Advisory Committee on Evidence Rules

Minutes of the Meeting of October 23-24, 2008

Santa Fe, New Mexico

The Judicial Conference Advisory Committee on the Federal Rules of Evidence (the "Committee") met on October 23rd and 24th in Santa Fe.

The following members of the Committee were present:

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

Also present were:

Hon. Lee H. Rosenthal, Chair of the Committee on Rules of Practice and Procedure ("Standing Committee")
Hon. Marilyn L. Huff, Liaison from the Committee on Rules of Practice and Procedure and member of the Standing Committee's Style Subcommittee
Hon. James A. Teilborg, Chair of the Standing Committee's Style Subcommittee
Hon. Michael M. Baylson, Liaison from the Civil Rules Committee
Hon. Richard A. Schell, Liaison from the Bankruptcy Rules Committee
John K. Rabiej, Esq., Chief, Rules Committee Support Office
James Ishida, Esq., Rules Committee Support Office
Peter McCabe, Esq., Secretary to the Standing Committee on Rules of Practice and Procedure.
Professor Daniel J. Capra, Reporter to the Evidence Rules Committee
Professor Kenneth S. Broun, Consultant to the Evidence Rules Committee
Professor R. Joseph Kimble, Consultant to the Standing Committee's Style Subcommittee
Timothy Reagan, Esq., Federal Judicial Center
Jeffrey Barr, Esq., Rules Committee Support Office
Alan Rudlin, Esq., ABA representative

Opening Business

Judge Hinkle welcomed the members and other participants to the meeting and noted that Ronald Tenpas, the Department of Justice representative, would be going off the Committee after this meeting. Judge Hinkle, Committee members, and the Reporter thanked Mr. Tenpas for his stellar efforts on behalf of the Committee and the rulemaking process.

The Committee approved the minutes of the Spring 2008 meeting.

Judge Hinkle reported on developments since the last meeting. At its June 2008 meeting, the Standing Committee approved for publication the proposed amendment to Rule 804(b)(3) as well as the proposed restyled Rules 101-415 (both proposals discussed below).

Judge Hinkle also reported that Evidence Rule 502, which provides important protections against waiver of privilege, was signed by the President on September 19, 2008. The Committee expressed its gratitude to Judge Rosenthal for her amazing dedication and brilliant leadership in getting Rule 502 passed by Congress. Judge Rosenthal noted that thanks were owed to John Rabiej, Dan Coquillette, and the Reporter for their work in the effort to enact Rule 502. Judge Rosenthal and the Committee also expressed thanks and appreciation to all those members of Congress, and the staff of both Judiciary Committees, who worked through the issues raised by Rule 502 and helped to move the rule through the process.

I. Restyling Project

At the Spring 2007 meeting, the Committee voted unanimously to begin a project to restyle the Evidence Rules. At the Fall 2007 meeting, the Committee agreed upon a protocol and a timetable for the restyling project. At the Spring 2008 meeting the Committee approved the restyled Rules 101-415; the Standing Committee authorized those rules to be released for public comment, but publication will be delayed until all the Evidence Rules are restyled.

At the Fall 2008 meeting the Committee reviewed a draft of restyled Rules 501-706. The draft had been prepared in the following steps: 1) Professor Kimble prepared a first draft, which was reviewed by the Reporter; 2) Professor Kimble made some changes in response to the Reporter's comment; 3) the revised draft was reviewed by the Evidence Rules Committee, and Professor Kimble made some further revisions in light of Committee comments; 4) the Style Subcommittee reviewed the draft and implemented changes, resolving most of the open questions left in the draft. The Advisory Committee reviewed the Style Subcommittee's approved version at the Fall 2008 meeting.

At the meeting, the Committee reviewed each rule to determine whether any change was one of substance rather than style (with "substance" defined as changing an evidentiary result or method of analysis, or changing language that is so heavily engrained in the practice as to constitute a

"sacred phrase"). Under the protocol for the restyling project, if a significant minority of Evidence Rules Committee members agree that the proposed change is substantive, then that change is not implemented.

The Committee also reviewed each rule to determine whether to recommend that a change, even though one of style, might be considered by the Style Subcommittee of the Standing Committee. After considering possible changes of both substance and style, the Committee unanimously voted to refer the restyled rules to the Standing Committee, with the recommendation that they be released for public comment. If the Standing Committee accepts the Evidence Rules Committee's recommendations, then all of the proposed restyled rules would be released for public comment as one complete package, in approximately two years.

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

Rule 501

Rule 501 currently provides as follows:

General Rule

> 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 restyled version of Rule 501, reviewed by the Committee at the meeting, provides as follows:

Privilege in General

> 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 provide otherwise:

- the United States Constitution;
- a federal statute; or
- other rules prescribed by the Supreme Court under statutory authority.

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

Committee Discussion:

1. Before discussion of the particulars of the restyled draft, the Committee considered whether a restyled rule would have to be directly enacted by Congress. 28 U.S.C. § 2074(b) provides that "any rule creating, abolishing or modifying a privilege shall have no force or effect unless approved by Congress." It is clear that any restyling would not create or abolish a privilege. The Committee also found it unlikely that any style changes could be thought to modify the privilege — it would modify the language of the rule, but not the privilege itself.

The Committee therefore decided to proceed with restyling Rule 501. Judge Rosenthal noted that she has been keeping Congress apprised of the work of the Rules Committee, and would notify the House and Senate Judiciary Committees of the restyling of Rule 501 as well as the other Evidence Rules.

2. The Committee considered whether the phrase "under statutory authority" was necessary. But the Reporter argued that the language was necessary given the Enabling Act provision requiring rules of privilege to be directly enacted by Congress. The reference to statutory authority provides emphasis that the Supreme Court cannot establish rules of privilege on its own rulemaking power — nor through its supervisory power over federal courts. The Committee agreed that the reference to statutory authority should be maintained. Professor Kimble noted that the phrase "under statutory authority" was used in other rules, such as Rules 402 and 801. The Committee agreed that it would need to be consistent in the use of the phrase.

3. The Committee agreed that there was no need to refer to the parties who would be holding the privilege, i.e., "witness, person, government, State, or political subdivision thereof ." The rule is not about who holds the privilege — rather it is about which law governs the existence and scope of a privilege. So the Committee agreed with the proposal to strike that language from the rule.

4. The restyled rule refers to a "civil case" while the existing rule refers to "civil actions and proceedings." The Committee recognized that the description of the cases or proceedings to which an Evidence Rule applies raises a "global" issue that must be treated consistently throughout the Rules. It determined that it would revisit all global terminology questions after it had completed restyling the final third of the Evidence Rules.

Committee Vote:

The Committee voted unanimously to recommend that the restyled Rule 501 be released for public comment.

Rule 601

Rule 601 currently provides as follows:

General Rule of Competency

> 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.

The restyled version of Rule 601, reviewed by the Committee at the meeting, provides as follows:

Competency to Testify in General

> Every person is competent to be a witness unless these rules provide otherwise. But in a civil case, state law on witness competency governs when the witness's testimony relates to a claim or defense for which state law supplies the rule of decision.

Committee Discussion:

1. The Reporter noted that the draft had been changed to clarify that state law applies when the witness's testimony, as opposed to competency, relates to a state law claim or defense. The Committee agreed that this change was necessary.

2. A Committee member asked what would happen in a case involving both federal and state claims, in which the competency rules of federal and state laws were in conflict. Both the original rule and the draft would seem to provide that state law on competency would apply to both federal and state claims. The Reporter noted that under the similar language of Rule 501, federal courts generally apply federal law to mixed claims. The Reporter was unaware of any case law involving mixed claims under Rule 601. In any case, the style change would not change the result that a court would reach under the current Rule 601.

Committee Vote:

The Committee voted unanimously to recommend that the restyled Rule 601 be released for public comment.

Rule 602

Rule 602 currently provides as follows:

Lack of 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.

The restyled version of Rule 602, reviewed by the Committee at the meeting, provided as follows:

Need for Personal Knowledge

A witness may testify on 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:

1. Committee members expressed concern about the change from "testifying to a matter" to "testifying *on* a matter." Members thought that courts and litigants more commonly use the term "testifying to a matter." The Committee recognized that the change was one of style; it voted unanimously to recommend to the Style Subcommittee that the draft be amended to return to the original iteration — "testify to a matter."

2. One Committee member wondered whether the exceptional sentence at the end of the rule should be made an exceptional clause at the beginning, e.g., "Except as provided in Rule 703, a witness may testify on a matter . . . " Professor Kimble responded that there is no uniform rule on how to treat exceptional clauses, and that moving the last sentence to the beginning of the rule would complicate the first sentence. The Committee made no recommendation to change the location of the last sentence.

Committee Vote:

The Committee voted unanimously to recommend that the restyled Rule 602 be released for public comment, with the suggestion that the Style Subcommittee substitute "on the matter" for "to the matter" in the first sentence of the Rule.

Rule 603

Rule 603 currently provides as follows:

Oath or Affirmation

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.

The restyled version of Rule 603, reviewed by the Committee at the meeting, provides as follows:

Oath or Affirmation to Testify Truthfully

Before testifying, a witness must give an oath or affirmation to testify truthfully. The oath or affirmation must be in a form designed to impress that duty on the witness's conscience.

Committee discussion:

None.

Committee Vote:

The Committee voted unanimously to recommend that the restyled Rule 603 be released for public comment.

Rule 604

Rule 604 currently provides as follows:

Interpreters

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.

The restyled version of Rule 604, reviewed by the Committee at the meeting, provided as follows:

Interpreters

An interpreter is subject to Rule 603 on giving an oath or affirmation to make a true translation and to Rule 702 on qualifying as an expert.

Committee Discussion:

Committee members expressed concern about the reference to Rule 702 in the restyled draft. Rule 702 covers testifying witnesses, and interpreters do not testify in the same sense as experts under Rule 702. Moreover, some interpreters are not experts within the meaning of Rule 702 — an example is a person who interprets the signals of an impaired witness, based on having taken care of the witness for years. While interpreters must be qualified, the Committee thought a reference to Rule 702 would raise confusion and argument about how to qualify interpreters — that is, the reference could raise problems not currently experienced by courts and litigants in the current

practice. **Consequently, the Committee unanimously determined that the reference to Rule 702 constituted a substantive change.**

Committee Vote:

The Committee voted unanimously that the reference to Rule 702 in the restyled draft constituted a substantive change. It also voted unanimously to recommend that the following restyled version of Rule 604 be released for public comment:

> "An interpreter must be qualified and must give an oath or affirmation to make a true translation."

Rule 605

Rule 605 currently provides as follows:

> **Competency of Judge 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 restyled version of Rule 605, reviewed by the Committee at the meeting, provided as follows:

> **Judge as a Witness**
>
> The presiding judge may not testify as a witness at the trial. A party need not object to preserve a claim that the judge did so.

Committee Discussion:

1. Committee members discussed whether the rule is intended to apply to judges commenting on the evidence. The Reporter stated that the Rule is not intended to regulate the judge in commenting on the evidence, nor in asking questions of witnesses (a topic covered by Rule 614). Committee members stated that taking the term "competency" out of the heading could send an incorrect signal that the rule should be construed more broadly to cover such matters as judges commenting on the evidence.

2. Committee members expressed concern that the restyled language "need not preserve a claim that the judge did so" might be a bit indistinct. The Committee found it stylistically preferable to state that a party "need not object to preserve the issue."

Committee Vote:

The Committee voted unanimously to recommend the following restyled Rule 605 for release for public comment:

Judge's Competency as a Witness

The presiding judge may not testify as a witness at the trial. A party need not object to preserve the issue.

Rule 606

Rule 606 currently provides as follows:

Competency of Juror 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.

(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.

The restyled version of Rule 606, reviewed by the Committee at the meeting, provided as follows:

Juror as a Witness

(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) 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; anything that may have affected the juror or another juror and thus influenced that person'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) any outside influence was improperly brought to bear on a juror; or

(C) a mistake was made in entering the verdict on the verdict form.

Committee Discussion:

1. Professor Kimble noted that if the reference to competency is to be restored in the heading to Rule 605, it should also be restored (for purposes of consistency) to the heading of Rule 606. The

Committee unanimously agreed.

2. Committee members expressed concern over the change from "the effect of anything upon that or any other juror's mind" to " anything that may have affected the juror or another juror." Under the case law of Rule 606(b), juror testimony is allowed about such things as extraneous information or outside influence, but juror testimony is *never* allowed on the *effect* of such information on jury deliberations or on any juror's vote. The change from "the effect of anything" to "anything that may have affected" changes the rule from one prohibiting testimony about *effect* on the jury to one that focuses on the things that may affect the jury. Moreover, the restyled draft, in prohibiting testimony about anything that affected the jury in (b)(1) creates a tension with (b)(2), which permits testimony about things that may have affected the jury. **Accordingly, Committee members unanimously determined that the change to "anything that may have affected the juror" constituted a substantive change.**

Committee Vote:

The Committee voted unanimously to recommend the following restyled Rule 606 for release for public comment:

Juror's Competency as a Witness

(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) 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 the 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) any outside influence was improperly brought to bear on a juror; or

(C) a mistake was made in entering the verdict on the verdict form.

Rule 607

Rule 607 currently reads as follows:

Who May Impeach

The credibility of a witness may be attacked by any party, including the party calling the witness.

The restyled version of Rule 607, reviewed by the Committee at the meeting, provides as follows:

Who May Impeach a Witness

Any party, including the party that called the witness, may attack the witness's credibility.

Committee Discussion:

None.

Committee Vote:

The Committee voted unanimously to recommend that the restyled Rule 607 be released for public comment.

Rule 608

Rule 608 currently provides as follows:

Evidence of Character and Conduct of Witness

(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.

(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.

The restyled version of Rule 608, reviewed by the Committee at the meeting, provided as follows:

A Witness's Character for Truthfulness or Untruthfulness

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

(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 about a matter that relates only to a character for truthfulness, a witness does not waive the privilege against self-incrimination.

Committee Discussion:

1. The restyled version retains the original rule's reference allowing bad acts impeachment only on cross-examination. In fact bad acts impeachment can occur on direct examination as well. This is because Rule 607 allows a party to call an adverse witness, in which case direct examination is functionally cross-examination — in which bad acts may be introduced to impeach the witness's character for untruthfulness. The Committee considered whether it would be a stylistic improvement to delete the references to cross-examination in Rule 608(b), on the ground that it would be a useful clarification and it would not change any case law. After discussion, the Committee decided against deleting the references to cross-examination. The Committee noted that courts are having no problem under the existing rule in allowing bad acts impeachment on direct examination where appropriate. They also observed that the cross-examination limitation may be useful to prohibit an attempt to *support* a witness's credibility through evidence of *good* acts on direct examination. Thus, deleting the references to cross-examination may lead to unintended consequences, well outside the scope of restyling.

2. Some Committee members suggested that the language in restyled Rule 608(a) — "may be attacked or supported by evidence in the form of an opinion about — or a reputation for — having a character for truthfulness or untruthfulness" — might be sharpened stylistically. After discussion, the Committee unanimously voted to suggest to the Style Subcommittee that the language to restyled Rule 608(a) should be changed as follows:

A witness's credibility may be attacked or supported by opinion or reputation evidence ~~in the form of an opinion about — or a reputation for — having a~~ of the witness's character for truthfulness or untruthfulness.

Committee Vote:

The Committee voted unanimously to recommend that restyled Rule 608 be released for

public comment, with the suggestion that the Style Subcommittee consider the proposed change to the first sentence of Rule 608(a).

Rule 609

Rule 609 currently provides as follows:

Impeachment by Evidence of Conviction of Crime

(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.

(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.

(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.

(d) Juvenile adjudications. Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

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

The restyled version of Rule 609, reviewed by the Committee at the meeting, provided as follows:

Impeachment by Evidence of a Criminal Conviction

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

determines that its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect. But before offering the evidence, the proponent must give an adverse party reasonable written notice, in any form, of the intent to use it so that the party has a fair opportunity to contest its use.

(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 a juvenile adjudication is admissible only if:

(1) the case is a criminal case;

(2) the adjudication was of a witness other than the defendant;

(3) a conviction for that offense would be admissible to attack an adult's credibility; and

(4) admitting the evidence is necessary to fairly determine guilt or innocence.

(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:

1. Committee members expressed concern about the deletion of the proviso "under the law under which the witness was convicted" in Rule 609(a)(1). That language provides a choice of law rule — the court must treat the conviction as the convicting jurisdiction would treat it. For example, it could occur that the witness was convicted of a crime that is treated as a misdemeanor in the convicting jurisdiction but that would be treated as a felony in the court in which the witness is testifying. Without the deleted language, a court could well decide to treat the conviction as a felony and find it admissible for impeachment under Rule 609(a)(1) — and that would be a substantive change from the existing rule. **The Committee voted unanimously that the choice of law provision in Rule 609(a)(1) must be restored to avoid a substantive change**— though the

Committee recognized that the language could be improved stylistically, given that the existing iteration uses the word "under" twice within the same phrase.

Professor Kimble suggested using the phrase "in the convicting jurisdiction" instead of "under the law under which the witness was convicted." The Committee agreed that this was a significant stylistic improvement. The Committee voted unanimously to change the restyled Rule 609(a)(1) accordingly:

> 1) for a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than one year, the evidence:

2. The restyled draft deleted the language "under this rule" in the first sentence of Rule 609(d), the provision on juvenile adjudications. The Reporter noted that courts and commentators have relied on the limiting phrase "under this rule" to hold that the Rule's substantial limitations on admissibility of juvenile adjudications are applicable only if the witness is being attacked for having an untruthful character. So for example, if impeachment is for bias, the chances for admissibility are much higher, as the Supreme Court indicated in *Davis v. Alaska*. Deleting the limiting phrase "under this rule" may lead to an argument that Rule 609(d) has been extended to other forms of impeachment. **The Committee therefore determined, unanimously, that deletion of the term "under this rule" was a substantive change, and voted unanimously to restore that language to the restyled draft.** The Committee therefore approved the preamble of Rule 609(d) to be restyled as follows:

> "Evidence of a juvenile adjudication is admissible under this rule only if:"

3. The restyled Rule 609(d)(1) provided, as a condition of admissibility of a juvenile adjudication, that "the case is a criminal case." The Committee determined that this language was inaccurate because it was vague as to which case was being described — the one in which the adjudication was obtained or the one in which the evidence is offered as impeachment. **The Committee therefore voted unanimously that a substantive change was required to the language of restyled Rule 609(d)(1).** After discussion, the Committee unanimously agreed on the following language:

> "Evidence of a juvenile adjudication is admissible under this rule only if:
>
> (1) ~~the case is~~ it is offered in a criminal case;

4. The restyled Rule 609(d)(3) provides, as a condition of admissibility of a juvenile adjudication, that "a conviction for that offense would be admissible to attack an adult's credibility." A Committee member suggested a style change would be useful in clarifying that the juvenile was

never "convicted" for the offense. After discussion, the Committee unanimously agreed to suggest to the Style Subcommittee a style change to Rule 609(d)(3), as follows:

"Evidence of a juvenile adjudication is admissible under this rule only if:

* * *

(3) a conviction of an adult for that offense would be admissible to attack ~~an~~ the adult's credibility;"

5. Rule 609(e), on the pendency of an appeal, refers only to convictions and not juvenile adjudications (the subject of Rule 609(d)). The Style Subcommittee asked the Evidence Rules Committee to consider whether adjudications should be included in subdivision (e). After discussion, the Committee determined that no reference to juvenile adjudications should be made in Rule 609(e). The original Advisory Committee could have included adjudications within the general rule that the pendency of appeal did not affect admissibility. But given the extremely narrow grounds for admissibility of juvenile adjudications in Rule 609(d), it is plausible that the Advisory Committee may have decided to allow trial courts to have discretion to exclude such adjudications if they were on appeal. Therefore, including adjudications under Rule 609(e) would be a substantive change. Looked at another way, the current Rule 609(e) contains no reference to juvenile adjudications, so continuing the omission in the restyling results in no substantive change.

Committee Vote:

The Committee voted unanimously to recommend that restyled Rule 609 be released for public comment, with the following changes to the existing draft: 1) addition of "in the convicting jurisdiction" to Rule 609(a)(1); 2) restoring "under this rule" to the preamble to Rule 609(d); 3) substituting "it is offered in a criminal case" for "the case is a criminal case" in Rule 609(d)(1); and 4) a style suggestion for changing Rule 609(d)(3) to clarify that the juvenile was not "convicted" of an offense.

Rule 610

Rule 610 currently provides as follows:

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.

The restyled version of Rule 610, reviewed by the Committee at the meeting, provides as follows:

Religious Beliefs or Opinions

Evidence of a witness's religious beliefs or opinions is not admissible to attack or support the witness's credibility.

Committee Discussion:

None.

Committee Vote:

The Committee voted unanimously to recommend that restyled Rule 610 be released for public comment.

Rule 611

Rule 611 currently provides as follows:

Mode and Order of Interrogation and Presentation

(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.

(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.

(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.

The restyled version of Rule 611, reviewed by the Committee at the meeting, provided as follows:

Mode and Order of Questioning Witnesses and Presenting Evidence

(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. The court should limit cross-examination to the subject matter of the direct examination and matters affecting a witness's credibility. The court may permit inquiry into additional matters as if on direct examination.

(c) Leading Questions. The court should permit leading questions on direct examination only if necessary to develop the witness's testimony. Ordinarily, the court should permit leading questions on cross-examination. And the court must permit leading questions when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party.

Committee Discussion:

1. The current Rule 611(a) states that the court "shall" exercise reasonable control over the mode and order of interrogating witnesses. One of the goals of the restyling project is to delete the word "shall" because it is subject to different interpretations — it could mean that a rule is mandatory, but it could also mean that a rule is permissive. In Rule 611(a), the restyling substitutes "should" for "shall." Other possibilities are "must" and "may." Committee members determined that

"must" could not be used in Rule 611(a), as that Rule is designed to give courts the discretion to handle various issues that might arise in the presentation of testimony and other evidence at trial. It would be inconsistent with the discretionary grant to impose a mandatory obligation on the trial court. After discussion, Committee members agreed with the restyled version's use of "should" rather than "may" because it implies more authority on the part of the court to control the proceedings.

2. The current Rule 611(b) provides that cross-examination "should be limited" to the subject matter of the direct examination. The restyled draft changed this language to the active voice by providing that "[t]he court should limit cross-examination to the subject matter of the direct examination . . ." Committee members contended that this change of focus, from what the parties should not do to what the court should do, was a substantive change. The changed language could be read to invite more court intervention, when in fact the rule is intended to instruct the parties to adhere to the American Rule in framing questions on cross-examination. Moreover, the focus on what the court should do in the first sentence of Rule 611(b) creates tension with the second sentence of the Rule, which provides that the court may in its discretion permit inquiry beyond the scope of direct. There is tension if the first sentence provides that the court should control the scope of cross-examination and the next sentence provides that it may expand the scope of cross. The Committee determined that the existing Rule's approach had much to recommend it, given its focus in the first instance on limiting the parties, and then allowing them to seek relief from the court. **The Committee unanimously agreed that the language "the court should limit" in the first sentence of the restyled Rule 611(b) effected a substantive change.** It unanimously approved a restyling that retained the focus of the existing Rule 611(b), changing the restyled version as follows:

> "~~The court should limit cross-examination to~~ Cross-examination should not exceed the subject matter of the direct examination and matters affecting the witness's credibility.

3. As in Rule 611(b), the restyling attempted to avoid the passive voice that is in the current Rule 611(c) by changing the focus of the rule to court involvement in regulating leading questions. The result is to imply that courts are to be more active in regulating leading questions than is implied in the current rule. As with Rule 611(b), **the Committee unanimously agreed that the change of focus in the first sentence of Rule 611(c) effected a substantive change to the Rule.** The Committee voted unanimously to return to the original focus of the rule (with a slight stylistic variation) and approved the following changes from the restyled version of the first sentence to Rule 611(c):

> "~~The court should permit leading questions~~ Leading questions should not be used on direct examination ~~only if~~ except as necessary to develop the witness's testimony."

4. The restyled version of the last sentence of Rule 611(c) provided that the court "must" permit leading questions when a party calls a hostile witness. Committee members noted, however, that under the case law the court is not absolutely required to permit leading questions of a hostile witness. *See, e.g., Rodriguez v. Banco Cent.* 990 F.2d 7 (1st Cir. 1993) (finding no error in the trial court's refusal to permit leading questions of hostile witnesses). **The Committee therefore determined unanimously that the use of the word "must" effected a substantive change of the last sentence of Rule 611(c).** The Committee unanimously approved the following restyled version of Rule 611(c):

> "And the court ~~must~~ should permit leading questions when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party."

Committee Vote:

The Committee voted unanimously to recommend that restyled Rule 611 be released for public comment, with the following changes to the restyled version: 1) Changing the first sentence of Rule 611(b) to "Cross-examination should not exceed the subject matter of the direct examination . . ."; 2) Changing the first sentence of Rule 611(c) to "Leading questions should not be used on direct examination . . ." 3) Changing "must" to "should" in the last sentence of Rule 611(c).

Rule 612

Rule 612 currently provides as follows:

Writing Used to Refresh 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.

The restyled version of Rule 612, reviewed by the Committee at the meeting, provides as follows:

Writing Used to Refresh a Witness's Memory

(a) General Application. This rule gives an adverse party certain options when a witness uses any form of 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. 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:

The Committee determined that the few issues it had previously raised about the restyling of Rule 612 had all been addressed very effectively by Professor Kimble in the latest draft.

Committee Vote:

The Committee voted unanimously to recommend that the restyled Rule 612 be released for public comment.

Rule 613

Rule 613 currently provides as follows:

Prior Statements of Witnesses

(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.

(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).

The restyled version of Rule 613, reviewed by the Committee at the meeting, provided as follows:

Witness's Prior Statements

(a) Showing or Disclosing the Statement During Questioning. When questioning a witness about the witness's prior statement, the 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.

(b) Extrinsic Evidence of a Prior Inconsistent Statement. Extrinsic evidence of a witness's prior inconsistent statement is admissible only if justice so requires or 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. This subdivision (b) does not apply to a party opponent's admission under Rule 801(d)(2).

Committee Discussion:

1. Rule 613(a) currently provides that a prior inconsistent statement need not be shown to the witness at the time of questioning, but that it must be shown or disclosed to "opposing counsel." This was restyled to provide that the statement must be shown "to an adverse party." Committee members pointed out that the change would mean that if it was the adverse party being examined, the examiner would have to disclose the statement to the witness on the stand. This would be contrary to the first sentence of the Rule, under which witnesses are not entitled to inspect their inconsistent statements. **Thus, taking out the reference to "opposing counsel" effected a substantive change in situations in which the adverse party is being questioned.** The Committee unanimously determined that the reference to "an adverse party" in the second sentence of Rule 613(a) had to be changed to "an adverse party's attorney."

2. The existing version of Rule 613(b) provides that extrinsic evidence of a prior inconsistent statement is not admissible unless the witness is afforded an opportunity to explain or deny the statement, "or the interests of justice so require." This interests of justice exception to the general rule of presentment is intended to be a narrow exception, and has been applied narrowly as well (usually to situations in which the statement was discovered after the witness has been excused and can no longer be produced). The restyled version places the interest of justice language as the first factor for the court to consider in determining whether to admit extrinsic evidence of a prior inconsistent statement. Committee members argued that this new placement raised "interest of justice" to a more prominent place than intended by the drafters of the rule. The drafters intended that the major focus of admissibility is to be whether the witness is afforded an opportunity to explain or deny the statement. **The Committee unanimously determined that the change in placement of the "interest of justice" factor effected a substantive change**. The Committee voted unanimously to return the interest of justice factor to the end of the first sentence of Rule 613(b).

Committee Vote:

The Committee voted unanimously to recommend that the following restyled version of Rule 613 be released for public comment (with changes shown from the restyled version reviewed at the Committee meeting:

Witness's Prior Statements

(a) Showing or Disclosing the Statement During Questioning. When questioning a witness about the witness's prior statement, the 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<u>'s attorney</u>.

(b) Extrinsic Evidence of a Prior Inconsistent Statement. Extrinsic evidence of a witness's prior inconsistent statement is admissible only if ~~justice so requires or 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 a party opponent's admission under Rule 801(d)(2).

Rule 614

Rule 614 currently provides as follows:

Calling and Interrogation of Witnesses by the Court

(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.

(b) Interrogation by court. The court may interrogate witnesses, whether called by itself or by a party.

(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.

The restyled version of Rule 614, reviewed by the Committee at the meeting, provides as follows:

Court's Calling or Questioning a Witness

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

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

(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:

None.

Committee Vote:

The Committee voted unanimously to recommend that the restyled version of Rule 614 be released for public comment.

Rule 615

Rule 615 currently provides as follows:

Exclusion of 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.

The restyled version of Rule 615, reviewed by the Committee at the meeting, provides as follows:

Excluding Witnesses

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:

None.

Committee Vote:

The Committee voted unanimously to recommend that the restyled version of Rule 615 be released for public comment.

Rule 701

Rule 701 currently provides as follows:

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.

The restyled version of Rule 701, reviewed by the Committee at the meeting, provides as follows:

Opinion Testimony by Lay Witnesses

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 Discussion:

1. In the drafting process leading up to the meeting, the major question on Rule 701 was whether the reference to "inferences" could be deleted as superfluous — leading to similar deletions of the references to "inferences" throughout Article VII. Professor Broun researched whether the term "inference" had any meaning in the case law different from "opinion" and found no case that had made any such distinction. The Reporter consulted scholars in Evidence and determined that a separate reference to "inferences" was unnecessary because in the final analysis, an inference (as used in Article VII) is a type of opinion.

At the meeting, the Committee unanimously agreed with the deletion of "inference" from Rule 701 as well as the other rules in Article VII.

Committee Vote:

The Committee voted unanimously to recommend that the restyled Rule 701 be released for public comment.

Rule 702

Rule 702 currently provides as follows:

Testimony by Experts

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.

The restyled version of Rule 702, reviewed by the Committee at the meeting, provides as follows:

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 Discussion:

In discussions of previous drafts, Professor Kimble, Committee members and the Style Subcommittee worked to make sure that the preamble to the rule accurately set forth the existing qualification requirements. At the meeting, there was no further discussion on restyled Rule 702.

Committee Vote:

The Committee voted unanimously to recommend that restyled Rule 702 be released for public comment.

Rule 703

Rule 703 currently provides as follows:

Basis of Opinion Testimony by Experts

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.

The restyled version of Rule 703, reviewed by the Committee at the meeting, provided as follows:

Basis of an Expert's Opinion Testimony

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 that same 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 the court determines that their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

Committee Discussion:

1. The existing rule provides that experts can rely on inadmissible information if other experts "in the particular field" would rely on such information in forming an opinion. The restyled version referred to experts "in that same field." Committee members noted that the case law on Rule 703 often relied on the language "the particular field" in order to determine which experts' whose reasonable reliance would be relevant. Members expressed concern that any change of that language could lead to unanticipated results. Committee members described the change to "that same field" as substantive, but the members of the Style Subcommittee at the meeting agreed in any case to restore the term "the particular field." The Committee unanimously approved that change, finding it unnecessary under the circumstances to vote on whether the proposed change in the restyled draft to "that same field" was substantive.

2. The Style Subcommittee asked the Committee to consider whether the reference in the last sentence of Rule 703 to "the jury" could have "any negative or unintended implications in a bench trial without a jury." Committee members addressed this question and determined that the reference to "the jury" was an essential part of the Rule. The last sentence of Rule 703 addresses whether an expert who relies on otherwise inadmissible information can disclose it at trial. The danger in the disclosure is that the jury will use the information not just to assess the basis of the expert's opinion, but also for some purpose not permitted under the Evidence Rules (e.g., using hearsay information for the truth of the matter asserted). At a bench trial, there is no comparable risk of misuse. Moreover, in a bench trial, it would make no sense to try to regulate disclosure of the otherwise inadmissible information at trial, because the judge likely would already have heard about the information at a *Daubert* hearing. Consequently, the reference to "the jury" in Rule 703 was appropriate and should be retained.

Committee Vote:

The Committee voted unanimously to recommend that the restyled version of Rule 703 be released for public comment, with the phrase "that same field" replaced by "the particular field" in the second sentence of the Rule.

Rule 704

Rule 704 currently provides as follows:

Opinion on 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.

(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.

The restyled version of Rule 704, reviewed by the Committee at the meeting, provided as follows:

Opinion on an Ultimate Issue

(a) Admissibility in General. An opinion is not objectionable just because it embraces an ultimate issue.

(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 Discussion:

1. Committee members suggested that the heading to subdivision (a) might be improved

because Rule 704(a) does not provide a grant of admissibility — rather it emphasizes that an opinion that is otherwise admissible (because it is helpful) is not excluded merely because it embraces an ultimate issue. The Committee unanimously agreed to request the Style Subcommittee to consider a change to the heading of subdivision (a) that would delete the term "Admissibility."

2. One Committee member suggested that the phrase "just because" in Rule 704(a) should be changed to "solely because" in order to sound less colloquial. The motion to make that style choice was defeated by a vote of two in favor and five against.

Committee Vote:

The Committee voted unanimously to recommend that restyled Rule 704 be released for public comment, with a suggestion to the Style Subcommittee to delete the word "Admissibility" from the heading to Rule 704(a).

Rule 705

Rule 705 currently provides as follows:

Disclosure of Facts or Data Underlying Expert 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.

The restyled version of Rule 705, reviewed by the Committee at the meeting, provided as follows:

Disclosing the Facts or Data Underlying an Expert's Opinion

> 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 court may require the expert to disclose those facts or data on cross-examination.

Committee Discussion:

The Style Subcommittee avoided the passive voice in the second sentence of the existing rule by providing that "the court may require the expert to disclose" facts or data on cross-examination. But Committee members noted that a focus on the court's role oversimplified what occurs at the trial when an expert does not disclose facts or data on direct. At that point, the cross-examiner can demand disclosure of the facts or data on cross, and the expert would be expected to comply. If not, the court would then have the authority to require the disclosure. The Committee unanimously determined that **the change of focus to solely what the court will do effected a substantive change in how Rule 705 actually applies in a litigation.** The Committee voted unanimously to restore the language of the existing rule: "the expert may be required."

Committee Vote:

The Committee voted unanimously to recommend that the following restyled version of Rule 705 be approved for public comment (blacklined from the restyled version reviewed by the Committee at the meeting):

Disclosing the Facts or Data Underlying an Expert's Opinion

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 court may require~~ the expert may be required to disclose those facts or data on cross-examination.

Rule 706

Rule 706 currently provides as follows:

Court Appointed Experts

(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.

(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) 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) Parties' experts of own selection. Nothing in this rule limits the parties in calling expert witnesses of their own selection.

The restyled version of Rule 706, reviewed by the Committee at the meeting, provides as follows:

Court-Appointed Experts

(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, in any form, 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.

(c) Compensation. The expert is entitled to whatever reasonable compensation the court allows. The compensation is payable as follows:

(1) in a criminal case and in a civil action or proceeding involving just compensation under the Fifth Amendment, from any funds that are provided by law; and

(2) in any other civil action or proceeding, by the parties in the proportion and at the time that the court directs — and the compensation is then charged like other costs.

(d) Disclosing the Appointment. The court may authorize disclosure to the jury that the court appointed the expert.

(e) Parties' Choice of Their Own Experts. This rule does not limit a party in calling its own experts

Committee Discussion:

Committee members suggested that it would be useful to change the heading to the Rule to clarify that the Rule covered only court-appointed experts who testify as witnesses. The Rule does not cover, for example, experts appointed by the court to be technical advisors. The Committee voted unanimously to suggest to the Style Subcommittee that the heading be amended to refer to "Court-Appointed Expert Witnesses."

Committee Vote:

The Committee voted unanimously to recommend that the restyled Rule 706 be released for public comment, with the suggestion to the Style Subcommittee that it consider changing the title of the rule to "Court-Appointed Expert Witnesses."

Rules 101-415

The restyled Rules 101-415 were approved for release for public comment at the June 2008 Standing Committee meeting (though the release will be delayed until all the rules have been restyled). The Style Subcommittee raised two issues on which it sought reconsideration by the Evidence Rules Committee. Both of these issues concerned restyled Rule 404(b)(2). The first was the heading to restyled Rule 404(b)(2) — which currently is "Permitted Uses". The Style Subcommittee requested reconsideration of a proposal to change the heading to "Exceptions." The second and related issue was requested reconsideration of a proposal to provide that "the court may admit" evidence of uncharged misconduct when offered for a non-character purpose. Restyled Rule 404(b) currently states that such evidence "may be admissible" if offered for a non-character purpose — which is the same language as is used in the existing Rule 404(b).

Both proposals for reconsideration were an attempt to use terminology that is consistent with Rules 407, 408 and other similar rules. Those rules, as restyled, are structured as providing "exceptions" to exclusionary principles, in which "the court may admit" the evidence if offered for a proper purpose.

The Committee considered the changes to Rule 404(b) proposed by the Style Subcommittee and unanimously rejected them on the ground that they would effect substantive changes to the Rule. The DOJ representative noted that hundreds of cases had established that Rule 404(b) was a rule of inclusion — not an "exception." It was also noted that Congress explicitly changed the original Advisory Committee draft of Rule 404(b) — which used more exclusionary language — to "may be admissible," thus indicating a legislative intent that Rule 404(b) is to be treated as an inclusionary rule. Under the Style protocol, language in a rule that is a "sacred phrase" is considered substantive and is not to be changed. The Committee unanimously determined that changing the heading to "Exceptions" and changing the text of the Rule to "the court may admit" was substantive both because 1) it made the rule potentially less permissive and 2) it would alter a "sacred phrase." Many members noted that the cost of stylistic uniformity would be high, given the Justice Department's strong objections to any attempt to change Rule 404(b) in a way that might be considered less permissive.

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

At its last meeting the Evidence Rules Committee approved, for release for public comment, an amendment to Evidence Rule 804(b)(3). The proposal was approved by the Standing Committee. The comment period ends in March, 2009. The amendment would require the government to provide corroborating circumstances indicating trustworthiness before a declaration against penal interest could be admitted in a criminal case. In its current form Rule 804(b)(3) requires an accused to provide corroborating circumstances clearly indicating the trustworthiness of a declaration against

penal interest for the hearsay to be admissible; but by its terms the Rule imposes no similar requirement on the prosecution. The need for the amendment arose after the Supreme Court's decision in *Whorton v. Bockting*, which held that the Confrontation Clause provides no protection against unreliable hearsay if that hearsay is nontestimonial. If the prosecution has to show only that a declarant made a statement that tended to disserve his interest — i.e., all that is required under the terms of the existing rule — then it might well be that unreliable hearsay could be admitted against an accused.

The Reporter noted that no public comment had yet been received on the proposed amendment to Rule 804(b)(3). The Committee will consider all public comments at its next meeting.

III. Report on Subcommittees

The Judicial Conference has requested the Standing Committee (as well as other Conference committees) to prepare a report on the use of subcommittees. Judge Rosenthal in turn asked the Advisory Committees to report on use of subcommittees — the goal is to prepare a "best practices" report on the use of subcommittees. Judge Hinkle reported on this development and informed the Committee that he had reported to Judge Rosenthal that, as the Evidence Rules Committee has no subcommittees, it had no relevant information about best practices — but that it would support the suggestions of Judge Rosenthal and the other Advisory Committees that do use subcommittees. The members of the Evidence Rules Committee agreed with this approach.

IV. Report on Proposed Amendment to Civil Rule 26

Judge Hinkle reported on a proposed amendment to Civil Rule 26. The amendment would provide protection against discovery of work product when counsel consults with testifying experts. One sentence in the Committee Note to the proposed amendment provides an opinion that if work product is to be protected in the discovery process, it should also result in the information being excluded at trial. Judge Hinkle observed that this sentence of the Committee Note carried possible implications for the rules of evidence. Judge Kravitz, chair of the Civil Rules Committee, has agreed that the amendment to Rule 26 deals only with discovery, not trial evidence. Judge Hinkle and the Evidence Committee Reporter have suggested removal of the Committee Note's reference to admissibility at trial. The Evidence Committee was not asked to address this issue and took no action.

V. Report on *Crawford v. Washington* and Subsequent Case Law

The Reporter prepared a report for the Committee on case law developments after *Crawford v. Washington*. The Court in *Crawford* held that if hearsay is "testimonial," its admission against an accused violates the right to confrontation unless the declarant is available and subject to cross-

examination. The Court in *Crawford* declined to define the term "testimonial," but the later case of *Davis v. Washington* provides some guidance on the proper definition of that term: a hearsay statement will be testimonial only if the primary purpose for making the statement is to have it used in a criminal prosecution. Thereafter the Court in *Whorton v. Bockting* held that if hearsay is not testimonial, then its admissibility is governed solely by rules of evidence, and not by the Confrontation Clause. This Supreme Court case law has been reviewed and developed in a large body of lower court case law. In the 2008-9 term, the Supreme Court will once again address a question under the Confrontation Clause — whether a report of a chemical test for drugs is testimonial.

Committee members resolved to continue to monitor case law developments after *Crawford*, and to propose amendments should they become necessary to bring the Federal Rules into compliance with the *Crawford* standards as developed in the federal case law.

VI. Next Meeting

The Spring 2009 meeting of the Committee is scheduled for March 30th and 31st in Washington, D. C.

Respectfully submitted,

Daniel J. Capra
Reporter