ARTICLE I. GENERAL PROVISIONS Rule 101 — Scope; Definitions
These rules govern proceedings in the courts of the United States and before the United States bankruptcy judges and United States magistrate judges, to the extent and with the exceptions stated in rule 1101.	**(a) Scope.** These rules apply to proceedings before United States courts. The specific courts and proceedings to which the rules apply, along with exceptions, are set out in Rule 1101. **(b) Definitions.** In these rules: **(1)** "civil case" means a civil action or proceeding; **(2)** "criminal case" includes a criminal proceeding; **(3)** "public office" includes a public agency; **(4)** "record" includes a memorandum, report, or data compilation; **(5)** a "rule prescribed by the Supreme Court" means a rule adopted by the Supreme Court under statutory authority; and **(6)** a reference to any kind of written material or other medium includes electronically stored information.

Committee Discussion:

1. Rule 101(a), proceedings before courts: A Committee member suggested that the phrase "these rules apply to proceedings *before* United States courts" would be more accurately stated as "these rules apply to proceedings *in* United States courts." The Committee unanimously agreed with this suggestion. The Committee referred the matter to the Style Subcommittee. **(The Style Subcommittee approved the change).**

2. Rule 101(b)(6) "any medium": Professor Kimble suggested that the definition of written material in (b)(6) should refer to "*any* other medium." The Committee unanimously approved this suggestion. The Committee referred the matter to the Style Subcommittee. **(The Style Subcommittee approved the change).**

Committee Determination: Restyled Rule 101 approved as issued for public comment, with changes to subdivisions (a) and (b)(6).

Rule 102. Purpose and Construction	Rule 102 — Purpose
These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.	These rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination.

Committee Determination: Restyled Rule 102 approved as issued for public comment.

Rule 103. Rulings on Evidence	Rule 103 — Rulings on Evidence
(a) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and **(1) Objection.** In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or **(2) Offer of proof.** In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked. Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.	**(a) Preserving a Claim of Error.** A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party and: **(1)** if the ruling admits evidence, the party, on the record: **(A)** timely objects or moves to strike; and **(B)** states the specific ground, unless it was apparent from the context; or **(2)** if the ruling excludes evidence, the party informs the court of its substance by an offer of proof, unless the substance was apparent from the context. **(b) Not Needing to Renew an Objection or Offer of Proof.** Once the court rules definitively on the record — either before or at trial — a party need not renew an objection or offer of proof to preserve a claim of error for appeal.
(b) Record of offer and ruling. The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.	**(c) Court's Statement About the Ruling; Directing an Offer of Proof.** The court may make any statement about the character or form of the evidence, the objection made, and the ruling. The court may direct that an offer of proof be made in question-and-answer form.
(c) Hearing of jury. In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.	**(d) Preventing the Jury from Hearing Inadmissible Evidence.** To the extent practicable, the court must conduct a jury trial so that inadmissible evidence is not suggested to the jury by any means.
(d) Plain error. Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.	**(e) Taking Notice of Plain Error.** A court may take notice of a plain error affecting a substantial right, even if the claim of error was not properly preserved.

Committee Discussion:

1. Rule 103(a): The existing Rule 103(a) is written in the passive voice. A claim of error is preserved if a "timely objection or motion to strike appears of record." The restyling changed it to the active voice: "the party, on the record, timely moves * * *."

A public comment noted that the change to active voice created an inadvertent substantive change, because the rule as issued for public comment provides that a claim of error is preserved only if "the party" moves for it. But in mulitparty cases, case law provides that if one party timely objects, a claim of error is preserved *for all identically situated parties.*

After discussion, the Committee determined that changing "the party" to "a party" in all appropriate places in Rule 103(a) would solve the substantive problem because it would not require every party to make an object and offer of proof if one party had done so. Accordingly, the Committee unanimously approved the following change to restyled Rule 103(a):

> A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party and:
>
> (1) if the ruling admits evidence, ~~the~~ a party, on the record:
>
> (A) timely objects or moves to strike; and
>
> (B) states the specific ground, unless it was apparent from the context; or
>
> (2) if the ruling excludes evidence, ~~the~~ a party informs the court of its substance by an offer of proof, unless the substance was apparent from the context.

(That change was also approved by the Style Subcommittee.)

2. Rule 103(d), examples: The restyled Rule 103(d) deletes the examples provided in the original rule of situations in which a judge is to use all practicable efforts to prevent inadmissible evidence from being suggested to the jury. A public comment suggested that these examples were helpful and should be restored. One Committee member agreed, finding the examples useful. But other members noted that the examples were underinclusive and so could be misinterpreted. Others noted that the Evidence Rules rarely give specific examples.

As no motion was made to change the restyled Rule 103(d) as issued for public comment, the examples were not restored to the rule.

Committee Determination: Restyled Rule 103 as issued for public comment approved, with changes to subdivision (a).

Rule 104. Preliminary Questions	Rule 104 — Preliminary Questions
(a) Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.	**(a) In General.** The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege.
(b) Relevancy conditioned on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.	**(b) Relevancy That Depends on a Fact.** When the relevancy of evidence depends on fulfilling a factual condition, the court may admit it on, or subject to, the introduction of evidence sufficient to support a finding that the condition is fulfilled.
(c) Hearing of jury. Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require, or when an accused is a witness and so requests.	**(c) Matters That the Jury Must Not Hear.** A hearing on a preliminary question must be conducted outside the jury's hearing if: **(1)** the hearing involves the admissibility of a confession; **(2)** a defendant in a criminal case is a witness and requests that the jury not be present; or **(3)** justice so requires.
(d) Testimony by accused. The accused does not, by testifying upon a preliminary matter, become subject to cross-examination as to other issues in the case.	**(d) ~~Testimony by~~ Cross-Examining a Defendant in a Criminal Case.** By testifying on a preliminary question, a defendant in a criminal case does not become subject to cross-examination on other issues in the case.
(e) Weight and credibility. This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.	**(e) Evidence Relevant to Weight and Credibility.** This rule does not limit a party's right to introduce before the jury evidence that is relevant to the weight or credibility of other evidence.

Committee Discussion:

1. Rule 104(b): The Committee recognized that restyling Rule 104(b) raised many challenges. The Rule had to provide: a) the standard of proof for conditional relevance (evidence sufficient to support a finding; b) an emphasis that if that standard is met, the judge must find the evidence conditionally relevant, but also could find the evidence excluded on other grounds; c) a provision, consistent with current law, that the conditional relevance determination could be made at the time of

the proffer or at a later time; d) a distinction in the text between two kinds of evidence: the proffered evidence subject to the conditional fact and the evidence offered to prove that conditional fact; e) an indication that the evidence offered to prove the conditional fact would itself have to meet standards of admissibility (because the ultimate determination of the factual condition is for the jury); and f) a statement that the evidence offered to prove the conditional fact need not always be produced by the party who proffers the underlying evidence --- the review for conditional relevance can consider all the evidence presented in the case.

At its Fall 2009 meeting, the Committee determined that the rule released for public comment did not capture all the prerequisites of Rule 104(b), and therefore made a substantive change. For one thing, the rule did not specify that when the court finds evidence sufficient to support a finding of the conditional fact, it must find Rule 104(b) satisfied.

After discussing a number of drafts before the Spring 2010 meeting, the Committee reviewed the following revision (blacklined from the rule as issued for public comment):

> When the relevance ~~relevancy~~ of evidence depends on ~~fulfilling a factual condition, the court may admit it on, or subject to, the introduction of evidence~~ whether a fact exists, proof must be introduced sufficient to support a finding that the ~~condition is fulfilled~~ fact does exist. The court may admit the proposed evidence on the condition that the proof be introduced later.

In discussion, one Committee raised a question about the word "proof" and suggested the word "evidence" as an alternative. But other members pointed out that using the word "evidence" at that point would raise the confusion that the restyling has sought to avoid --- i.e., the confusion between the evidence the party wishes to introduce and the evidence of the conditional fact.

After further discussion, the Committee unanimously approved the proposed change to Rule 104(b). (The change had already been approved by the Style Subcommittee.)

2. Rule 104(c), hearings: This rule provides for certain "hearings" to be conducted outside the "hearing" of the jury. From a style standpoint, the challenge is the different usages of the word "hearing." Professor Kimble sought to remedy some of that awkwardness by referring to a hearing where the jury is not "present"--- but Committee members, at the Fall 2009 meeting, noted that this would be a substantive change because a hearing could be held with the jury present but unable to hear the proceedings.

Professor Kimble proposed the following version of restyled Rule 104(c) at the Spring 2010 meeting. It had been approved by the Style Subcommittee before the meeting.

Conducting a Hearing So That the Jury Cannot ~~Must Not~~ Hear It. ~~A~~ The court must conduct a hearing on a preliminary question ~~must be conducted outside the jury's hearing~~ so that the jury cannot hear it if:

(1) the hearing involves the admissibility of a confession;

(2) a defendant in a criminal case is a witness and so requests ~~that the jury not be present~~; or

(3) justice so requires.

Some Committee members suggested that the caption to the rule was awkward, but all recognized that any change would be a question of style --- and the Style Subcommittee had already approved the proposal. The Committee voted unanimously to approve the above change to the restyled version of Rule 104(c).

Committee Determination: Restyled Rule 104 approved with changes to subdivisions (b) and (c), and technical change previously approved at the Fall 2009 meeting.

Rule 105. Limited Admissibility	Rule 105 — Limiting Evidence That Is Not Admissible Against Other Parties or for Other Purposes
When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.	If the court admits evidence that is admissible against a party or for a purpose — but not against another party or for another purpose — the court, on request, must restrict the evidence to its proper scope and instruct the jury accordingly.

Committee Determination: Restyled Rule 105 approved as issued for public comment.

Rule 106. Remainder of or Related Writings or Recorded Statements	Rule 106 — Rest of or Related Writings or Recorded Statements
When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.	If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part — or any other writing or recorded statement — that in fairness ought to be considered at the same time.

Committee Discussion:

Members discussed the caption and agreed that it sounded awkward. A Committee member suggested the following change:

Rule 106 — ~~Rest~~ Remainder of or Related Writings or Recorded Statements

This was a suggestion for a return to the caption in the original rule. After discussion, the Committee unanimously approved a recommendation to the Style Subcommittee to consider a return to the caption of the original rule.

Committee Determination: Restyled Rule 106 approved with the suggestion to the Style Subcommittee to return to the caption of the original rule.

(The Style Subcommittee subsequently approved the suggested change).

ARTICLE II. JUDICIAL NOTICE Rule 201. Judicial Notice of Adjudicative Facts	ARTICLE II. JUDICIAL NOTICE Rule 201 — Judicial Notice of Adjudicative Facts
(a) Scope of rule. This rule governs only judicial notice of adjudicative facts.	**(a) Scope.** This rule governs judicial notice of an adjudicative fact only, not a legislative fact.
(b) Kinds of facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.	**(b) Kinds of Facts That May Be Judicially Noticed.** The court may judicially notice a fact that is not subject to reasonable dispute because it: **(1)** is generally known within the court's territorial jurisdiction; or **(2)** can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.
(c) When discretionary. A court may take judicial notice, whether requested or not. **(d) When mandatory.** A court shall take judicial notice if requested by a party and supplied with the necessary information.	**(c) Taking Notice.** At any stage of the proceeding, the court: **(1)** may take judicial notice on its own; or **(2)** must take judicial notice if a party requests it and the court is supplied with the necessary information.
(e) Opportunity to be heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.	**(d) Opportunity to Be Heard.** On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the <u>fact to be</u> noticed ~~fact~~. If the court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard.
(f) Time of taking notice. Judicial notice may be taken at any stage of the proceeding.	
(g) Instructing jury. In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.	**(e) Instructing the Jury.** In a civil case, the court must instruct the jury to accept the noticed fact as conclusive. In a criminal case, the court must instruct the jury that it may or may not accept the noticed fact as conclusive.

Committee Discussion:

Rule 201(d), "the noticed fact": At the Fall 2009 meeting, the Committee agreed to change "the noticed fact" to "the fact to be noticed" in Restyled Rule 201(d). The reason for the change was that at the time of the hearing the fact will ordinarily not have been noticed --- the hearing is usually conducted to determine whether the court should take judicial notice. A member pointed out that it may occur that a court would take notice and *then* hold a hearing. After discussion, however, the Committee concluded that the term "the fact to be noticed" was sufficiently broad to include facts noticed before and after the hearing. No motion was made to reverse the change approved at the Fall 2009 meeting. So under the protocol adopted for the Spring 2010 meeting, the Committee approved the restyled Rule 201(d), with the change of "the noticed fact" to "the fact to be noticed" in Rule 201(d).

Committee Determination:

Restyled Rule 201 approved with the change to subdivision (d) as previously approved by the Committee.

ARTICLE III. PRESUMPTIONS IN CIVIL ACTIONS AND PROCEEDINGS **Rule 301. Presumptions in General in Civil Actions and Proceedings**	ARTICLE III. PRESUMPTIONS IN CIVIL CASES **Rule 301 — Presumptions in a Civil Case Generally**
In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.	In a civil case, unless a federal statute or these rules provide otherwise, the party against whom a presumption is directed has the burden of ~~going forward with~~ producing evidence to rebut the presumption. But this rule does not shift the burden of ~~proof in the sense of the risk of nonpersuasion; the burden of proof~~ persuasion, which remains on the party who had it originally.

Committee Discussion:

At the Fall 2009 meeting, the Committee considered a public comment suggesting that the language "the burden of proof in the sense of the risk of nonpersuasion" was awkward and that Rule 301 could be clarified by distinguishing the various burdens that are referred to in the rule. Committee members noted that the two sentences in the restyled Rule as issued for public comment address different questions. The first allocates a burden of *production* while the second allocates a burden of *persuasion.* The restyled Rule uses the term "burden of going forward" for the former concept and "burden of proof in the sense of the risk of nonpersuasion" for the latter. While these terms are taken from the original Rule 301, the Committee discussed how the terminology might be improved to make the rule more easily understood. After significant discussion, the Committee unanimously approved tentative changes to the restyled Rule 301 --- as seen in the above blackline. Subsequently the Style Subcommittee approved those changes.

At the Spring 2010 meeting, the Committee considered a suggestion that "burden of persuasion" in the last sentence should be changed to "burden of proof." The Committee determined that burden of "proof" is usually applied to a question of sufficiency and not admissibility --- i.e., the burden of a party to persuade a factfinder that all of the evidence it has presented has proved its case. Burden of "persuasion" is the term that is more commonly used with presumptions. Accordingly, the Committee determined unanimously that no change should be made to the changes that had been tentatively adopted at the Fall 2009 meeting.

Committee Determination:

Restyled Rule 301 approved with changes previously approved (as indicated in the blackline).

Rule 302. Applicability of State Law in Civil Actions and Proceedings	Rule 302 — Effect of State Law on Presumptions in a Civil Case
In civil actions and proceedings, the effect of a presumption respecting a fact which is an element of a claim or defense as to which State law supplies the rule of decision is determined in accordance with State law.	In a civil case, state law governs the effect of a presumption regarding a claim or defense for which state law supplies the rule of decision.

Committee Determination: Restyled Rule 302 approved as issued for public comment.

ARTICLE IV. RELEVANCY AND ITS LIMITS Rule 401. Definition of ''Relevant Evidence''	ARTICLE IV. RELEVANCY AND ITS LIMITS Rule 401 — Test for Relevant Evidence
''Relevant evidence'' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.	Evidence is relevant if it has any tendency to make more or less probable the existence of a fact that is of consequence in determining the action.

Committee Discussion:

1. "than it would be without the evidence": The restyled version of Rule 401 as issued for public comment dropped the language "than it would be without the evidence." Some public comments disagreed with this change, arguing that the language is necessary to clarify and sharpen the definition of relevance. Without that language, a newcomer might think that evidence is relevant only when it makes the existence of a fact "more likely than not."

In response to the public comment, Professor Kimble suggested that Rule 401 should be restructured in a way that would include the language "than it would be without the evidence." That proposal was as follows (blacklined from the restyled rule as issued for public comment):

> Evidence is relevant if:
>
> (a) it has any tendency to make a fact more or less probable ~~the existence of a fact that is of consequence in determining the action~~ than it would be without the evidence; and
>
> (b) the fact is of consequence in determining the action.

The Style Subcommittee approved Professor Kimble's proposal. After discussion, the Advisory Committee unanimously approved the changes proposed by Professor Kimble. Members noted that the subdivisions are not freestanding. Subdivision (b), in referring to a "the fact," is referring to subdivision (a). Professor Kimble noted that the restyling frequently "build" one subdivision on another within a rule.

Committee Determination: Restyled Rule 402 approved, with changes from the Rule as issued for public comment --- adding "than it would be without the evidence" and restructuring the Rule.

Rule 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible	Rule 402 — General Admissibility of Relevant Evidence
All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.	Relevant evidence is admissible unless any of the following provides otherwise: • the United States Constitution; • a federal statute; • these rules; or • other rules prescribed by the Supreme Court. Irrelevant evidence is not admissible.

Committee Discussion:

Bullet points: The Committee reviewed once again its decision to use bullet points --- on a limited basis --- as part of the restyling. Committee members noted that previous restylings used bullet points as a way to organize lists and concepts, and to make a rule more user-friendly. Some have criticized the use of bullet points because they cannot be cited conveniently. But Committee members noted that the listed sources for excluding relevant evidence in Rule 402 cannot be individually cited at all in the current rule. So a citation to "the second bullet point" is an improvement under current law.

The alternative to bullet points is numbered subdivisions, but Committee members concluded that subdivisions would not work in Rule 402. For one thing, it would be odd to have subdivisions that are simply a list of phrases or words --- no verbs. For another, the use of subdivisions would make it difficult to deal with what would amount to a hanging paragraph at the end of the rule.

Members also noted that bullet points were being used only rarely in the restyled rules --- only where listed factors could not be set forth efficiently in numbered subdivisions. Finally, members noted that the use of bullet points was obviously a question of style and not substance --- and that the Style Subcommittee of the Standing Committee (which has the final word on questions of style), approved the use of bullet points in Rule 402 as well as in a few other rules.

Committee members unanimously approved the restyled Rule 402 as it was approved for public comment.

Committee Determination: Restyled Rule 402 approved as issued for public comment.

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time	Rule 403 — Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons
Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.	The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

Committee Determination: Restyled Rule 403 approved as issued for public comment.

Rule 404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes	Rule 404 — Character Evidence; Crimes or Other Acts
(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 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.** 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; **(3) Character of witness.** Evidence of the character of a witness, as provided in Rules 607, 608, and 609.	**(a) Character Evidence.** **(1)** ***Prohibited Uses.*** Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait. **(2)** ***Exceptions <u>for a Defendant or a Victim</u> in a Criminal Case.*** The following exceptions apply in a criminal case: **(A)** a defendant may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it; **(B)** subject to the limitations in Rule 412, a defendant may offer evidence of an alleged ~~crime~~ victim's pertinent trait, and if the evidence is admitted, the prosecutor may: **(i)** offer evidence to rebut it; and **(ii)** offer evidence of the defendant's same trait; and **(C)** in a homicide case, the prosecutor may offer evidence of the alleged victim's trait of peacefulness to rebut evidence that the victim was the first aggressor. **(3)** ***Exceptions for a Witness*****.** Evidence of a witness's character may be admitted under Rules 607, 608, and 609.

(b) 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.	**(b) Crimes or Other Acts.** **(1)** ***Prohibited Uses.*** Evidence of a crime or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character. **(2)** ***Permitted Uses; Notice <u>in a Criminal Case</u>.*** This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. On request by a defendant in a criminal case, the prosecutor must: **(A)** provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and **(B)** do so before trial — or during trial if the court, for good cause, excuses lack of pretrial notice.

Committee Discussion:

1. Rule 404(a)(2) caption.

At the Fall 2009 meeting the Committee agreed with Professor Kimble's suggestion to clarify the caption to Rule 404(a)(2) --- the clarification being that the exceptions set forth in that subdivision were with respect to "a defendant or a victim" in a criminal case. At the Spring 2010 meeting, Professor Kimble suggested that the "a" before victim should be dropped. The Committee agreed. The caption, as finally approved by the Committee, reads as follows:

Exceptions for a Defendant or ~~a~~ Victim in a Criminal Case.

(The Style Subcommittee subsequently approved this change).

2. Rule 404(b) --- Notice Provision.

A public comment suggested that the restyled notice provision no longer conditioned admissibility of evidence on giving proper notice. The original rule states that uncharged misconduct may be admissible for a non-character purpose, "provided that" the prosecution properly notifies the defendant. The restyled provision sets the notice requirement in a separate sentence and says the prosecutor "must" give proper notice, without saying what happens if notice is not given.

Some Committee members noted that other notice provisions in the Rules had been set forth as mandatory requirements, without stating that evidence would be excluded for failure to comply --- and courts have read those provisions as precluding admissibility if notice is not given. Examples include Rules 412-415. That is a sensible reading of a notice requirement because the rules of evidence do not deal with sanctions --- they are all about admissibility, and so it should be assumed that failing to meet a requirement in a rule would render it inadmissible under that rule. Other Committee members noted that the restyled Rule 404(b) notice provision had been made consistent with the other notice provisions, and consistency is an important goal of the restyling project.

Two Committee members suggested that starting the sentence on notice with the word "But" would help to tie the notice requirement into admissibility. Other members responded that use of the word "But" would not be very clarifying in this instance, and it would mean that the Rule 404(b) notice provision would be different from all others. A motion to add "But" to the beginning of the notice sentence was made and seconded. Two members voted in favor, three against, and one abstained.

Committee Determination: Rule 404 approved with technical changes made at Fall 2009 meeting, and a minor change to the caption of Rule 404(a)(2).

Rule 405. Methods of Proving Character	Rule 405 — Methods of Proving Character
(a) Reputation or opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.	**(a) By Reputation or Opinion.** When evidence of a person's character or character trait is admissible, it may be proved by testimony about the person's reputation or by testimony in the form of an opinion. On cross-examination of the character witness, the court may allow an inquiry into relevant specific instances of the person's conduct.
(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.	**(b) By Specific Instances of Conduct.** When a person's character or character trait is an essential element of a charge, claim, or defense, the character or trait may also be proved by relevant specific instances of the person's conduct.

Committee Determination: Restyled Rule 405 approved as issued for public comment, with the blacklined change approved at the Fall 2009 meeting.

Rule 406. Habit; Routine Practice	Rule 406 — Habit; Routine Practice
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.	Evidence of a person's habit or an organization's routine practice may be admitted to prove that on a particular occasion the person or organization acted in accordance with the habit or routine practice. The court may admit this evidence regardless of whether it is corroborated or whether there was an eyewitness.

Committee Discussion:

"Is relevant": A public comment expressed concern that replacing "is relevant" with "may be admitted" could result in an unintended substantive change---because "may be admitted" seems more conditional than "is relevant." The Committee discussed the matter and determined that no substantive change was made. The statement "is relevant" is itself conditional because relevant evidence is not always admitted --- it can be excluded under Rule 403, the hearsay rule, etc. Committee members concluded that "may be admitted" is in fact more helpful to the reader than "is relevant" because the reader might wonder why habit evidence --- which is obviously relevant to whether a person acted in accordance with the habit --- needs to be characterized as "relevant" under the rule.

Committee Determination: Restyled Rule 406 approved as issued for public comment.

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Rule 407. Subsequent Remedial Measures	Rule 407 — Subsequent Remedial Measures
When, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.	When measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove: • negligence; • culpable conduct; • a defect in a product or its design; or • a need for a warning or instruction. But the court may admit this evidence for another purpose, such as impeachment or — if disputed — proving ownership, control, or the feasibility of precautionary measures.

Committee Discussion:

1. Bullet points: The Committee reviewed the use of bullet points in Rule 407 and found that they were helpful for understanding the permissible purposes under the Rule --- and also to avoid the anomaly of a hanging paragraph after any numbered subdivision. The Committee also noted that the use of bullet points presented a question of style not substance, and the Style Subcommittee had already approved restyled Rule 407.

2. Change from "controverted" to "disputed": A public comment contended that the word "controverted" in the original rule means that the defendant must put in some affirmative evidence contesting the point before the plaintiff can respond with subsequent remedial measure evidence. The comment suggested that the change from "controverted" to "disputed" was substantive on the ground that "disputed" was a less rigorous standard. But the Committee noted that the word "disputed" is an accurate description of the case law, and concluded that there is no substantive difference between "controverted" and "disputed." Case law does not require a defendant in all cases to introduce affirmative evidence contesting a point for subsequent remedial measures to be admissible. Committee members observed that as a matter of style, the word "disputed" is plainer and more common than "controverted" --- and the change was approved by the Style Subcommittee. No Committee member moved to change the language of the restyled Rule 407 as it was issued for public comment.

Committee Determination: Restyled Rule 407 approved as issued for public comment.

Rule 408. Compromise and Offers to Compromise	Rule 408 — Compromise Offers and Negotiations
(a) Prohibited uses. Evidence of the following is not admissible on behalf of any party, when offered to prove 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 accepting or offering or promising to accept—a valuable consideration in compromising or attempting to compromise the claim; and **(2)** conduct or statements made in compromise negotiations regarding the claim, except when offered in a criminal case and the negotiations related to a claim by a public office or agency in the exercise of regulatory, investigative, or enforcement authority.	**(a) Prohibited Uses.** Evidence of the following is not admissible — on behalf of any party — either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction: **(1)** furnishing, promising, or offering — or accepting, promising to accept, or offering to accept — a valuable consideration in order to compromise the claim; and **(2)** conduct or a statement made during compromise negotiations about the claim — except when offered in a criminal case and when the negotiations related to a claim by a public office in the exercise of its regulatory, investigative, or enforcement authority.
(b) Permitted uses. 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.	**(b) Exceptions.** The court may admit this evidence for another purpose, such as proving a witness's bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

Committee Discussion:

A public comment suggested that the restyled language "in order to compromise the claim" would not cover statements and offers in settlement that were unsuccessful. The Committee considered whether to change the language to "in an effort to compromise the claim." But ultimately the Committee decided not to adopt any change to the Restyled Rule. Committee members noted that the Rule covers offers and promises without regard to whether the settlement actually occurs --- and the term "in order to compromise the claim" focuses on the intent of the offeror, not on whether any settlement is actually reached.

Committee Determination: Restyled Rule 408 approved as issued for public comment.

Rule 409. Payment of Medical and Similar Expenses	Rule 409 — Offers to Pay Medical and Similar Expenses
Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury.	Evidence of furnishing, promising to pay, or offering to pay medical, hospital, or similar expenses resulting from an injury is not admissible to prove liability for the injury.

Committee Determination: Restyled Rule 409 approved as issued for public comment.

Rule 410. Inadmissibility of Pleas, Plea Discussions, and Related Statements	Rule 410 — Pleas, Plea Discussions, and Related Statements
Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions: **(1)** a plea of guilty which was later withdrawn; **(2)** a plea of nolo contendere; **(3)** any statement made in the course of any proceedings under Rule 11 of the Federal Rules of Criminal Procedure or comparable state procedure regarding either of the foregoing pleas; or **(4)** any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn. However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel.	**(a) Prohibited Uses.** In a civil or criminal case, evidence of the following is not admissible against the defendant who made the plea or participated in the plea discussions: **(1)** a guilty plea that was later withdrawn; **(2)** a nolo contendere plea; **(3)** a statement about either of those pleas made during a proceeding under Federal Rule of Criminal Procedure 11 or a comparable state procedure; or **(4)** a statement made during plea discussions with an attorney for the prosecuting authority if the discussions did not result in a guilty plea or they resulted in a later-withdrawn guilty plea. **(b) Exceptions.** The court may admit a statement described in Rule 410(a)(3) or (4): **(1)** in any proceeding in which another statement made during the same plea or plea discussions has been introduced, if in fairness both statements ought to be considered together; or **(2)** in a criminal proceeding for perjury or false statement, if the defendant made the statement under oath, on the record, and in the presence of counsel.

Committee Discussion:

1. Rule 410(a)(3) --- "a statement about either of those pleas"

At the last Committee meeting, the DOJ representative explained how the restyled language in Rule 410(a)(3) creates a substantive change: the restyling unintentionally narrows the class of statements that are inadmissible to those only "about the pleas." As restyled, the phrase "regarding either of the foregoing pleas" modifies the word "statement." Thus, the restyled rule limits the non-admissibility to only statements "about the pleas" as opposed to *any* statements made during the defined proceedings. But the currently understood meaning among practitioners is that the phrase "regarding either of the foregoing pleas" modifies the *comparable state procedure*, not the statement. Thus, under the current rule, a broader range of statements -- those made "in the course of any proceedings" would

be excluded. The Committee agreed with the Department's position that the restyled version of Rule 410 needed to be revised in order to avoid a substantive change by narrowing the class of statements subject to Rule 410 protection.

For the Spring 2010 meeting, Professor Kimble prepared the following change to Rule 410(a)(3):

> (3) a statement made during a proceeding on ~~about~~ either of those pleas ~~made during a proceeding~~ under Federal Rule of Criminal Procedure 11 or a comparable state procedure;

The DOJ reviewed the proposal before the meeting and concluded that it solved the substantive concern that it had raised. The Style Subcommittee also approved the change.

At the meeting, the Committee unanimously approved the change, agreeing that the revision avoided any substantive change from the original rule.

2. Rule 410(b)(1), technical change:

A member of the public suggested the following change to Rule 410(b)(1) as issued for public comment:

> (1) in any proceeding in which another statement made during the same plea or plea discussions has been introduced, if in fairness ~~both~~ the statements ought to be considered together; or

The Style Subcommittee agreed with this suggestion and the Advisory Committee approved it unanimously.

Committee Determination: Restyled Rule 410 approved as issued for public comment, with change to (a)(3) and technical change to (b)(1).

Rule 411. Liability Insurance	Rule 411 — Liability Insurance
Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.	Evidence that a person did or did not have liability insurance is not admissible to prove ~~that~~ whether the person acted negligently or otherwise wrongfully. But the court may admit this evidence for another purpose, such as proving a witness's bias or prejudice or — if disputed — proving agency, ownership, or control.

Committee Discussion:

1. "did or did not have liability insurance": A public comment argued that the restyled language "have liability insurance" is not as comprehensive as the original language "insured against liability." It explained that "having liability insurance," in common language, is thought to mean having a liability insurance policy. But the phrase "insured against liability" has a broader connotation, including indemnity agreements that are not often thought of as liability insurance.

The Committee agreed with the public comment, and so approved the following change to the restyled rule as it was issued for public comment:

> Evidence that a person ~~did or did not have liability insurance~~ was or was not insured against liability is not admissible to prove * * *

(This change was also approved by the Style Subcommittee).

2. Addition of "if disputed": A public comment argued that adding the condition "if disputed" to the proper purposes set forth in the rule was a substantive change --- because there is no such requirement in the original rule.

Professor Kimble added "if disputed" to provide a parallel to Rule 407. But in discussion, the Committee determined that the two rules were not necessarily parallel. Given the dearth of case law on Rule 411, the Committee was unable to determine, with sufficient confidence, whether the addition of an "in dispute" requirement would mean a substantive change in Rule 411. The Committee unanimously determined that the prudent course would be to delete the "if disputed" language that had been added to the Rule. The language was therefore dropped from the restyled Rule 411. That change was also approved by the Style Subcommittee.

Committee Determination: Restyled Rule 411 approved with a change to the language on liability insurance; deletion of "if disputed"; and adoption of change approved at previous meeting, to prohibit proof of insurance when offered to show lack of negligence.

Rule 412. Sex Offense Cases; Relevance of Alleged Victim's Past Sexual Behavior or Alleged Sexual Predisposition	**Rule 412 — Sex-Offense Cases: The Victim's Sexual Behavior or Predisposition**
(a) Evidence Generally Inadmissible. The following evidence is not admissible in any civil or criminal proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c): **(1)** Evidence offered to prove that any alleged victim engaged in other sexual behavior. **(2)** Evidence offered to prove any alleged victim's sexual predisposition.	**(a) Prohibited Uses.** The following evidence is not admissible in a civil or criminal proceeding involving alleged sexual misconduct: **(1)** evidence offered to prove that a victim engaged in other sexual behavior; or **(2)** evidence offered to prove a victim's sexual predisposition.
(b) Exceptions. **(1)** In a criminal case, the following evidence is admissible, if otherwise admissible under these rules: **(A)** evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury or other physical evidence; **(B)** evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and **(C)** evidence the exclusion of which would violate the constitutional rights of the defendant. **(2)** In a civil case, evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible if it is otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. Evidence of an alleged victim's reputation is admissible only if it has been placed in controversy by the alleged victim.	**(b) Exceptions.** **(1)** ***Criminal Cases.*** The court may admit the following evidence in a criminal case: **(A)** evidence of specific instances of a victim's sexual behavior, if offered to prove that someone other than the defendant was the source of semen, injury, or other physical evidence; **(B)** evidence of specific instances of a victim's sexual behavior toward the defendant, if offered by the prosecutor or if offered by the defendant to prove consent; and **(C)** evidence whose exclusion would violate the defendant's constitutional rights. **(2)** ***Civil Cases.*** In a civil case, the court may admit evidence offered to prove a victim's sexual behavior or sexual predisposition if its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. The court may admit evidence of a victim's reputation only if the victim has placed it in controversy.

(c) Procedure To Determine Admissibility. **(1)** A party intending to offer evidence under subdivision (b) must— **(A)** file a written motion at least 14 days before trial specifically describing the evidence and stating the purpose for which it is offered unless the court, for good cause requires a different time for filing or permits filing during trial; and **(B)** serve the motion on all parties and notify the alleged victim or, when appropriate, the alleged victim's guardian or representative. **(2)** Before admitting evidence under this rule the court must conduct a hearing in camera and afford the victim and parties a right to attend and be heard. The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.	**(c) Procedure to Determine Admissibility.** **(1)** ***Motion.*** If a party intends to offer evidence under Rule 412(b), the party must: **(A)** file a motion that specifically describes the evidence and states the purpose for which it is to be offered; **(B)** do so at least 14 days before trial unless the court, for good cause, sets a different time; **(C)** serve the motion on all parties; and **(D)** notify the victim or, when appropriate, the victim's guardian or representative. **(2)** ***Hearing*.** Before admitting evidence under this rule, the court must conduct an in-camera hearing and give the victim and parties a right to attend and be heard. Unless the court orders otherwise, the motion, related materials, and the record of the hearing must be and remain sealed.
	(d) Definition of "Victim." In this rule, "victim" includes an alleged victim.

Committee Discussion:

1. Rule 412(b)(1)(B): "sexual behavior toward the defendant"

A public comment suggested that the phrase "sexual behavior toward the defendant" was incorrect. The Committee considered this comment and determined that the language was a substantive change, because the exception has been construed to allow evidence of a victim's sexual behavior even though it was not necessarily directed "toward" the defendant. The Committee discussed alternative language --- including "concerning the defendant," which was language proposed by the Style Subcommittee. In the end the Committee determined that the safest approach (i.e., the approach that could not lead to a substantive change) was to use the language from the original rule. The Committee therefore unanimously approved the following change to the restyled Rule 412(b)(2)(B) as released for public comment:

> evidence of specific instances of a victim's sexual behavior ~~toward~~ with respect to the defendant, if offered by the prosecutor or if offered by the defendant to prove consent; and

(That change was subsequently approved by the Style Subcommittee).

2. Rule 412(b)(1)(B): Change from "the person accused of sexual misconduct" to "the defendant"

After the meeting, while implementing the above-discussed change to Rule 412(b)(1)(B), the Reporter noticed another substantive change in that subdivision. The original rule provides an exception for "evidence of specific instances of sexual behavior by the alleged victim with respect to *the person accused of the sexual misconduct* offered by the accused to prove consent or by the prosecution." The restyled rule as issued for public comment reads "evidence of specific instances of a victim's sexual behavior with respect to *the defendant*, if offered by the prosecutor or if offered by the defendant to prove consent." This change provides a more limited exception because it does not permit evidence of sexual behavior of the victim with respect to a *third party*, when offered to prove the victim's consent. An example would be a case in which the defendant was charged with aiding and abetting a sexual assault, and the defendant offers prior sexual behavior between the victim and the alleged perpetrator to prove consent with the alleged abuser.

In an email exchange after the meeting, the Committee agreed that the change was substantive, and approved a return to the wording of the original rule. Together with the already approved change to this subdivision, the restyled rule as approved by the Committee reads as follows:

> evidence of specific instances of a victim's sexual behavior ~~toward the defendant~~ with respect to the person accused of the sexual misconduct if offered by the prosecutor or if offered by the defendant to prove consent; and

(That change was subsequently approved by the Style Subcommittee).

Committee Determination: Rule 412 approved as issued for public comment, with changes to (b)(1)(B) as noted above.

Rule 413. Evidence of Similar Crimes in Sexual Assault Cases	**Rule 413 — Similar Crimes in Sexual- Assault Cases**
(a) In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant.	**(a) Permitted Uses.** In a criminal case in which a defendant is accused of a sexual assault, the court may admit evidence that the defendant committed any other sexual assault. The evidence may be considered on any matter to which it is relevant.
(b) In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.	**(b) Disclosure <u>to the Defendant</u>.** If the prosecutor intends to offer this evidence, the prosecutor must disclose it to the defendant, including witnesses' statements or a summary of the expected testimony. The prosecutor must do so at least 15 days before trial or at a later time that the court allows for good cause.
(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.	**(c) Effect on Other Rules.** This rule does not limit the admission or consideration of evidence under any other rule.
(d) For purposes of this rule and Rule 415, ''offense of sexual assault'' means a crime under Federal law or the law of a State (as defined in section 513 of title 18, United States Code) that involved— **(1)** any conduct proscribed by chapter 109A of title 18, United States Code; **(2)** contact, without consent, between any part of the defendant's body or an object and the genitals or anus of another person; **(3)** contact, without consent, between the genitals or anus of the defendant and any part of another person's body; **(4)** deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person; or **(5)** an attempt or conspiracy to engage in conduct described in paragraphs (1)–(4).	**(d) Definition of "Sexual Assault."** In this rule and Rule 415, "sexual assault" means a crime under federal law or under state law (as "state" is defined in 18 U.S.C. § 513) involving: **(1)** any conduct prohibited by 18 U.S.C. chapter 109A; **(2)** contact, without consent, between any part of the defendant's body — or an object — and another person's genitals or anus; **(3)** contact, without consent, between the defendant's genitals or anus and any part of another person's body; **(4)** deriving sexual pleasure or gratification from inflicting death, bodily injury, or physical pain on another person; or **(5)** an attempt or conspiracy to engage in conduct described in paragraphs (1)–(4).

Committee Determination: Restyled Rule 413 approved as issued for public comment, with the addition of the blacklined change to the heading of subdivision (b) previously approved.

Rule 414. Evidence of Similar Crimes in Child Molestation Cases	**Rule 414 — Similar Crimes in Child- Molestation Cases**
(a) In a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant's commission of another offense or offenses of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant.	**(a) Permitted Uses.** In a criminal case in which a defendant is accused of child molestation, the court may admit evidence that the defendant committed any other act of child molestation. The evidence may be considered on any matter to which it is relevant.
(b) In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.	**(b) Disclosure <u>to the Defendant</u>.** If the prosecutor intends to offer this evidence, the prosecutor must disclose it to the defendant, including witnesses' statements or a summary of the expected testimony. The prosecutor must do so at least 15 days before trial or at a later time that the court allows for good cause.
(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.	**(c) Effect on Other Rules.** This rule does not limit the admission or consideration of evidence under any other rule.
(d) For purposes of this rule and Rule 415, ''child'' means a person below the age of fourteen, and ''offense of child molestation'' means a crime under Federal law or the law of a State (as defined in section 513 of title 18, United States Code) that involved— **(1)** any conduct proscribed by chapter 109A of title 18, United States Code, that was committed in relation to a child; **(2)** any conduct proscribed by chapter 110 of title 18, United States Code; **(3)** contact between any part of the defendant's body or an object and the genitals or anus of a child; **(4)** contact between the genitals or anus of the defendant and any part of the body of a child; **(5)** deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on a child; or **(6)** an attempt or conspiracy to engage in conduct described in paragraphs (1)–(5).	**(d) Definition of "Child" and "Child Molestation."** In this rule and Rule 415: **(1)** "child" means a person below the age of 14; and **(2)** "child molestation" means a crime under federal law or under state law (as "state" is defined in 18 U.S.C. § 513) involving: **(A)** any conduct prohibited by 18 U.S.C. chapter 109A and committed with a child; **(B)** any conduct prohibited by 18 U.S.C. chapter 110; **(C)** contact between any part of the defendant's body — or an object — and a child's genitals or anus; **(D)** contact between the defendant's genitals or anus and any part of a child's body; **(E)** deriving sexual pleasure or

	gratification from inflicting death, bodily injury, or physical pain on a child; or **(F)** an attempt or conspiracy to engage in conduct described in paragraphs (A)–(E).

Committee Determination: Restyled Rule 414 approved as issued for public comment, with the addition of the blacklined change to the heading of subdivision (b) previously approved.

Rule 415. Evidence of Similar Acts in Civil Cases Concerning Sexual Assault or Child Molestation	Rule 415 — Similar Acts in Civil Cases Involving Sexual Assault or Child Molestation.
(a) In a civil case in which a claim for damages or other relief is predicated on a party's alleged commission of conduct constituting an offense of sexual assault or child molestation, evidence of that party's commission of another offense or offenses of sexual assault or child molestation is admissible and may be considered as provided in Rule 413 and Rule 414 of these rules.	**(a) Permitted Uses.** In a civil case involving a claim for relief based on a party's alleged sexual assault or child molestation, the court may admit evidence that the party committed any other sexual assault or act of child molestation. The evidence may be considered as provided in Rules 413 and 414.
(b) A party who intends to offer evidence under this Rule shall disclose the evidence to the party against whom it will be offered, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.	**(b) Disclosure.** If a party intends to offer this evidence, the party must disclose it to the party against whom it will be offered, including witnesses' statements or a summary of the expected testimony. The party must do so at least 15 days before trial or at a later time that the court allows for good cause.
(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.	**(c) Effect on Other Rules.** This rule does not limit the admission or consideration of evidence under any other rule.

Committee Discussion:

Heading of Rule 415(b), notice provision: Professor Kimble noted that while the headings to the notice provisions of Rules 413 and 414 had been changed at the previous meeting to make them more descriptive, the heading to Rule 415(b) had not. Professor Kimble proposed the following change to the heading, for parallelism with Rules 413(b) and 414(b):

Disclosure <u>to the Opponent</u>

The Advisory Committee unanimously approved this suggestion. It had been previously approved by the Style Subcommittee.

Committee Determination: Restyled Rule 415 approved as issued for public comment, with a change to the heading of Rule 415(b).

ARTICLE V. PRIVILEGES Rule 501. General Rule	ARTICLE V. PRIVILEGES Rule 501 — Privilege in General
Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.	The common law — as interpreted by United States courts in the light of reason and experience — governs a claim of privilege unless any of the following provides otherwise: • the United States Constitution; • a federal statute; or • other rules prescribed by the Supreme Court. But in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.

Committee Discussion:

1. Bullet points: As with Rule 402 and 407, the Committee unanimously determined that the use of bullet points was appropriate for the list set forth in Rule 501. The use of lettered subdivisions is unworkable for the same reasons as in those previous rules. The result would be subdivisions with dangling words, and a dangling paragraph at the end. And as with those other Rules, the Committee noted that the use bullet points was a question of style, and the Style Subcommittee to the Standing Committee had already approved the restyled Rule 501.

2. "other rules prescribed by the Supreme Court": A public comment suggested that the word "other" might be "misplaced." "Other" could not be referring to the prior bullet points, because the Constitution and Federal Statutes are not rules prescribed by the Supreme Court. It could be a reference to rules "other than Rule 501" --- which might make some sense now that there is a Rule 502. But Rule 502 already has a provision stating that it takes precedence over Rule 501, so the reference to "other" in Rule 501 is not necessary.

Professor Kimble agreed that the word "other" should be deleted, as did the Style Subcommittee. The Committee voted unanimously to delete the word "other" from the third bullet point.

Committee Determination: Restyled Rule 501 approved as issued for public comment, with the deletion of the word "other."

Rule 502 — Attorney-Client Privilege and Work Product; Limitations on Waiver	Rule 502 — Attorney-Client Privilege and Work Product; Limitations on Waiver
The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection.	The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection.
(a) Disclosure made in a Federal proceeding or to a Federal office or agency; scope of a waiver. When the disclosure is made in a Federal proceeding or to a Federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a Federal or State proceeding only if: **(1)** the waiver is intentional; **(2)** the disclosed and undisclosed communications or information concern the same subject matter; and **(3)** they ought in fairness to be considered together.	**(a) Disclosure Made in a Federal Proceeding or to a Federal Office or Agency; Scope of a Waiver.** When the disclosure is made in a federal proceeding or to a federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a federal or state proceeding only if: **(1)** the waiver is intentional; **(2)** the disclosed and undisclosed communications or information concern the same subject matter; and **(3)** they ought in fairness to be considered together.
(b) Inadvertent disclosure. When made in a Federal proceeding or to a Federal office or agency, the disclosure does not operate as a waiver in a Federal or State proceeding if: **(1)** the disclosure is inadvertent; **(2)** the holder of the privilege or protection took reasonable steps to prevent disclosure; and **(3)** the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B).	**(b) Inadvertent Disclosure.** When made in a federal proceeding or to a federal office or agency, the disclosure does not operate as a waiver in a federal or state proceeding if: **(1)** the disclosure is inadvertent; **(2)** the holder of the privilege or protection took reasonable steps to prevent disclosure; and **(3)** the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B).

(c) Disclosure made in a State proceeding. When the disclosure is made in a State proceeding and is not the subject of a State-court order concerning waiver, the disclosure does not operate as a waiver in a Federal proceeding if the disclosure: **(1)** would not be a waiver under this rule if it had been made in a Federal proceeding; or **(2)** is not a waiver under the law of the State where the disclosure occured.	**(c) Disclosure Made in a State Proceeding.** When the disclosure is made in a state proceeding and is not the subject of a state-court order concerning waiver, the disclosure does not operate as a waiver in a federal proceeding if the disclosure: **(1)** would not be a waiver under this rule if it had been made in a federal proceeding; or **(2)** is not a waiver under the law of the state where the disclosure occurred.
(d) Controlling effect of a court order. A Federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court—in which event the disclosure is also not a waiver in any other Federal or State proceeding.	**(d) Controlling Effect of a Court Order.** A federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court—in which event the disclosure is also not a waiver in any other federal or state proceeding.
(e) Controlling effect of a party agreement. An agreement on the effect of disclosure in a Federal proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.	**(e) Controlling Effect of a Party Agreement.** An agreement on the effect of disclosure in a federal proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.
(f) Controlling effect of this rule. Notwithstanding Rules 101 and 1101, this rule applies to State proceedings and to Federal court-annexed and Federal court-mandated arbitration proceedings, in the circumstances set out in the rule. And notwithstanding Rule 501, this rule applies even if State law provides the rule of decision.	**(f) Controlling Effect of this Rule.** Notwithstanding Rules 101 and 1101, this rule applies to state proceedings and to federal court-annexed and federal court-mandated arbitration proceedings, in the circumstances set out in the rule. And notwithstanding Rule 501, this rule applies even if state law provides the rule of decision.
(g) Definitions. In this rule: **(1)** ''attorney-client privilege'' means the protection that applicable law provides for confidential attorney-client communications; and **(2)** ''work-product protection'' means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial.	**(g) Definitions.** In this rule: **(1)** "attorney-client privilege" means the protection that applicable law provides for confidential attorney-client communications; and **(2)** "work-product protection" means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial.

Committee Discussion:

Rule 502 was drafted and revised in accordance with style guidelines during the process of its enactment in 2008. As it was approved by Congress and the styling of the rule was hard-fought, the Committee resolved not to propose any style changes to Rule 502 as enacted --- with the exception of a few capitalization changes.

Committee Determination: Rule 502 approved as issued for public comment.

ARTICLE VI. WITNESSES **Rule 601. General Rule of Competency**	**ARTICLE VI. WITNESSES** **Rule 601 — Competency to Testify in General**
Every person is competent to be a witness except as otherwise provided in these rules. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the competency of a witness shall be determined in accordance with State law.	Every person is competent to be a witness unless these rules provide otherwise. But in a civil case, state law governs the witness's competency regarding a claim or defense for which state law supplies the rule of decision.

Committee Determination: Restyled Rule 601 approved as issued for public comment.

Rule 602. Lack of Personal Knowledge	Rule 602 — Need for Personal Knowledge
A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. This rule is subject to the provisions of rule 703, relating to opinion testimony by expert witnesses.	A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony. This rule does not apply to testimony by an expert witness under Rule 703.

Committee Discussion:

Last sentence: After discussion, the Committee voted unanimously to change the last sentence as follows

> **This rule does not apply to an expert's testimony ~~by an expert witness~~ under Rule 703.**

This revision deletes the word "witness" on the ground that the expert has to be a witness when she gives "testimony." It also helps to clarify that the exception to personal knowledge applies only when a witness is testifying as an expert. If an expert also testifies as a lay witness, she must have personal knowledge.

(The Style Subcommittee approved this change).

Committee Determination: Rule 602 approved as issued for public comment, with a change to the last sentence.

Rule 603. Oath or Affirmation	Rule 603 — Oath or Affirmation to Testify Truthfully
Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so.	Before testifying, a witness must give an oath or affirmation to testify truthfully. It must be in a form designed to impress that duty on the witness's conscience.

Committee Discussion:

"give an oath": A public comment suggested that "give an oath" should be changed to "take an oath." But the Style Subcommittee rejected this change and the Advisory Committee deferred to --- and agreed with --- that determination.

Committee Determination: Restyled Rule 603 approved as issued for public comment.

Rule 604. Interpreters	Rule 604 — Interpreter
An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation to make a true translation.	An interpreter must be qualified and must give an oath or affirmation to make a true translation.

Committee Determination: Restyled Rule 604 approved as issued for public comment.

Rule 605. Competency of Judge as Witness	Rule 605 — Judge's Competency as a Witness
The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point.	The presiding judge may not testify as a witness at the trial. A party need not object to preserve the issue.

Committee Determination: Restyled Rule 605 approved as issued for public comment.

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Rule 606. Competency of Juror as Witness	Rule 606 — Juror's Competency as a 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.	**(a) At the Trial.** A juror may not testify ~~as a witness~~ before the other jurors at the trial. If a juror is called to testify, the court must give an adverse party an opportunity to object outside the jury's presence.
(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. But a juror may testify about (1) whether extraneous prejudicial information was improperly brought to the jury's attention, (2) whether any outside influence was improperly brought to bear upon any juror, or (3) whether there was a mistake in entering the verdict onto the verdict form. A juror's affidavit or evidence of any statement by the juror may not be received on a matter about which the juror would be precluded from testifying.	**(b) During an Inquiry into the Validity of a Verdict or Indictment.** **(1)** ***Prohibited Testimony or Other Evidence*.** During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters. **(2)** ***Exceptions*.** A juror may testify about whether: **(A)** extraneous prejudicial information was improperly brought to the jury's attention; **(B)** an outside influence was improperly brought to bear on any juror; or **(C)** a mistake was made in entering the verdict on the verdict form.

Committee Discussion:

Rule 606(a), "as a witness": At the Fall 2010 meeting, the Committee agreed to the deletion of "as a witness" from Rule 606(a) as it was released for public comment. This was done at Professor Kimble's suggestion. His reasoning was that the language was superfluous because the only way that a juror could testify under the terms of the Rule is as a witness. Before the Spring 2010 meeting, the Reporter reviewed every use of the word "witness" in the Restyled Rules, in response to a public comment that broadly declared that every use of "witness" in the context of "testifying" was superfluous.

With respect to Rule 606(a), the Reporter suggested that there may be situations in which a juror could be asked to make a statement in front of the jury that could colorably be called "testimony" --- but where the juror is not actually called as a witness. If so, then the deletion of "as a witness" --- which is in the original rule --- would be substantive, because it could be read to prohibit a practice that is currently permitted.

Committee members unanimously agreed with this assessment, citing as examples voir dire and polling the jury. It therefore determined that the deletion of "as a witness" was substantive and voted to restore that language to the Restyled Rule. (The Style Subcommittee agreed with this change).

Committee Determination: Rule 606 approved as issued for public comment.

Rule 607. Who May Impeach	Rule 607 — Who May Impeach a Witness
The credibility of a witness may be attacked by any party, including the party calling the witness.	Any party, including the party that called the witness, may attack the witness's credibility.

Committee Determination: Restyled Rule 607 approved as issued for public comment.

Rule 608. Evidence of Character and Conduct of Witness	Rule 608 — A Witness's Character for Truthfulness or Untruthfulness
(a) Opinion and reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.	**(a) Reputation or Opinion Evidence.** A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character. But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked.
(b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified. The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness' privilege against self-incrimination when examined with respect to matters that relate only to character for truthfulness.	**(b) Specific Instances of Conduct.** Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of: **(1)** the witness; or **(2)** another witness whose character the witness being cross-examined has testified about. **(c) Privilege Against Self-Incrimination.** A witness does not waive the privilege against self-incrimination by testifying about a matter that relates only to a character for truthfulness.

Committee Discussion:

Rule 608(c): At the Fall 2010 meeting, the Committee determined that Rule 608(c), as issued for public comment, effected a substantive change. The second paragraph of the original Rule 608(b) allows a witness who testifies at trial to invoke the privilege when asked about bad acts that pertain only to the witness's character for truthfulness. As restyled, Rule 608(c) provides that if a witness testifies only to a character for truthfulness, that witness does not waive the privilege. This is incorrect because the original rule does not cover witnesses who testify to a character for truthfulness at all --- if it did, it would be included in Rule 608(a), not 608(b).

After discussion, the Committee voted unanimously that Rule 608(c) would have to be changed and that it would have to be placed --- as it was in the original --- as part of Rule 608(b). The language about the privilege modifies Rule 608(b) not Rule 608(a), as it is intended to protect a witness who testifies to factual issues and then is impeached with bad acts.

The Committee unanimously approved the following change to Restyled Rule 608(b)/(c):

(b) Specific Instances of Conduct. Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of:

(1) the witness; or

(2) another witness whose character the witness being cross-examined has testified about.

~~**(c) Privilege Against Self-Incrimination.**~~

By testifying on another matter, a ~~A~~ witness does not waive ~~the~~ any privilege against self-incrimination ~~when being examined about a matter~~ for testimony that relates only to the witness's character for truthfulness.

(The Style Subcommittee agreed with this change).

Committee Resolution: Restyled Rule 608 approved, with change to the text of Rule 608(c), and return of that changed text to the end of Rule 608(b).

Rule 609. Impeachment by Evidence of Conviction of Crime	Rule 609 — Impeachment by Evidence of a Criminal Conviction
(a) General rule. For the purpose of attacking the 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 shall be admitted regardless of the punishment, if it readily can be determined that establishing the elements of the crime required proof or admission of an act of dishonesty or false statement by the witness.	**(a) In General.** The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction: **(1)** for a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than one year, the evidence: **(A)** must be admitted, subject to Rule 403, if the witness is not a defendant in a criminal case; and **(B)** must be admitted if the witness is a defendant in a criminal case and the probative value of the evidence outweighs its prejudicial effect; and **(2)** for any crime regardless of the punishment, the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving — or the witness's admitting — a dishonest act or false statement.
(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 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 10 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.	**(b) Limit on Using the Evidence After 10 Years.** This subdivision (b) applies if more than 10 years have passed since the witness's conviction or release from confinement for ~~the conviction~~ it, whichever is later. Evidence of the conviction is admissible only if: **(1)** its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect; and **(2)** the proponent gives an adverse party reasonable written notice of the intent to use it so that the party has a fair opportunity to contest its use.

(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 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.	**(c) Effect of a Pardon, Annulment, or Certificate of Rehabilitation.** Evidence of a conviction is not admissible if: **(1)** the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding that the person has been rehabilitated, and the person has not been convicted of a later crime punishable by death or by imprisonment for more than 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.	**(d) Juvenile Adjudications**. Evidence of a juvenile adjudication is admissible under this rule only if: **(1)** it is offered in a criminal case; **(2)** the adjudication was of a witness other than the defendant; **(3)** ~~a conviction of an adult~~ an adult's conviction for that offense would be admissible to attack the adult's credibility; and **(4)** admitting the evidence is necessary to fairly determine 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.	**(e) Pendency of an Appeal.** A conviction that satisfies this rule is admissible even if an appeal is pending. Evidence of the pendency is also admissible.

Committee Discussion:

Rule 609(a)(1): references to the defendant in a criminal case: Before the meeting, the Reporter and the DOJ representative raised separate concerns about possible substantive changes to the Restyled Rule 609(a)(1). The Reporter noted that the balancing test for criminal defendants in Restyled Rule 609(a)(1)(B) referred only to "prejudicial effect" while the original Rule limits the consideration of prejudicial effect to the defendant who testifies. Under the Restyled Rule, a defendant could complain about prejudice he would suffer when *another* defendant is impeached with a prior conviction. That is not possible under the existing Rule.

The DOJ representative noted another problem with the Restyled Rule. The more protective balancing test applies to "the defendant in a criminal case" --- but under the restyled language it need not be the defendant in the criminal case in which the impeachment evidence is offered. Thus an argument could be made that a witness in one case who is a defendant in another criminal case would be subject to the more protective balancing test of Rule 609(a)(1)(B). That is not the current law and as a policy matter it makes no sense.

After extensive discussion at the meeting, the Committee voted unanimously that the Restyled Rule 609(a)(1) made two substantive changes, and unanimously approved an amendment to the rule as issued for public comment. The amendment, blacklined from the rule issued for public comment, is as follows:

> **(a) In General.** The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction:
>
> **(1)** for a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than one year, the evidence:
>
> **(A)** must be admitted, subject to Rule 403, in a civil case or in a criminal case in which ~~if~~ the witness is not a defendant ~~in a criminal case~~; and
>
> **(B)** must be admitted ~~if the witness is a defendant~~ in a criminal case in which the witness is a defendant, if ~~and~~ the probative value of the evidence outweighs its prejudicial effect ~~on the witness~~ to that defendant; and
>
> **(2)** for any crime regardless of the punishment, the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving — or the witness's admitting — a dishonest act or false statement.

(The Style Subcommittee approved these changes).

2. Rule 609(d)(4)—"admitting the evidence"

A public comment suggested that Restyled Rule 609(d)(4) should be changed as follows:

> ~~admitting~~ the evidence is necessary to fairly determine guilt or innocence.

The Advisory Committee voted unanimously against this change. The Committee reasoned that it is *admitting* the evidence it that is the important event that will affect the determination of determine guilt or innocence.

(The Style Subcommittee agreed to keep "admitting" in Rule 609(d)(4).

Committee Determination: Restyled Rule 609 approved, with changes to Rule 609a, and technical changes approved by the Committee at its Fall 2009 meeting.

Rule 610. Religious Beliefs or Opinions	Rule 610 — Religious Beliefs or Opinions
Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness' credibility is impaired or enhanced.	Evidence of a witness's religious beliefs or opinions is not admissible to attack or support the witness's credibility.

Committee Determination: Rule 610 approved as issued for public comment.

Rule 611. Mode and Order of Interrogation and Presentation	Rule 611 — Mode and Order of Questioning Witnesses and Presenting Evidence
(a) Control by court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.	**(a) Control by the Court; Purposes.** The court should exercise reasonable control over the mode and order of questioning witnesses and presenting evidence so as to: **(1)** make those procedures effective for determining the truth; **(2)** avoid wasting time; and **(3)** protect witnesses from harassment or undue embarrassment.
(b) Scope of cross-examination. Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.	**(b) Scope of Cross-Examination**. Cross-examination should not go beyond the subject matter of the direct examination and matters affecting a witness's credibility. The court may allow inquiry into additional matters as if on direct examination.
(c) Leading questions. Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.	**(c) Leading Questions.** Leading questions should not be used on direct examination except as necessary to develop the witness's testimony. Ordinarily, the court should allow leading questions on cross-examination. And the court should allow leading questions when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party.

Committee Discussion:

1. Rule 611(a), "mode and order of questioning witnesses": The Committee noted that the use of the word "questioning" was substantively inaccurate, because the trial court has authority to regulate not only "questioning" but also anything addressed to the witness that is not in the form of a question. The Committee voted unanimously to change "questioning" to "examining." The Committee noted that "question" is used throughout Rule 611(c), but those references should not be changed because that subdivision is in fact directed only toward questions --- leading questions.

2. Rule 611(b), "a witness's credibility": A public comment suggested that "a witness's credibility" should be changed to "the witness's credibility" as it is only one witness referred to in the Rule. The Style Committee agreed with this suggestion and the Advisory Committee unanimously approved the change.

3. Rule 611(b), restoring "in the exercise of discretion": A public comment suggested that the language in the original rule --- allowing the judge "in the exercise of discretion" to expand the scope of cross-examination --- be retained in the restyled Rule 611(b). Professor Kimble opposed this suggestion on the ground that it would raise the question of what the unadorned use of *may* means everywhere else in the rule. "In the exercise of discretion" is considered a redundant intensifier. The Advisory Committee voted unanimously to reject the suggestion that "in the exercise of the discretion" be added to the Rule as issued for public comment.

4. Rule 611(c) --- "And the court should allow leading questions . . .": The Magistrate Judges' Association opined that the use of "And" to start the last sentence of Restyled Rule 611(c) did not establish a clear enough relationship between the two sentences of the Rule. Before the meeting, Professor Kimble restructured Ruled 611(c) to accord with the Magistrate Judges' suggestion. What follows is the proposed change from the Restyled Rule 611(c) as issued for public comment:

> Ordinarily, the court should allow leading questions:
>
> > (1) on cross-examination~~.~~ ; ~~And~~ and
> >
> > (2) ~~the court should allow leading questions~~ when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party.

This proposal was approved by the Style Subcommittee. The Advisory Committee reviewed the proposal and approved it unanimously. It noted that the word "ordinarily" now modifies the use of leading questions on cross-examination and when a party calls a hostile witness or an adverse party. But the Committee also noted that the restructuring accurately captured the case law: leading questions are ordinarily allowed in all the situations referred to in the Rule.

Committee Determination: Restyled Rule 611 approved with changes to all three subdivisions.

Rule 612. Writing Used To Refresh Memory	Rule 612 — Writing Used to Refresh a Witness's Memory
Except as otherwise provided in criminal proceedings by section 3500 of title 18, United States Code, if a witness uses a writing to refresh memory for the purpose of testifying, either— **(1)** while testifying, or **(2)** before testifying, if the court in its discretion determines it is necessary in the interests of justice, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony the court shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the court shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.	**(a) Scope.** This rule gives an adverse party certain options when a witness uses a writing to refresh memory: **(1)** while testifying; or **(2)** before testifying, if the court decides that justice requires a party to have those options. **(b) Adverse Party's Options; Deleting Unrelated Matter.** Unless 18 U.S.C. § 3500 provides otherwise in a criminal case, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness about it, and to introduce in evidence any portion that relates to the witness's testimony. If the producing party claims that the writing includes unrelated matter, the court must examine the writing in camera, delete any unrelated portion, and order that the rest be delivered to the adverse party. Any portion deleted over objection must be preserved for the record. **(c) Failure to Produce or Deliver <u>the Writing</u>.** If a writing is not produced or is not delivered as ordered, the court may issue any appropriate order. But if the prosecution does not comply in a criminal case, the court must strike the witness's testimony or — if justice so requires — declare a mistrial.

Committee Discussion:

1. Rule 612(a)(2) --- "a party": Professor Kimble suggested a change from "a" party to "the" party, in order to properly connect to the reference to "an adverse party" in the first line of Rule 612(a). The Style Subcommittee agreed. The Advisory Committee unanimously approved the change.

2. Rule 612(b) --- two subdivisions? Two public comments suggested that Rule 612(b) be split into two subdivisions, because as written it covers two separate (but related) topics. The Committee unanimously rejected this suggestion. Members noted that dividing Rule 612(b) would require the duplication of a number of principles in two separate subdivisions.

3. Rule 612(c) --- "justice" requires: The current rule provides for various remedies when a party fails to produce or deliver the writing used to refresh recollection; it refers to "justice" twice --- first in the reference to an order of the court, second in a reference to an order for a mistrial if the prosecution refuses to comply. The restyled version refers to "justice" only with respect to the order for

a mistrial. Two public comments suggested that “justice requires” should be restored to the provision governing court orders. Professor Kimble opposed this change. He stated that the other restylings generally refer to "any appropriate order" without intensifiers like "any order that justice requires" or "any order appropriate under the circumstances." But there is no comparable short form in the second sentence of Rule 612(c).

The Advisory Committee unanimously agreed with Professor Kimble’s view. Several members noted that the restyled Rule 612(c) accurately describes the judge’s options and obligations under the current practice.

Committee Determination: Restyled Rule 612 approved as issued for public comment, with blacklined change approved at Fall 2009 meeting, and with change from “a party” to “the party” in subdivision (a)(2).

Rule 613. Prior Statements of Witnesses	Rule 613 — Witness's Prior Statement
(a) Examining witness concerning prior statement. In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel.	**(a) Showing or Disclosing the Statement During Questioning.** When questioning a witness about the witness's prior statement, ~~the~~ a party need not show it or disclose its contents to the witness. But the party must, on request, show it or disclose its contents to an adverse party's attorney.
(b) Extrinsic evidence of prior inconsistent statement of witness. Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in rule 801(d)(2).	**(b) Extrinsic Evidence of a Prior Inconsistent Statement.** Extrinsic evidence of a witness's prior inconsistent statement is admissible only if the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to question the witness about it, or if justice so requires. This subdivision (b) does not apply to an opposing party's statement under Rule 801(d)(2).

Committee Discussion:

Question/Examine: The Restyled Rule uses "questioning" in subdivision (a) and "question" in subdivision (b). A public comment suggested that "examine" would be a better word because people use the term "cross-examine" (not cross-question) and "examination" is an appropriately broader term than "questioning." The Style Subcommittee agreed with this suggestion and changed "questioning" to "examining" in (a) and "question" to "examine" in (b). The Advisory Committee unanimously agreed with this change.

Committee Determination: Restyled Rule 613 approved as issued for public comment, with technical change (blacklined) previously approved by the Advisory Committee, and changes from "question" to "examine" in the caption and in both subdivisions.

Rule 614. Calling and Interrogation of Witnesses by Court	Rule 614 — Court's Calling or Questioning a Witness
(a) Calling by court. The court may, on its own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called.	**(a) Calling.** The court may call a witness on its own or at a party's ~~suggestion~~ request. Each party is entitled to cross-examine the witness.
(b) Interrogation by court. The court may interrogate witnesses, whether called by itself or by a party.	**(b) Questioning.** The court may question a witness regardless of who calls the witness.
(c) Objections. Objections to the calling of witnesses by the court or to interrogation by it may be made at the time or at the next available opportunity when the jury is not present.	**(c) Objections.** A party may object to the court's calling or questioning a witness either at that time or at the next opportunity when the jury is not present.

Committee Discussion:

1. Questioning/Examining: As in Rules 611 and 613, the Style Subcommittee agreed with the suggestion from public comment that "examine" was a broader and more accurate word than "question." Thus a change was made to the title to Rule 614, the caption and text of subdivision (b), and the text of subdivision (c). The Style Subcommittee agreed with this change.

2. Rule 614(c), "when the jury is not present": The Style Subcommittee decided to change decided to change "at the next opportunity when the jury is not present" to "at the next opportunity when the jury cannot hear the objection." The Advisory Committee determined that this was a substantive change because it would mean that an objection that could be made under the current rule might be lost under the amended rule. It might require a party to request, or to object at, a sidebar right after the objectionable questioning --- and this could raise the negative inference that the Rule 614(c) timing rule is intended to avoid. The Advisory Committee recognized the rationale for the change --- to create parallelism with Rule 104. But that rule covers a different objection in a different context, and while "hearing" works there it does not work in Rule 614(c).

The Advisory Committee voted unanimously to restore the language of the Restyled Rule 614(c) as issued for public comment: "at the next opportunity when the jury is not present."

(In a subsequent telephone conference, the Style Subcommittee approved the language adopted by the Advisory Committee).

Committee Determination: Restyled Rule 614 approved as issued for public comment, with change to subdivision (a), as blacklined, previously approved, and with changes from "question" to "examine" throughout the Rule. The Rule as finally approved is blacklined from the public comment version as follows:

Rule 614. Court's Calling or ~~Questioning~~ Examining a Witness

(a) Calling. The court may call a witness on its own or at a party's ~~suggestion~~ request. Each party is entitled to cross-examine the witness.

(b) ~~Questioning~~ Examining. The court may ~~question~~ examine a witness regardless of who calls the witness.

(c) Objections. A party may object to the court's calling or ~~questioning~~ examining a witness either at that time or at the next opportunity when the jury is not present.

Rule 615. Exclusion of Witnesses	Rule 615 — Excluding Witnesses
At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause, or (4) a person authorized by statute to be present.	At a party's request, the court must order witnesses excluded so that they cannot hear other witnesses' testimony. Or the court may do so on its own. But this rule does not authorize excluding: **(a)** a party who is a natural person; **(b)** an officer or employee of a party that is not a natural person, after being designated as the party's representative by its attorney; **(c)** a person whose presence a party shows to be essential to presenting the party's claim or defense; or **(d)** a person authorized by statute to be present.

Committee Discussion

"a person whose presence a party shows to be essential": A public comment suggested that the words "a party shows to be" is superfluous and that the phrase should just be "a person whose presence is essential." The Style Subcommittee implemented this change, but the Advisory Committee voted unanimously that this was a substantive change. It shifted the focus from the party, whose burden it is (under the current rule) to show the witness is necessary, to the court. It implies that the court must make a sua sponte determination and refuse to exclude a person whose presence is essential even if a party never makes an argument on the subject. Committee members noted that the other grounds for exception against exclusion are in essence self-authenticating, whereas the exception in (c) is dependent on a factual condition --- it makes sense to impose on the party the burden of showing that the factual condition is met.

The Committee voted unanimously to restore "a party shows to be" to the Restyled Rule. It also voted unanimously that the change suggested in public comment was substantive.

(In a subsequent telephone conference the Style Subcommittee approved the reinsertion of "a party shows to be").

Committee Determination: Restyled Rule 615 approved as issued for public comment.

ARTICLE VII. OPINIONS AND EXPERT TESTIMONY **Rule 701. Opinion Testimony by Lay Witnesses**	**ARTICLE VII. OPINIONS AND EXPERT TESTIMONY** **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 within the scope of Rule 702.	If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is: **(a)** rationally based on the witness's perception; **(b)** helpful to clearly understanding the witness's testimony or to determining a fact in issue; and **(c)** not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Committee Determination: Restyled Rule 701 approved as issued for public comment.

Rule 702. Testimony by Experts	**Rule 702 — Testimony by Expert Witnesses**
If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.	A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: **(a)** the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; **(b)** the testimony is based on sufficient facts or data; **(c)** the testimony is the product of reliable principles and methods; and **(d)** the expert has reliably applied the principles and methods to the facts of the case.

Committee Determination: Restyled Rule 702 approved as issued for public comment.

Rule 703. Bases of Opinion Testimony by Experts	**Rule 703 — Bases of an Expert's Opinion Testimony**
The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.	An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

Committee Determination: Restyled Rule 703 approved as issued for public comment.

Rule 704. Opinion on Ultimate Issue	**Rule 704 — Opinion on an Ultimate Issue**
(a) Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.	**(a) In General — Not Automatically Objectionable.** An opinion is not objectionable just because it embraces an ultimate issue.
(b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.	**(b) Exception.** In a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense.

Committee Determination: Restyled Rule 704 approved as issued for public comment.

Rule 705. Disclosure of Facts or Data Underlying Expert Opinion	Rule 705 — Disclosing the Facts or Data Underlying an Expert's Opinion
The expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.	Unless the court orders otherwise, an expert may state an opinion — and give the reasons for it — without first testifying to the underlying facts or data. But the expert may be required to disclose those facts or data on cross-examination.

Committee Determination: Rule 705 approved as issued for public comment.

Rule 706. Court Appointed Experts	Rule 706 — Court-Appointed Expert Witnesses
(a) Appointment. The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless the witness consents to act. A witness so appointed shall be informed of the witness' duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of the witness' findings, if any; the witness' deposition may be taken by any party; and the witness may be called to testify by the court or any party. The witness shall be subject to cross-examination by each party, including a party calling the witness.	**(a) Appointment Process.** On a party's motion or on its own, the court may order the parties to show cause why expert witnesses should not be appointed and may ask the parties to submit nominations. The court may appoint any expert witness that the parties agree on and any of its own choosing. But the court may only appoint someone who consents to act. **(b) Expert's Role.** The court must inform the expert in writing of the expert's duties and have a copy filed with the clerk. Or the court may so inform the expert at a conference in which the parties have an opportunity to participate. The expert: **(1)** must advise the parties of any findings the expert makes; **(2)** may be deposed by any party; **(3)** may be called to testify by the court or any party; and **(4)** may be cross-examined by any party, including the party that called the expert.
(b) Compensation. Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and civil actions and proceedings involving just compensation under the fifth amendment. In other civil actions and proceedings the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs.	**(c) Compensation.** The expert is entitled to whatever reasonable compensation the court allows. The compensation is payable as follows: **(1)** in a criminal case or in a civil case involving just compensation under the Fifth Amendment, from any funds that are provided by law; and **(2)** in any other civil case, by the parties in the proportion and at the time that the court directs — and the compensation is then charged like other costs.
(c) Disclosure of appointment. In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that the court appointed the expert witness.	**(d) Disclosing the Appointment <u>to the Jury</u>.** The court may authorize disclosure to the jury that the court appointed the expert.
(d) Parties' experts of own selection. Nothing in this rule limits the parties in calling expert witnesses of their own selection.	**(e) Parties' Choice of Their Own Experts.** This rule does not limit a party in calling its own experts.

Committee Discussion:

1. Deletion of "witness/witnesses" in subdivision (a): A public comment suggested broadly that the word "witness" should be deleted whenever combined with "expert" because the expert would by definition have to be a witness. But that broad statement is inaccurate. The Committee determined that deleting the word "witness" in Restyled Rule 706 would be a substantive change because it could lead to an interpretation that Rule 706 governs all court-appointed experts, when in fact it applies only to the appointment by the court of expert *witnesses.*

The Style Subcommittee agreed with the assessment that taking the word "witness" completely out of Rule 706(a) would be a substantive change. But it decided to delete that word from the second sentence of Rule 706(a), because the context will have been made clear by keeping the word in the first sentence. The Advisory Committee unanimously approved the deletion of the word "witness" from the second sentence.

2. Rule 706(c), change by Style Subcommittee: The Style Subcommittee decided to change "The expert is entitled to whatever reasonable compensation the court allows" to "The expert is entitled to a reasonable compensation, as set by the court." After a short discussion, the Advisory Committee determined that the change was not substantive and approved it unanimously.

Committee Determination: Restyled Rule 706 approved as issued for public comment, with deletion of "witness" in second sentence of subdivision (a), a change to the opening sentence of subdivision (c), and a previously approved change to the caption of subdivision (d).

ARTICLE VIII. HEARSAY Rule 801. Definitions	ARTICLE VIII. HEARSAY Rule 801 — Definitions That Apply to This Article; Exclusions from Hearsay
The following definitions apply under this article: **(a) Statement.** A ''statement'' is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.	**(a)** **Statement.** "Statement" means: **(1)** a person's oral or written assertion; or **(2)** a person's nonverbal conduct, if the person intended it as an assertion.
(b) Declarant. A ''declarant'' is a person who makes a statement.	**(b)** **Declarant.** "Declarant" means the person who made the statement.
(c) Hearsay. ''Hearsay'' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.	**(c)** **Hearsay.** "Hearsay" means a prior statement — one the declarant does not make while testifying at the current trial or hearing — that a party offers in evidence to prove the truth of the matter asserted by the declarant.
(d) Statements which are not hearsay. A statement is not hearsay if— **(1) Prior statement by witness.** The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person; or	**(d)** **Statements That Are Not Hearsay.** A statement that meets the following conditions is not hearsay: **(1)** ***A Declarant-Witness's Prior Statement.*** The declarant testifies and is subject to cross-examination about the prior statement, and the statement: **(A)** is inconsistent with the declarant's testimony and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition; **(B)** is consistent with the declarant's testimony and is offered to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or **(C)** identifies a person as someone the declarant perceived earlier.

(2) Admission by party-opponent. The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy. The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).	**(2)** ***An Opposing Party's Statement.*** The statement is offered against an opposing party and: **(A)** was made by the party in an individual or representative capacity; **(B)** is one that the party appeared to adopt or accept as true; **(C)** was made by a person whom the party authorized to make a statement on the subject; **(D)** was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or **(E)** was made by the party's co-conspirator during and in furtherance of the conspiracy. The statement must be considered but does not by itself establish the declarant's authority under (C); the existence or scope of the relationship under (D); or the existence of the conspiracy or participation in it under (E).

Committee Discussion:

1. Rule 801(a), intent requirement for implied assertions: The existing rule is unclear on whether an intent to communicate an assertion is a requirement when it is made orally or in writing, but the assertion is implied rather than express. The classic example is a letter written to a testator about the writer's travel plans, offered to prove that the testator is competent. The communication of competence is implied, not express. Under the common law, implied assertions, when offered for the truth of the matter impliedly asserted, were hearsay. In contrast, most (though not all) federal courts have held that in order to be hearsay, the declarant must *intend* to communicate the implied assertion.

The Restyled Rule 801(a) as issued for public comment provides that the intent requirement is only applicable to conduct, and not to oral or written assertions. That is a substantive change in most federal courts. After extensive discussion, the Committee voted unanimously that the Restyled Rule 801(a) makes a substantive change. The Committee then discussed a remedy. Committee members concluded that the best solution was the one that would hew closest to the text of the original rule.

Committee members unanimously proposed the following change to Restyled Rule 801(a) (blacklined from the Rule as issued for public comment):

> **(a) Statement.** "Statement" means~~:~~
>
> ~~**(1)** a person's~~ an oral or written assertion~~;~~ or
>
> ~~**(2)** a person's~~ nonverbal conduct of a person, if ~~the person intended it~~ it is intended by the person as an assertion.

The clean version reads as follows:

> "Statement" means an oral or written assertion or nonverbal conduct of a person, if it is intended by the person as an assertion.

Professor Kimble suggested a slightly different version:

> "Statement" means a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.

The Committee noted that Professor Kimble's version was also acceptable as a substantive matter, but it expressed a preference for the above version, because it is closest to the original.

In a telephone conference after the meeting, the Style Subcommittee adopted Professor Kimble's proposal. As the Advisory Committee agreed that the choice between the two options was one of style, Professor Kimble's proposed language will be recommended to the Standing Committee.

2. Rule 801(c), "prior" statement: The restyled definition of hearsay describes it as "a *prior* statement — one the declarant does not make while testifying at the current trial or hearing — that a party offers in evidence to prove the truth of the matter asserted by the declarant." A public comment argued that the addition of the word "prior" constituted a substantive change, because a witness could make a statement *after* testifying at a trial that, when offered for truth, would be hearsay under existing law. The Committee agreed with this assessment, and voted unanimously to delete the word "prior" from the definition, on the ground that it constituted a substantive change. The Style Subcommittee reviewed and approved this change.

3. Rule 801(c), "truth of the matter asserted by the declarant": Several public comments argued that the phrase "by the declarant" was incorrect --- a substantive change --- because the declarant may

have made a number of statements. The question is not whether the declarant is telling the truth in general, but whether the statement is true. In response to these comments, Professor Kimble and the Reporter proposed a revision, defining hearsay as an out-of-court statement

> "that a party offers in evidence to prove the truth of the matter asserted ~~by the declarant~~ in the statement."

After discussion, the Committee voted unanimously in favor of this change. The change was also approved by the Style Subcommittee.

4. Rule 801(c), Style Subcommittee restructuring: The Style Subcommittee suggested that the hearsay definition be broken up into subdivisions in order to make the several requirements easier to understand. Including the substantive changes discussed above, the Style Subcommittee's approved version looks like this:

> **"Hearsay means a statement that:**
>
> > **(1) the declarant does not make while testifying at the current trial or hearing; and**
> >
> > **(2) a party offers in evidence to prove the truth of the matter asserted in the statement."**

The Advisory Committee unanimously approved the Style Subcommittee's changes to Rule 801(c).

5. Rule 801(d)(1), use of the word "prior": Professor Kimble suggested that because the word "prior" was deleted from the definition of hearsay in Rule 801(c), it should also be deleted from Rule 801(d)(1). But the Committee unanimously rejected this suggestion. Unlike hearsay itself, which could be uttered after a witness testifies, Rule 801(d)(1) can only apply to statements made prior to the witness's testimony. Deleting "prior" would be confusing in these circumstances. Given the difficulty of mastering the hearsay rule, the Committee believed it made no sense to delete words that help to describe the rule's application.

Professor Kimble noted that if the word "prior" is kept, a minor change was necessary to Rule 801(d)(1) in light of the fact that "prior" was deleted from Rule 801(c). Now there is no syntactic connection between the subdivisions, and so the following stylistic change was necessary:

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

(1) ***A Declarant-Witness's Prior Statement.*** The declarant testifies and is subject to cross-examination about ~~the~~ a prior statement, and the statement: . . .

The Committee unanimously approved this technical change. The Style Subcommittee approved it as well.

6. Rule 801(d)(1)(B), suggested style change: A Committee member suggested a slight style change to Rule 801(d)(1)(B), the hearsay exemption for certain prior consistent statements:

. . . the statement:

. . .

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

After discussion, the Committee voted unanimously to recommend the style change for the consideration of the Style Subcommittee.

(In a telephone conference after the meeting, the Style Subcommittee rejected the suggested change to Rule 801(d)(1)(B). As the suggestion was a style change, that change will not be made).

7. Rule 801(d)(2)(A), caption: A public comment suggested that the caption to restyled Rule 801(d)(2) was underinclusive because it referred to "An Opposing Party's Statement" when the exemption also covers statements of a party's agent and statements of a coconspirator. In response to that comment, the Style Subcommittee approved the following change to the heading:

"**An Opposing Party's Statement -- or One Attributable to the Party**".

After discussion, the Advisory Committee concluded that the change to the heading was substantive because it misdescribed the statements covered by the Rule. A Committee member contended that co-conspirator statements, for example, are not "attributable" to the party. The Committee determined that the heading as originally restyled was in fact an accurate statement of the statements covered by this subdivision. The Committee voted unanimously to restore the caption to the version issued for public comment.

(In a telephone conference after the meeting, the Style Subcommittee agreed with the decision to restore the heading to the version released for public comment --- deleting "or One Attributable to the Party").

8. Rule 801(d)(2)(B) – "manifested": At the Fall 2009 meeting, the Committee determined that the Restyled Rule 801(d)(2)(B) made a substantive change because it could signal that adoption of a statement could be found on a lesser showing than under current law. The problem for restyling is that the current rule requires the party to have "manifested" an adoption or belief in the truth of the statement, but courts have found silence in certain circumstances to be an adoption. So there is a disconnect between the case law and the language of the rule, and any attempt to change the text to less vigorous language --- such as "appeared" in the restyled version --- risks further dilution of the standards for adoption. At the previous meeting, the Committee unanimously determined that the word "manifested" must be retained in the restyling.

For the Committee meeting, Professor Kimble drafted two versions of Rule 801(d)(2)(B) that used "manifested":

"is one the party manifested that it adopted or believed to be true;"

"is one that the party manifested an adoption of or a belief in its truth;"

Before the meeting, the Style Subcommittee had approved the first alternative.

After discussion at the meeting, the Advisory Committee concluded unanimously that both options were substantively correct. The Committee preferred the latter alternative, however, because it was closer to the original rule.

(In a telephone conference after the meeting, the Style Subcommittee adhered to its decision to use the language: "is one the party manifested that it adopted or believed to be true;". As the decision between the two alternatives is a question of style, the language approved by the Style Subcommittee will be recommended to the Standing Committee).

9. Rule 801(d)(2)(E), co-conspirator: Professor Kimble consulted Bryan Garner --- who wrote the book on style --- and Bryan stated that the proper usage was "coconspirator." The Style Committee therefore decided to take the hyphen out of "co-conspirator" and the Advisory Committee unanimously approved the change.

Committee Determination: Restyled Rule 801 approved with changes from the rule as issued for public comment as set forth above.

Rule 802. Hearsay Rule	Rule 802 — The Rule Against Hearsay
Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.	Hearsay is not admissible unless any of the following provides otherwise: • a federal statute; • these rules; or • other rules prescribed by the Supreme Court.

Committee Determination: Rule 802 approved as issued for public comment.

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial	**Rule 803 — Exceptions to the Rule Against Hearsay — Regardless of Whether the Declarant Is Available as a Witness**
The following are not excluded by the hearsay rule, even though the declarant is available as a witness: **(1) Present sense impression.** A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.	The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness: **(1)** ***Present Sense Impression.*** A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.
(2) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.	**(2)** ***Excited Utterance.*** A statement relating to a startling event or condition, made while the declarant was under the stress ~~of~~ of excitement that it caused.
(3) Then existing mental, emotional, or physical condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.	**(3)** ***Then-Existing Mental, Emotional, or Physical Condition.*** A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will.
(4) Statements for purposes of medical diagnosis or treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.	**(4)** ***Statement Made for Medical Diagnosis or Treatment.*** A statement that: **(A)** is made for — and is reasonably pertinent to — medical diagnosis or treatment; and **(B)** describes medical history; past or present symptoms or sensations; their inception; or their general cause.

(5) Recorded recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.	**(5)** ***Recorded Recollection.*** A record that: **(A)** is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately; **(B)** was made or adopted by the witness when the matter was fresh in the witness's memory; and **(C)** accurately reflects the witness's knowledge. If admitted, the record may be read into evidence but may be received as an exhibit only if offered by an adverse party.
(6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term ''business'' as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.	**(6)** ***Records of a Regularly Conducted Activity.*** A record of an act, event, condition, opinion, or diagnosis if: **(A)** the record was made at or near the time by — or from information transmitted by — someone with knowledge; **(B)** the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit; **(C)** making the record was a regular practice of that activity; ~~and~~ **(D)** all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(b)(11) or (12) or with a statute permitting certification~~.~~; and **(E)** ~~But this exception does not apply if~~ neither the source of information ~~or~~ nor the method or circumstances of preparation indicate a lack of trustworthiness.

(7) Absence of entry in records kept in accordance with the provisions of paragraph (6). Evidence that a matter is not included in the memoranda reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.	**(7)** ***Absence of a Record of a Regularly Conducted Activity.*** Evidence that a matter is not included in a record described in paragraph (6) if: **(A)** the evidence is admitted to prove that the matter did not occur or exist; ~~and~~ **(B)** a record was regularly kept for a matter of that kind~~.~~ ; and **(C)** ~~But this exception does not apply if~~ neither the possible source of the information ~~or~~ nor other circumstances indicate a lack of trustworthiness.
(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.	**(8)** ***Public Records.*** A record of a public office setting out: **(A)** the office's activities; **(B)** a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or **(C)** in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation. But this exception does not apply if the source of information or other circumstances indicate a lack of trustworthiness.
(9) Records of vital statistics. Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.	**(9)** ***Public Records of Vital Statistics.*** A record of a birth, death, or marriage, if reported to a public office in accordance with a legal duty.

(10) Absence of public record or entry. To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.	**(10)** ***Absence of a Public Record.*** Testimony — or a certification under Rule 902 — that a diligent search failed to disclose a public record if the testimony or certification is admitted to prove that: **(A)** the record does not exist; or **(B)** a matter did not occur or exist, even though a public office regularly kept a record for a matter of that kind.
(11) Records of religious organizations. Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.	**(11)** ***Records of Religious Organizations Concerning Personal or Family History.*** A statement of birth, legitimacy, ancestry, marriage, divorce, death, relationship by blood or marriage, or similar facts of personal or family history, contained in a regularly kept record of a religious organization.
(12) Marriage, baptismal, and similar certificates. Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.	**(12)** ***Certificates of Marriage, Baptism, and Similar Ceremonies.*** A statement of fact contained in a certificate: **(A)** made by a person who is authorized by a religious organization or by law to perform the act certified; **(B)** attesting that the person performed a marriage or similar ceremony or administered a sacrament; and **(C)** purporting to have been issued at the time of the act or within a reasonable time after it.
(13) Family records. Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.	**(13)** ***Family Records.*** A statement of fact about personal or family history contained in a family record, such as a Bible, genealogy, chart, engraving on a ring, inscription on a portrait, or engraving on an urn or burial marker.

(14) Records of documents affecting an interest in property. The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.	**(14)** ***Records of Documents That Affect an Interest in Property.*** The record of a document that purports to establish or affect an interest in property if: **(A)** the record is admitted to prove the content of the original recorded document, along with its signing and its delivery by each person who purports to have signed it; **(B)** the record is kept in a public office; and **(C)** a statute authorizes recording documents of that kind in that office.
(15) Statements in documents affecting an interest in property. A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.	**(15)** ***Statements in Documents That Affect an Interest in Property.*** A statement contained in a document that purports to establish or affect an interest in property if the matter stated was relevant to the document's purpose — unless later dealings with the property are inconsistent with the truth of the statement or the purport of the document.
(16) Statements in ancient documents. Statements in a document in existence twenty years or more the authenticity of which is established.	**(16)** ***Statements in Ancient Documents.*** A statement in a document that is at least 20 years old and whose authenticity is established.
(17) Market reports, commercial publications. Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.	**(17)** ***Market Reports and Similar Commercial Publications.*** Market quotations, lists, directories, or other compilations that are generally relied on by the public or by persons in particular occupations.

(18) Learned treatises. To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.	**(18)** ***Statements in Learned Treatises, Periodicals, or Pamphlets.*** A statement contained in a treatise, periodical, or pamphlet if: **(A)** the statement is called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination; and **(B)** the publication is established as a reliable authority by the expert's admission or testimony, by another expert's testimony, or by judicial notice. If admitted, the statement may be read into evidence but not received as an exhibit.
(19) Reputation concerning personal or family history. Reputation among members of a person's family by blood, adoption, or marriage, or among a person's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history.	**(19)** ***Reputation Concerning Personal or Family History.*** A reputation among a person's family by blood, adoption, or marriage — or among a person's associates or in the community — concerning the person's birth, adoption, legitimacy, ancestry, marriage, divorce, death, relationship by blood, adoption, or marriage, or similar facts of personal or family history.
(20) Reputation concerning boundaries or general history. Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or State or nation in which located.	**(20)** ***Reputation Concerning Boundaries or General History.*** A reputation in a community — arising before the controversy — concerning boundaries of land in the community or customs that affect the land, or concerning general historical events important to that community, state, or nation.
(21) Reputation as to character. Reputation of a person's character among associates or in the community.	**(21)** ***Reputation Concerning Character.*** A reputation among a person's associates or in the community concerning the person's character.

(22) Judgment of previous conviction. Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the Government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.	**(22)** ***Judgment of a Previous Conviction.*** Evidence of a final judgment of conviction if: **(A)** the judgment was entered after a trial or guilty plea, but not a nolo contendere plea; **(B)** the judgment was for a crime punishable by death or by imprisonment for more than a year; **(C)** the evidence is admitted to prove any fact essential to the judgment; and **(D)** when offered by the prosecutor in a criminal case for a purpose other than impeachment, the judgment was against the defendant. The pendency of an appeal may be shown but does not affect admissibility.
(23) Judgment as to personal, family, or general history, or boundaries. Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.	**(23)** ***Judgments Involving Personal, Family, or General History or a Boundary.*** A judgment that is admitted to prove a matter of personal, family, or general history, or boundaries, if the matter: **(A)** was essential to the judgment; and **(B)** could be proved by evidence of reputation.
(24) [Other exceptions.] [Transferred to Rule 807]	**(24) [Other exceptions.]** [Transferred to Rule 807]

Committee Discussion:

1. Rule 803(2) --- stress of excitement: The Restyled Rule 803(2) changed the language to "stress or excitement" but at the Fall 2009 meeting the Committee voted unanimously to return to "the stress of excitement" --- because that language was derived from earlier codifications and had been construed in hundreds of cases. At the Spring 2010 meeting, Professor Kimble suggested that the phrase might be changed to "the stress of *the* excitement" but the Committee once again determined that the language was well-ensconced and should not be changed. Professor Kimble dropped the suggestion.

2. Rule 803(6) --- clerical change: The Magistrate Judges' Association pointed out a typo in Rule 803(6)'s cross-reference to the certification provisions of Rule 902. The reference in the Restyled Rules is to "Rule 902(b)(11) or (12)" --- which tied to a previous draft in which Rule 902 had lettered subdivisions. But those lettered subdivisions were dropped in the Restyled Rule as issued for public comment. The Style Committee therefore deleted the "(b)" and the Advisory Committee unanimously agreed with this change.

3. Rule 803(8), "statement" and "trustworthiness clause" --- The definition of "record" in Rule 101 was intended to streamline the records-based rules --- especially Rules 803(6)-(8), so that the related words "memorandum", "data compilation" etc. need not be repeated. But a public comment noted that Rules 803(8), 803(10) and 901(b)(7) also cover a *statement*. And "statement" is not part of the definition of "record." This meant that the restyling drops the word "statement" from those rules. The Committee determined that dropping the word "statement" effected a substantive change because some statements covered by these rules are not in records --- such as a statement of a public official at a press conference.

In addition, at the Fall 2009 meeting, the Committee resolved to find a way to include the trustworthiness clause of Rule 803(8) as a lettered subdivision, to avoid the use of a hanging paragraph.

In response to these two concerns, Professor Kimble drafted and the Style Subcommittee approved the following version of Restyled Rule 803(8), blacklined from the rule as issued for public comment:

(8) ***Public Records.*** A record or statement of a public office ~~setting out~~ if:

(A) it sets out:

(i) the office's activities;

~~**(B)**~~ **(ii)** a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or

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

(B) ~~But this exception does not apply if~~ neither the source of information ~~or~~ nor other circumstances indicate a lack of trustworthiness.

Clean version:

A record or statement of a public office if:

(A) it sets out:

(i) the office's activities;

(ii) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or

(iii) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and

(B) neither the source of information nor other circumstances indicate a lack of trustworthiness.

After discussion, the Committee unanimously approved the changes to Restyled Rule 803(8).

4. Rule 803(10), addition of statement, and consideration of "even though": Restyled Rule 803(10)(B) as issued for public comment covers the absence of a public record to prove that "a matter did not occur or exist, *even though* a public office regularly kept a record for a matter of that kind." Before the meeting, Judge Hinkle suggested that the words "even though" did not connect well with the introductory language of the Rule. In addition, as with Rule 803(8) and as raised in public comment, the definition of "record" does not cover a statement, and so the word "statement" had to be reintroduced into the Restyled Rule.

In response to these concerns, the Style Subcommittee approved changes to Rule 803(10) as it was issued for public comment. The blacklined version is as follows:

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

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

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

The Advisory Committee unanimously approved these changes to Restyled Rule 803(10).

5. Rule 803(22), caption, " Judgment of a Previous Conviction": A public comment suggested that the word "Previous" in the caption was superfluous because the conviction would have to be "previous" to be admissible in the case. The Style Subcommittee agreed with this suggestion and deleted the word.

In discussion, Advisory Committee members were unanimously in favor of returning the word "Previous" to the caption. One of the goals of the restyling project is to make headings more, not less, helpful. Use of "Previous" helps the reader, especially a novice, to know that the rule is not talking about the possible conviction in the existing case. It thus sets the context of the rule for the reader. There is a difference between superfluity and emphasis. Committee members also noted that use of the word "Previous" would probably make it easier to search for the applicable rule.

The Committee voted unanimously to request the Style Committee to retain the word "Previous" in the caption to Rule 803(22).

(In a telephone conference after the meeting, the Style Subcommittee agreed to return "Previous" to the caption of Rule 803(22)).

6. Rule 803(22)(B), "judgment for a crime": A public comment suggested that the term "judgment for a crime" in Rule 803(22)(B) should be changed to "*conviction* for a crime," meaning that the subdivision would be changed as follows:

> **(B)** the ~~judgment~~ conviction was for a crime punishable by death or by imprisonment for more than a year;

The Style Subcommittee agreed with the public comment and made the change. The Advisory Committee unanimously approved the change.

Committee Determination: Restyled Rule 803 approved, with changes to the rule as issued for public comment in Rules 803(2), (6), (8), (10) and (22).

Rule 804. Hearsay Exceptions; Declarant Unavailable	Rule 804 — Exceptions to the Rule Against Hearsay — When the Declarant Is Unavailable as a Witness
(a) Definition of unavailability. ''Unavailability as a witness'' includes situations in which the declarant— **(1)** is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or **(2)** persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or **(3)** testifies to a lack of memory of the subject matter of the declarant's statement; or **(4)** is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or **(5)** is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means. A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.	**(a) Criteria for Being Unavailable.** A declarant is considered to be unavailable as a witness if the declarant: **(1)** is exempted by a court ruling on the ground of having a privilege to not testify about the subject matter of the declarant's statement; **(2)** refuses to testify about the subject matter despite a court order to do so; **(3)** testifies to not remembering the subject matter; **(4)** cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness; or **(5)** is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure: **(A)** the declarant's attendance, in the case of a hearsay exception under Rule 804(b)(1) or (5); or **(B)** the declarant's attendance or testimony, in the case of a hearsay exception under Rule 804(b)(2), (3), or (4). But this subdivision (a) does not apply if the statement's proponent procured or wrongfully caused the declarant's unavailability in order to prevent the declarant from attending or testifying.

(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness: **(1) Former testimony.** Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.	**(b) The Exceptions.** The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness: **(1)** ***Former Testimony.*** Testimony that: **(A)** was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and **(B)** is now offered against a party who had — or, in a civil case, whose predecessor in interest had — an opportunity and similar motive to develop it by direct, cross-, or redirect examination.
(2) Statement under belief of impending death. In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.	**(2)** ***Statement Under the Belief of Imminent Death.*** In a prosecution for homicide or in a civil case, a statement that the declarant, while believing the declarant's death to be imminent, made about its cause or circumstances.
(3) Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.	**(3)** ***Statement Against Interest.*** A statement that: **(A)** a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and

	(B) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.
(4) Statement of personal or family history. **(**A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.	**(4) Statement of Personal or Family History.** A statement about: **(A)** the declarant's own birth, adoption, legitimacy, ancestry, marriage, divorce, relationship by blood or marriage, or similar facts of personal or family history, even though the declarant had no way of acquiring personal knowledge about that fact; or **(B)** another person concerning any of these facts, as well as death, if the declarant was related to the person by blood, adoption, or marriage or was so intimately associated with the person's family that the declarant's information is likely to be accurate.

Rule 804(b)

(5) [Other exceptions.] [Transferred to Rule 807] **(6) Forfeiture by wrongdoing.** A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.	**(5)** ***Statement Offered Against a Party Who Wrongfully Caused the Declarant's Unavailability.*** A statement offered against the party that wrongfully caused — or acquiesced in wrongfully causing — the declarant's unavailability in order to prevent the declarant from attending or testifying. **[Other exceptions.]** [Transferred to Rule 807]

Committee Discussion:

1. Rule 804(a)(1), "having a privilege": A public comment noted that characterizing the unavailability condition as the declarant "having a privilege" is narrower than the existing rule, in which a declarant is exempted "on the ground of privilege." The public comment observed that a declarant might be exempted on ground of privilege even though the declarant is not the holder of the privilege --- i.e., does not "have" the privilege. For example, an attorney would be unavailable to testify to the client's confidential communication, but the attorney doesn't "have" the privilege, the client does.

The Advisory Committee accordingly determined that Restyled Rule 804(a)(1), as issued for public comment, effected a substantive change. After discussion, the Committee unanimously approved an amendment. The language of the proposed amendment was subsequently reviewed and revised slightly by the Style Subcommittee. Blacklined from the public comment version, the amendment reads as follows:

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

(1) is exempted ~~by a court ruling on the ground of~~ ~~having~~ ~~a privilege to not testify~~ from testifying about the subject matter of the declarant's statement <u>because the court rules that a privilege applies</u>;

2. Rule 804(a), hanging paragraph, "unavailability <u>as a witness</u>":

Professor Kimble suggested the following change to the last (hanging) paragraph of Rule 804(a):

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

The Advisory Committee found it unnecessary as a matter of substance. Professor Kimble wished to include it to parallel the language of Rule 804(b)(6) (see discussion below), even though that is unnecessary as a substantive matter because the two provisions cover different situations and are construed differently. The Style Subcommittee reviewed Professor Kimble's suggestion after the meeting and approved it, so "as a witness" will be included in Rule 804(a) as recommended to the Standing Committee.

3. Rule 804(b)(5), attending or testifying: The Restyled Rule as issued for public comment would allow a finding of forfeiture if a party wrongfully prevented the declarant from "attending or testifying." The Reporter expressed concern that "attending or testifying" --- when used in the disjunctive in Rule 804(b)(5) --- could result in a substantive change, because a party could be found to have forfeited a hearsay objection simply by preventing a declarant from *attending* the trial (e.g., by threatening him not to appear) when the declarant might still be able to testify (without attending).

The Committee unanimously agreed that "attending or testifying" was a substantive change. After discussion, the Committee determined that the best solution would be to continue to use the term of art used in the original rule --- "unavailability as a witness." That term covered all the possible forms of unavailability --- including asserted failure of memory --- that could give rise to a finding of forfeiture. The Committee unanimously approved the following change to Rule 804(b)(5) as issued for public comment:

Statement Offered Against a Party Who Wrongfully Caused the Declarant's Unavailability. A statement offered against the party that wrongfully caused — or acquiesced in wrongfully causing — the declarant's unavailability as a witness, ~~with the intent to do so~~ and did so intending that result.

(After the meeting, Judge Hinkle found another glitch in the Restyled Rule --- the reference to "the" party should be "a" party, as it is in the caption. The Style Subcommittee approved the Advisory Committee's change together with the change from "the" to "a").

4. Rule 804(b)(5)/(6), placement: In 1997 the original Rule 804(b)(5) — providing a residual exception to the hearsay rule — was consolidated with the identically-worded Rule 803 and

transferred to Rule 807. In the official publication of the Federal Rules of Evidence, the following designation of Rule 804(b)(5) is indicated:

(5) [Transferred to Rule 807.]

Professor Kimble suggested that, as part of the restyling project, this designation should be deleted and what is now Rule 804(b)(6) be renumbered to (b)(5) to fill the gap.

But many Committee members argued that making that change would 1) deprive the reader important knowledge about the history of the rules; 2) disrupt electronic searches; and 3) lead to search results for "Rule 804(b)(5)" that would cover two separate hearsay exceptions. The Committee noted that while subdivisions have been renumbered in the restyling, no rule has been renumbered --- and the hearsay exceptions, while technically subdivisions, are as a matter of practice more like freestanding rules.

The Advisory Committee unanimously resolved to request the Style Subcommittee to restore the original numbering to Rule 804(b)(6), and to return the historical reference to Rule 804(b)(5). The Committee was very concerned that renumbering Rule 804(b)(6) would lead to confusion and perhaps to a failure by some parties to make proper objections and arguments in court. Members noted that Evidence Rules are often applied on the fly, and the Committee believed that it is important to have constancy in their numbering. So while the renumbering may be a question of style, the change could have real-world negative consequences.

(In a telephone conference after the meeting, the Style Subcommittee agreed to move the forfeiture exception back to Rule 804(b)(6), and to preserve the historical reference in Rule 804(b)(5).)

Committee Determination: Restyled Rule 804(b) approved, with changes to the rule as issued for public comment in Rules 804(a)(1), and 804(b)(5), and (with Style Subcommittee approval) Rule 804)(b)(5) renumbered as Rule 804(b)(6).

Rule 805. Hearsay Within Hearsay	**Rule 805 — Hearsay Within Hearsay**
Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.	Hearsay within hearsay is not excluded by the rule against hearsay if each part of the combined statements conforms with an exception to the rule.

Committee Determination: Rule 805 approved as issued for public comment.

Rule 806. Attacking and Supporting Credibility of Declarant	**Rule 806 — Attacking and Supporting the Declarant's Credibility**
When a hearsay statement, or a statement defined in Rule 801(d)(2)(C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.	When a hearsay statement — or a statement described in Rule 801(d)(2)(C), (D), or (E) — has been admitted in evidence, the declarant's credibility may be attacked, and then supported, by any evidence that would be admissible for those purposes if the declarant had testified as a witness. The court may admit evidence of the declarant's inconsistent statement or conduct, regardless of when it occurred or whether the declarant had an opportunity to explain or deny it. If the party against whom the statement was admitted calls the declarant as a witness, the party may examine the declarant on the statement as if on cross-examination.

Committee Determination: Rule 806 approved as issued for public comment.

Rule 807. Residual Exception	**Rule 807 — Residual Exception**
A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.	**(a) In General.** Under the following circumstances, a hearsay statement is not excluded by the rule against hearsay even if the statement is not specifically covered by a hearsay exception in Rule 803 or 804: **(1)** the statement has equivalent circumstantial guarantees of trustworthiness; **(2)** it is offered as evidence of a material fact; **(3)** it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and **(4)** admitting it will best serve the purposes of these rules and the interests of justice. **(b) Notice.** The statement is admissible only if, before the trial or hearing, the proponent gives an adverse party reasonable notice of the intent to offer the statement and its particulars, including the declarant's name and address, so that the party has a fair opportunity to meet it.

Committee Determination: Rule 807 approved as issued for public comment.

ARTICLE IX. AUTHENTICATION AND IDENTIFICATION **Rule 901. Requirement of Authentication or Identification**	ARTICLE IX. AUTHENTICATION AND IDENTIFICATION **Rule 901 — Authenticating or Identifying Evidence**
(a) General provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.	**(a) In General.** To authenticate or identify an item of evidence in order to have it admitted, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.
(b) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:	**(b) Examples.** The following are examples only — not a complete list — of evidence that satisfies the requirement:
(1) Testimony of witness with knowledge. Testimony that a matter is what it is claimed to be.	**(1)** ***Testimony of a Witness with Knowledge.*** Testimony that an item is what it is claimed to be.
(2) Nonexpert opinion on handwriting. Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.	**(2)** ***Nonexpert Opinion About Handwriting.*** A nonexpert's opinion that handwriting is genuine, based on a familiarity with it that was not acquired for the current litigation.
(3) Comparison by trier or expert witness. Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.	**(3)** ***Comparison by an Expert Witness or the Trier of Fact.*** A comparison with an authenticated specimen by an expert witness or the trier of fact.
(4) Distinctive characteristics and the like. Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.	**(4)** ***Distinctive Characteristics and the Like.*** The appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances.
(5) Voice identification. Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.	**(5)** ***Opinion About a Voice.*** An opinion identifying a person's voice — whether heard firsthand or through mechanical or electronic transmission or recording — based on hearing the voice at any time under circumstances that connect it with the alleged speaker.

(6) Telephone conversations. Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.	**(6)** ***Evidence About a Telephone Conversation.*** For a telephone conversation, evidence that a call was made to the number assigned at the time to: **(A)** a particular person, if circumstances, including self-identification, show that the person answering was the one called; or **(B)** a particular business, if the call was made to a business and the call related to business reasonably transacted over the telephone.
(7) Public records or reports. Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.	**(7)** ***Evidence About Public Records.*** Evidence that: **(A)** a record is from the public office where items of this kind are kept; or **(B)** a document was lawfully recorded or filed in a public office.
(8) Ancient documents or data compilation. Evidence that a document or data compilation, in any form, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence 20 years or more at the time it is offered.	**(8)** ***Evidence About Ancient Documents or Data Compilations.*** For a document or data compilation, evidence that it: **(A)** is in a condition that creates no suspicion about its authenticity; **(B)** was in a place where, if authentic, it would likely be; and **(C)** is at least 20 years old when offered.
(9) Process or system. Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.	**(9)** ***Evidence About a Process or System.*** Evidence describing a process or system and showing that it produces an accurate result.
(10) Methods provided by statute or rule. Any method of authentication or identification provided by Act of Congress or by other rules prescribed by the Supreme Court pursuant to statutory authority.	**(10)** ***Methods Provided by a Statute or Rule.*** Any method of authentication or identification allowed by a federal statute or a rule prescribed by the Supreme Court.

Committee Discussion:

1. Rule 901(b)(7), "statement": Restyled Rule 901(b)(7), an authentication provision for public records, raises the same problem as previously discussed with Rule 803(8), the hearsay exception for public records. The definition of "record" in Rule 101 includes all the references in current Rule 901(b)(7) except "statement." The Committee unanimously determined that "statement" must be added to the Restyled Rule 901(b)(7).

2. Rule 901(b)(7), "lawfully recorded or filed": The current Rule provides a ground for authenticity for public records "authorized by law to be recorded or filed and in fact recorded or filed in a public office." The language of the Rule was restyled to "lawfully recorded or filed in a public office." The Committee determined that this was a substantive change: the restyled language focuses on the *act* of recording and requires it to be lawful. The existing language focuses on whether recording is authorized. There could be a situation in which a document was legally authorized to be recorded yet there might be a dispute over whether the recording was actually lawful. Where that dispute arises, proof of the document itself may be necessary, and the current rule would provide for authentication but the restyled rule would not.

To account for the deletion of "statement" and the substantive change concerning lawful recording, the Committee unanimously approved the following changes to Restyled Rule 901(b)(7) (blacklined from the rule as issued for public comment):

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

(A) a document was recorded or filed in a public office, as authorized by law ~~record or statement is from the public office where items of this kind are kept~~; or

(B) a purported public record or statement is from the office where items of this kind are kept ~~document was lawfully recorded or filed in a public office~~.

(In a telephone conference after the meeting, the Style Subcommittee approved the changes to Rule 901(b)(7).

Committee Determination: Restyled Rule 901 approved, with changes to the Rule as issued for public comment in Rule 901(b)(7).

Rule 902. Self-authentication	**Rule 902 — Evidence That Is Self-Authenticating**
Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following: **(1) Domestic public documents under seal.** A document bearing a seal purporting to be that of the United States, or of any State, district, Commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.	The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted: **(1)** ***Domestic Public Documents That Are Signed and Sealed.*** A document that bears: **(A)** a signature purporting to be an execution or attestation; and **(B)** a seal purporting to be that of the United States; any state, district, commonwealth, territory, or insular possession of the United States; the former Panama Canal Zone; the Trust Territory of the Pacific Islands; a political subdivision of any of these entities; or a department, agency, or officer of any entity named above.
(2) Domestic public documents not under seal. A document purporting to bear the signature in the official capacity of an officer or employee of any entity included in paragraph (1) hereof, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.	**(2)** ***Domestic Public Documents That Are Signed But Not Sealed.*** A document that bears no seal if: **(A)** it bears the signature of an officer or employee of an entity named in Rule 902(1)(B); and **(B)** another public officer who has a seal and official duties within that same entity certifies under seal — or its equivalent — that the signer has the official capacity and that the signature is genuine.

(3) Foreign public documents. A document purporting to be executed or attested in an official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position (A) of the executing or attesting person, or (B) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation. A final certification may be made by a secretary of an embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification.	**(3)** ***Foreign Public Documents.*** A document that purports to be signed or attested by a person who is authorized by a foreign country's law to do so. The document must be accompanied by a final certification that certifies the genuineness of the signature and official position of the signer or attester — or of any foreign official whose certificate of genuineness relates to the signature or attestation or is in a chain of certificates of genuineness relating to the signature or attestation. The certification may be made by a secretary of a United States embassy or legation; by a consul general, vice consul, or consular agent of the United States; or by a diplomatic or consular official of the foreign country assigned or accredited to the United States. If all parties have been given a reasonable opportunity to investigate the document's authenticity and accuracy, the court may, for good cause, either: **(A)** order that it be treated as presumptively authentic without final certification; or **(B)** allow it to be evidenced by an attested summary with or without final certification.
(4) Certified copies of public records. A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) of this rule or complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority.	**(4)** ***Certified Copies of Public Records.*** A copy of an official record — or a copy of a document that was lawfully recorded or filed in a public office — if the copy is certified as correct by: **(A)** the custodian or another person authorized to make the certification; or **(B)** a certificate that complies with Rule 902(1), (2), or (3), a federal statute, or a rule prescribed by the Supreme Court.
(5) Official publications. Books, pamphlets, or other publications purporting to be issued by public authority.	**(5)** ***Official Publications.*** A book, pamphlet, or other publication purporting to be issued by a public authority.

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

Rule 902(7)-(11)

(7) Trade inscriptions and the like. Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin.	**(7)** ***Trade Inscriptions and the Like.*** An inscription, sign, tag, or label purporting to have been affixed in the course of business and indicating origin, ownership, or control.
(8) Acknowledged documents. Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments.	**(8)** ***Acknowledged Documents.*** A document accompanied by a certificate of acknowledgment that is lawfully signed by a notary public or another officer who is authorized to take acknowledgements.
(9) Commercial paper and related documents. Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law.	**(9)** ***Commercial Paper and Related Documents.*** Commercial paper, a signature on it, and related documents, to the extent allowed by general commercial law.
(10) Presumptions under Acts of Congress. Any signature, document, or other matter declared by Act of Congress to be presumptively or prima facie genuine or authentic.	**(10)** ***Presumptions Under a Federal Statute.*** A signature, document, or anything else that a federal statute declares to be presumptively or prima facie genuine or authentic.

(11) Certified domestic records of regularly conducted activity. The original or a duplicate of a domestic record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by a written declaration of its custodian or other qualified person, in a manner complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority, certifying that the record— **(A)** was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters; **(B)** was kept in the course of the regularly conducted activity; and **(C)** was made by the regularly conducted activity as a regular practice. A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.	**(11)** ***Certified Domestic Records of a Regularly Conducted Activity.*** The original or a copy of a domestic record that meets the requirements of Rule 803(6), modified as follows: the conditions referred to in 803(6)(D) must be shown by a certification of the custodian or another qualified person that complies with a federal statute or a rule prescribed by the Supreme Court. Before the trial or hearing, the proponent must give an adverse party reasonable written notice of the intent to offer the record — and must make the record and certification available for inspection — so that the party has a fair opportunity to challenge them.

(12) Certified foreign records of regularly conducted activity. In a civil case, the original or a duplicate of a foreign record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by a written declaration by its custodian or other qualified person certifying that the record— **(A)** was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters; **(B)** was kept in the course of the regularly conducted activity; and **(C)** was made by the regularly conducted activity as a regular practice. The declaration must be signed in a manner that, if falsely made, would subject the maker to criminal penalty under the laws of the country where the declaration is signed. A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.	**(12)** ***Certified Foreign Records of a Regularly Conducted Activity.*** In a civil case, the original or a copy of a foreign record that meets the requirements of Rule 902(11), modified as follows: the certification, rather than complying with a federal statute or Supreme Court rule, must be signed in a manner that, if falsely made, would subject the maker to a criminal penalty in the country where the certification is signed. The proponent must also meet the notice requirements of Rule 902(11).

Committee Discussion:

1. Rule 902(4), lawfully recorded: As with Rule 901(b)(7), the Restyled Rule 902(4) was found to have made a substantive change by using "lawfully" recorded in place of "authorized by law." The Committee unanimously approved the following change to Rule 902(4):

> **(4)** ***Certified Copies of Public Records.*** A copy of an official record — or a copy of a document that was ~~lawfully~~ recorded or filed in a public office, as authorized by law — if the copy is certified as correct by:
>
> **(A)** the custodian or another person authorized to make the certification; or
>
> **(B)** a certificate that complies with Rule 902(1), (2), or (3), a federal statute, or a rule prescribed by the Supreme Court.

(In a telephone conference after the meeting, the Style Subcommittee approved the change to Restyled Rule 904).

2. Rule 902(11), "modified as follows": The Magistrate Judges' Association raised a concern about the use of the term "modified as follows" in Restyled Rule 902(11) as it was issued for public comment. Rule 902(11) is a certification provision for business records. It does not "modify" the admissibility requirements of Rule 803(6). After discussion, the Committee determined that the use of the term "modified" was substantively incorrect. The Committee unanimously approved the following change to Rule 902(11):

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

(In a telephone conference after the meeting, the Style Subcommittee approved the change to restyled Rule 902(11)).

Committee Determination: Restyled Rule 902 approved, with changes to the Rule as issued for public comment in Rules 902(4) and (11).

Rule 903. Subscribing Witness' Testimony Unnecessary	**Rule 903 — Subscribing Witness's Testimony**
The testimony of a subscribing witness is not necessary to authenticate a writing unless required by the laws of the jurisdiction whose laws govern the validity of the writing.	A subscribing witness's testimony is necessary to authenticate a writing only if required by the law of the jurisdiction that governs its validity.

Committee Determination: Restyled Rule 903 approved as issued for public comment.

ARTICLE X. CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS Rule 1001. Definitions	ARTICLE X. CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS Rule 1001 — Definitions That Apply to This Article
For purposes of this article the following definitions are applicable: **(1) Writings and recordings.** ''Writings'' and ''recordings'' consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation. **(2) Photographs.** ''Photographs'' include still photographs, X-ray films, video tapes, and motion pictures. **(3) Original.** An ''original'' of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An ''original'' of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an ''original''. **(4) Duplicate.** A ''duplicate'' is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduces the original.	In this article~~, the following definitions apply~~: **(a)** ~~**Writing.**~~ A "writing" consists of letters, words, numbers, or their equivalent set down in any form. **(b)** ~~**Recording.**~~ A "recording" consists of letters, words, numbers, or their equivalent recorded in any manner. **(c)** ~~**Photograph.**~~ "Photograph" means a photographic image or its equivalent stored in any form. **(d)** ~~**Original.**~~ An "original" of a writing or recording means the writing or recording itself or any counterpart intended to have the same effect by the person who executed or issued it. For electronically stored information, "original" means any printout — or other output readable by sight — if it accurately reflects the information. An "original" of a photograph includes the negative or a print from it. **(e)** ~~**Duplicate.**~~ "Duplicate" means a counterpart produced by a mechanical, photographic, chemical, electronic, or other equivalent process or technique that accurately reproduces the original.

Committee Determination: Restyled Rule 1001 approved as issued for public comment, with minor style changes that were approved at the Fall 2009 meeting.

Rule 1002. Requirement of Original	Rule 1002 — Requirement of the Original
To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by Act of Congress.	An original writing, recording, or photograph is required in order to prove its content unless these rules or a federal statute provides otherwise.

Committee Determination: Rule 1002 approved as issued for public comment.

Rule 1003. Admissibility of Duplicates	Rule 1003 — Admissibility of Duplicates
A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.	A duplicate is admissible to the same extent as the original unless a genuine question is raised about the original's authenticity or the circumstances make it unfair to admit the duplicate.

Committee Determination: Restyled Rule 1003 approved as issued for public comment.

Rule 1004. Admissibility of Other Evidence of Contents	Rule 1004 — Admissibility of Other Evidence of Content
The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if— **(1) Originals lost or destroyed.** All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or **(2) Original not obtainable.** No original can be obtained by any available judicial process or procedure; or **(3) Original in possession of opponent.** At a time when an original was under the control of the party against whom offered, that party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and that party does not produce the original at the hearing; or **(4) Collateral matters.** The writing, recording, or photograph is not closely related to a controlling issue.	An original is not required and other evidence of the content of a writing, recording, or photograph is admissible if: **(a)** all the originals are lost or destroyed, and not by the proponent acting in bad faith; **(b)** an original cannot be obtained by any available judicial process; **(c)** the party against whom the original would be offered had control of the original; was at that time put on notice, by pleadings or otherwise, that the original would be a subject of proof at the trial or hearing; and fails to produce it at the trial or hearing; or **(d)** the writing, recording, or photograph is not closely related to a controlling issue.

Committee Determination: Restyled Rule 1004 approved as issued for public comment.

Rule 1005. Public Records	Rule 1005 — Copies of Public Records to Prove Content
The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with rule 902 or testified to be correct by a witness who has compared it with the original. If a copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.	The proponent may use a copy to prove the content of an official record — or of a document that was lawfully recorded or filed in a public office — if these conditions are met: the record or document is otherwise admissible; and the copy is certified as correct in accordance with Rule 902(4) or is testified to be correct by a witness who has compared it with the original. If no such copy can be obtained by reasonable diligence, then the proponent may use other evidence to prove the content.

Committee Determination: Restyled Rule 1005 approved as issued for public comment.

Rule 1006. Summaries	Rule 1006 — Summaries to Prove Content
The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court.	The proponent may use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court. The proponent must make the originals or duplicates available for examination or copying, or both, by other parties at a reasonable time or place. And the court may order the proponent to produce them in court.

Committee Determination: Rule 1006 approved as issued for public comment.

Rule 1007. Testimony or Written Admission of Party	Rule 1007 — Testimony or Admission of a Party to Prove Content
Contents of writings, recordings, or photographs may be proved by the testimony or deposition of the party against whom offered or by that party's written admission, without accounting for the nonproduction of the original.	The proponent may prove the content of a writing, recording, or photograph by the testimony, deposition, or written admission of the party against whom the evidence is offered. The proponent need not account for the original.

Committee Discussion:

Admission of a party: Both the heading and the text of Restyled Rule 1007 refer to an "Admission of a Party." This is a reference to Rule 801(d)(2). The Reporter noted, however, that Restyled Rule 801(d)(2) no longer refers to "admissions" --- rather they are now called "statements" of a party. The Committee unanimously approved the change to the heading and as follows:

Rule 1007 --- Testimony or ~~Admission~~ Statement of a Party to Prove Content

> The proponent may prove the content of a writing, recording, or photograph by the testimony, deposition, or written ~~admission~~ statement of the party against whom the evidence is offered. The proponent need not account for the original.

This change was also approved by the Style Subcommittee.

Committee Determination: Rule 1007 approved as issued for public comment, with the substitution of "statement" for "admission" in the heading and text.

Rule 1008. Functions of Court and Jury	Rule 1008 — Functions of the Court and Jury
When the admissibility of other evidence of contents of writings, recordings, or photographs under these rules depends upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is ordinarily for the court to determine in accordance with the provisions of rule 104. However, when an issue is raised (a) whether the asserted writing ever existed, or (b) whether another writing, recording, or photograph produced at the trial is the original, or (c) whether other evidence of contents correctly reflects the contents, the issue is for the trier of fact to determine as in the case of other issues of fact.	Ordinarily, the court determines whether the proponent has fulfilled the factual conditions for admitting other evidence of the content of a writing, recording, or photograph under Rule 1004 or 1005. But in a jury trial, the jury determines — in accordance with Rule 104(b) — any issue about whether: **(a)** an asserted writing, recording, or photograph ever existed; **(b)** another one produced at the trial or hearing is the original; or **(c)** other evidence of content accurately reflects the content.

Committee Determination: Rule 1008 approved as issued for public comment.

XI. MISCELLANEOUS RULES **Rule 1101. Applicability of Rules**	XI. MISCELLANEOUS RULES **Rule 1101 — Applicability of the 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.	**(a) To Courts and Judges.** These rules apply to proceedings before: • United States district courts; • United States bankruptcy and magistrate judges; • United States courts of appeals; • the United States Court of Federal Claims; and • the district courts of Guam, the Virgin Islands, and the Northern Mariana Islands.
(b) 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.	**(b) To Cases and Proceedings.** These rules apply in: • civil cases and proceedings, including bankruptcy, admiralty, and maritime cases; • criminal cases and proceedings; • contempt proceedings, except those in which the court may act summarily; and • cases and proceedings under 11 U.S.C.
(c) Rule of privilege. The rule with respect to privileges applies at all stages of all actions, cases, and proceedings.	**(c) Rules on Privilege.** The rules on privilege apply to all stages of a case or proceeding.

(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.	**(d) Exceptions.** These rules — except for those on privilege — do not apply to the following: **(1)** the court's determination, under Rule 104(a), on a preliminary question of fact governing admissibility; **(2)** grand-jury proceedings; and **(3)** miscellaneous proceedings such as: • extradition or rendition; • issuing an arrest warrant, criminal summons, or search warrant; • a preliminary examination in a criminal case; • sentencing; • granting or revoking probation or supervised release; and • considering whether to release on bail or otherwise.

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

Committee Discussion:

Bankruptcy Cases: At the Fall 2009 meeting the Committee added bankruptcy cases to the list of cases to which the Evidence Rules are applicable, in subdivision (b). This was out of concern that the reference to 11 U.S.C. in the existing rule did not cover all the bankruptcy cases in which the Evidence Rules apply. At the Spring 2010 meeting, the liaison from the Bankruptcy Rules Committee observed that because bankruptcy cases are now specifically mentioned, the reference to 11 U.S.C. has become superfluous. The Committee therefore voted unanimously to delete the bullet point for 11 U.S.C.

Committee Determination: Rule 1101 approved as issued for public comment, with technical changes approved at Fall 2009 and Spring 2010 meetings.

Rule 1102. Amendments	Rule 1102 — Amendments
Amendments to the Federal Rules of Evidence may be made as provided in section 2072 of title 28 of the United States Code.	These rules may be amended as provided in 28 U.S.C. § 2072.

Committee Discussion:

Provision concerning supersession: The Civil Rules restyling project included an amendment to Rule 86, providing that if any restyling amendment conflicts with another law, "priority in time for the purpose of 28 U.S.C.§2072(b) is not affected" by the amendment. The Evidence Rules Committee discussed whether a similar provision should be added to Rule 1102.

The Committee relied heavily on an excellent memorandum from Professor Cooper, Reporter to the Civil Rules Committee, prepared during the Civil Rules restyling project. In that memo, Professor Cooper noted that it was very unlikely (though not impossible) for a court to find that a style amendment would supersede a pre-existing statute. But even if a court would so find, the Committee determined that it was essentially impossible for an Evidence Rule to supersede any prior legislation. This is because the Evidence Rules are written to accommodate statutory law whenever enacted. For example, Rule 402 provides that evidence is relevant unless a statute provides otherwise; Rule 501 likewise defers to statute; Rule 802, the rule against hearsay, defers to statute; the authenticity rules are illustrative only and do not at all conflict with a statute that would govern authenticity. So if the rules themselves do not take priority over statutes --- no matter when enacted --- there is no reason to draft against the already remote possibility that a court would find that an Evidence Rule could become "last in time" by a style amendment.

The Committee determined that in the context of the Evidence Rules, a supersession provision could do more harm than good. It might lead a reader to think that there is a possible problem when in fact there is not. A reader might think, for example, that Rule 402 doesn't mean what it says when it defers to statutes. The Committee also noted that Rule 1101(e) as restyled has further lessened the need for a supersession clause because it states that a statute "may provide for admitting or excluding evidence independently from these rules." Including a separate supersession provision could cause the reader to think that the amended Rule 1101(e) does not mean what it says.

After this discussion, the Committee unanimously rejected any amendment to the Restyled Rules that would add a supersession provision.

Committee Determination: Rule 1102 approved as issued for public comment.

Rule 1103. Title	**Rule 1103 — Title**
These rules may be known and cited as the Federal Rules of Evidence.	These rules may be cited as the Federal Rules of Evidence.

Committee Determination: Rule 1103 approved as issued for public comment.

III. Committee Notes to the Restyled Evidence Rules

The Committee approved the following Committee Notes to the Restyled Rules of Evidence: 1) a Note to Rule 101 that described the goals and methodology of the restyling project; 2) a template for each of the amended rules, indicating that the amendments are stylistic only; and 3) additional language for particular rules to explain questions about a rule that might be raised by the bench or bar.

A. Rule 101 Note

The Committee approved the following Note to Rule 101:

Committee Note

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

The Style Project

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

1. General Guidelines

Guidance in drafting, usage, and style was provided by Bryan Garner, *Guidelines for Drafting and Editing Court Rules*, Administrative Office of the United States Courts (1969) and Bryan Garner, *Dictionary of Modern Legal Usage* (2d ed. 1995). See also Joseph Kimble, *Guiding Principles for Restyling the Civil Rules*, in *Preliminary Draft of Proposed Style Revision of the Federal Rules of Civil Procedure*, at page x (Feb. 2005) (available at http://www.uscourts.gov/rules/Prelim_draft_proposed_pt1.pdf); Joseph Kimble, *Lessons in Drafting from the New Federal Rules of Civil Procedure*, 12 Scribes J. Legal Writing 25 (2008-2009). For specific commentary on the Evidence restyling project, see Joseph Kimble, *Drafting Examples from the Proposed New Federal Rules of Evidence*, 88 Mich. B.J. 52 (Aug. 2009); 88 Mich B.J. 46 (Sept. 2009); 88 Mich B.J. 54 (Oct. 2009); 88 Mich. B.J. 50 (Nov. 2009).

2. Formatting Changes

Many of the changes in the restyled Evidence Rules result from using format to achieve clearer presentations. The rules are broken down into constituent parts, using progressively indented subparagraphs with headings and substituting vertical for horizontal lists. "Hanging indents" are used throughout. These formatting changes make the structure of the rules graphic

and make the restyled rules easier to read and understand even when the words are not changed. Rules 103, 404(b), 606(b), and 612 illustrate the benefits of formatting changes.

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

The restyled rules reduce the use of inconsistent terms that say the same thing in different ways. Because different words are presumed to have different meanings, such inconsistencies can result in confusion. The restyled rules reduce inconsistencies by using the same words to express the same meaning. For example, consistent expression is achieved by not switching between "accused" and "defendant" or between "party opponent" and "opposing party" or between the various formulations of civil and criminal action/case/proceeding.

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

The restyled rules minimize the use of redundant "intensifiers." These are expressions that attempt to add emphasis, but instead state the obvious and create negative implications for other rules. The absence of intensifiers in the restyled rule does not change their substantive meaning. See, e.g., Rule 104(c) (omitting "in all cases"); Rule 602 (omitting "but need not"); Rule 611(b) (omitting "in the exercise of its discretion").

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

4. Rule Numbers

The restyled rules keep the same numbers to minimize the effect on research. Subdivisions have been rearranged within some rules to achieve greater clarity and simplicity. [Rule 804(b)(6) has been renumbered to Rule 804(b)(5) so that the numbering within the rule is continuous.]

5. No Substantive Change

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

a. Under the existing practice in any circuit, the change could lead to a different result on a question of admissibility (e.g., a change that requires a court to provide either a less or more stringent standard in evaluating the admissibility of particular evidence);

b. Under the existing practice in any circuit, the amendment could lead to a change in the procedure by which an admissibility decision is made (e.g., a change in the time in which an objection must be made, or a change in whether a court must hold a hearing on an admissibility question);

c. The change would restructure a rule in a way that would alter the approach that courts and litigants have used to think about, and argue about, questions of admissibility (e.g., merging Rules 104(a) and 104(b) into a single subdivision); or

d. The amendment would change a “sacred phrase" — one that has become so familiar in practice that to alter it would be unduly disruptive to practice and expectations. Examples in the Evidence Rules include "unfair prejudice" and "truth of the matter asserted."

B. Template for Basic Note

The Committee approved the following basic Committee Note for all the Restyled Rules, except Rule 502:

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

C. Additional Notes for Specific Rules

In preparing the restyled Evidence Rules for public comment, the Committee operated under the presumption that the basic template was a sufficient Committee Note for each of the Rules. Because no substantive change was intended, the Committee determined that it would ordinarily be enough to say just that.

The Committee recognized, however, that changes to certain rules were relatively extensive, and this might raise questions about possible inadvertent substantive consequences. The Committee therefore developed a working principle for providing additional comment in a Committee Note to a specific rule. The working principle was:

An extra, short statement may be added to Rules where a change has been made that might cause a reasonable reader to wonder about the Committee’s intent or meaning.

Under that working principle, the Committee amended the basic template for the Committee Notes to the following Rules

1. Rule 101(b)(6) — Evidence stored in electronic form

Rule 101(b)(6) provides that "a reference to any kind of written material or any other medium includes electronically stored information." A public comment suggested that it would be useful for the Committee Note to provide a cross-reference to Civil Rule 34. The Committee concluded that a cross-referencing Note would assist the reader in determining the meaning of the term "electronically stored information." The Committee therefore approved the following addition to the basic Note:

> The reference to electronically stored information is intended to track the language of Fed.R.Civ.P. 34.

2. Rules 407, 408 and 411.

Explanation:

These rules had always been rules of exclusion. They had never provided a ground of admissibility. The rules stated that certain evidence was inadmissible if offered for certain purposes, but that the preclusion *did not apply* if the evidence were offered for other purposes. The restyling has turned them into positive rules of admissibility. They now state that the court *may admit* the evidence if offered for a permissible purpose. In the public comment period, the ABA Litigation Section suggested that the change to these rules is substantive (though the Committee had voted and found the changes to be stylistic only). The Committee therefore determined that an explanatory Note would be useful to clarify the limited effect of the amendment.

Addition to the Committee Note:

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

3. Rule 502

Explanation:

Rule 502 was only recently enacted, and in the run-up to its acceptance by Congress, the Committee expended great effort to make sure that the style changes already made in the Rule would be preserved. The Committee therefore determined that it would be imprudent to restyle the Rule *again* during the restyling project. The only changes made to Rule 502 were changes in capitalization. So the template Committee Note, which refers to the fact that a rule has been restyled, would not accurately describe the Committee's work on Rule 502. The Committee therefore approved the following Note to Rule 502:

Committee Note

Rule 502 has been amended by changing the initial letter of a few words from uppercase to lowercase as part of the restyling of the Evidence Rules to make style and terminology consistent throughout the rules. There is no intent to change any result in any ruling on evidence admissibility.

4. Rule 608(b)

Explanation:

Rule 608 allows specific acts to be inquired into "on cross-examination." But because of Rule 607, impeachment with specific acts may also be permitted on direct examination. The courts have permitted such impeachment on direct in appropriate cases despite the language of Rule 608(b). The restyling makes no change to the language "on cross-examination" on the ground that there is no reason to make a change because courts are already applying the rule properly. A reasonable lawyer might wonder whether the Committee, by keeping the language, intends that it apply the way it is written. The Committee therefore approved the following addition to the basic Committee Note to Rule 608:

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

5. Rules 701, 703, 704 and 705.

Explanation:

These restyled rules cut out all references to an "inference." The Committee determined that the change was stylistic only, but as the term "inference" is often used by lawyers — especially with respect to experts — it might be anticipated that some could think that the change is more important than intended. The Committee therefore approved the following addition to the basic Committee Notes to Rules 701, 703, 704 and 705:

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

6. Rule 801(d)(2).

Explanation: The restyling drops the term “admission” in favor of “statement of a party-opponent. That proposal has been well-received. But lawyers and judges often refer to Rule 801(d)(2) as the hearsay exception for “admissions” — so the Committee thought that an additional explanation of this change was appropriate. The Committee approved the following language to be added to the basic Committee Note to Rule 801(d)(2):

Statements falling under the hearsay exclusion provided by Rule 801(d)(2) are no longer referred to as "admissions" in the title to the subdivision. The term "admissions" is confusing because not all statements covered by the exclusion are admissions in the colloquial sense — a statement can be within the exclusion even if it "admitted" nothing and was not against the party's interest when made. The term "admissions" also raises confusion in comparison with the Rule 804(b)(3) exception for declarations against interest. No change in application of the exclusion is intended.

7. Rule 804(b)(3).

Explanation:

One amendment in the restyled package to the rules is clearly a substantive change to the current rule — Rule 804(b)(3) extends the corroborating circumstances requirement to declarations against penal interest offered by the prosecution.

But this substantive change was not made in the restyling project. By the time restyling takes effect, the restyled-and-substantively-changed Rule 804(b)(3) will already have been in effect for a year. In order to avoid confusion, the Committee decided to provide an explanation in the Committee Note to Rule 804(b)(3).

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

IV. Closing Matters

Judge Hinkle, the Committee, and Judge Rosenthal all expressed deep gratitude to Professor Kimble for his outstanding and incredibly dedicated efforts in the restyling project.

Judge Hinkle noted with regret that Justice Hurwitz and Bill Taylor were going off the Committee. Both were outstanding members and will be sorely missed. The Reporter expressed his gratitude to Justice Hurwitz for his stellar work on Rule 502.

Finally, Judge Hinkle noted that this was his last meeting as Committee Chair. Committee members and the Reporter expressed their deep gratitude for Judge Hinkle's fine work and outstanding leadership as Chair. Without his guidance and commitment, the restyling could never have been done.

The meeting was adjourned on April 23, 2010

Respectfully submitted
Daniel J. Capra
Reporter