106th Congress, 2d Session – – – – – – – – – – – – – House Document 106–225

AMENDMENTS TO FEDERAL RULES OF EVIDENCE

COMMUNICATION

FROM

THE CHIEF JUSTICE, THE SUPREME COURT OF THE UNITED STATES

TRANSMITTING

AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE THAT HAVE BEEN ADOPTED BY THE COURT, PURSUANT TO 28 U.S.C. 2072

MAY 2, 2000.—Referred to the Committee on the Judiciary and ordered to be printed

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SUPREME COURT OF THE UNITED STATES,
Washington, DC, April 17, 2000.

Hon. J. DENNIS HASTERT,
Speaker of the House of Representatives,
Washington, DC.

DEAR MR. SPEAKER: By direction of the Supreme Court of the United States, I have the honor to submit to the Congress the amendments to the Federal Rules of Evidence that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying these rules are excerpts from the report of the Judicial Conference of the United States containing the Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States code.

Sincerely,

WILLIAM H. REHNQUIST.

SUPREME COURT OF THE UNITED STATES

APR 17 2000

ORDERED:

1. That the Federal Rules of Evidence for the United States District Courts be, and they hereby are, amended by including therein amendments to Evidence Rules 103, 404, 701, 702, 703, 803(6), and 902.

[See infra., pp. ___ ___ ___.]

2. That the foregoing amendments to the Federal Rules of Evidence shall take effect on December 1, 2000, and shall govern all proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Evidence in accordance with the provisions of Section 2072 of Title 28, United States Code.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF 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.

(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) 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) 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.

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

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

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

same trait of character of the accused offered by the prosecution;

(2) Character of alleged victim. — Evidence 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.

(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.

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.

Rule 702. 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.

Rule 703. Bases 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.

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

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

* * * * *

(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.

* * * * *

Rule 902. Self-authentication

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

* * * * *

(11) Certified domestic records of regularly conducted activity. — The original or a duplicate of a domestic record of regularly conducted

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

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

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

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

A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must

make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.

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

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

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

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

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

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

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CRIMINAL RULES

FERN M. SMITH
EVIDENCE RULES

TO: **Honorable Anthony J. Scirica, Chair**
Standing Committee on Rules of Practice and Procedure

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

DATE: **May 1, 1999**

RE: **Report of the Advisory Committee on Evidence Rules**

I. Introduction

The Advisory Committee on Evidence Rules met on April 12th and 13th, 1999, in New York City. At the meeting, the Committee approved seven proposed amendments to the Evidence Rules, with the recommendation that the Standing Committee approve them and forward them to the Judicial Conference. The discussion of these proposed amendments is summarized in Part II of this Report. An appendix to this Report includes the text, Committee Note, GAP report, and summary of public comment for each proposed amendment.

* * * * *

II. Action Items — Recommendations to Forward Proposed Amendments to the Judicial Conference

At its January 1998 meeting, the Standing Committee approved the publication of proposed amendments to Evidence Rules 103, 404(a), 803(6) and 902. At its June 1998 meeting,

the Standing Committee approved the publication of proposed amendments to Evidence Rules 701, 702 and 703. The public comment period for all of these rules was the same — August 1, 1998 to February 1, 1999.

The Advisory Committee on Evidence Rules conducted two public hearings on the proposed amendments, at which it heard the testimony of 18 witnesses. In addition, the Committee received written comments from 174 persons or organizations, commenting on all or some of the proposed amendments.

The Committee has considered all of these comments in detail, and has responded to many of them through revision of the text or Committee Notes of some of the proposals released for public comment. The Committee has also considered and incorporated almost all of the suggestions from the Style Subcommittee of the Standing Committee. After careful review, the Evidence Rules Committee recommends that all of the proposed amendments, as revised where necessary after publication, be approved and forwarded to the Judicial Conference.

A complete discussion of the Committee's consideration of the public comments respecting each proposed amendment can be found in the draft minutes attached to this Report. The following discussion briefly summarizes the proposed amendments.

A. Action Item — Rule 103. Rulings on Evidence. [Rules App. B-10]

Courts are currently in dispute over whether it is necessary for a party to renew an objection or offer of proof at trial, after the trial court has made an advance ruling on the admissibility of proffered evidence. Some courts hold that a renewed objection or offer of proof is always required in order to preserve a claim of error on appeal. Some cases can be found holding that a renewed objection or offer of proof is never required. Some courts hold that a renewal is not required if the advance ruling is definitive. The Evidence Rules Committee has proposed an amendment to Rule 103 that would resolve this conflict in the courts, and provide litigants with helpful guidance as to when it is necessary to renew an objection or offer of proof in order to preserve a claim of error for appeal. Under the proposed amendment, if the advance ruling is definitive, a party need not renew an objection or offer of proof at trial; otherwise renewal is required. Requiring renewal when the advance ruling is definitive leads to wasteful practice and costly litigation, and provides a trap for the unwary. Requiring renewal where the ruling is not definitive properly gives the trial judge the opportunity to revisit the admissibility question in the context of the trial.

Public comment on the proposed amendment's resolution of the renewal question was almost uniformly favorable. Some comments suggested that certain details might be treated in the Committee Note. For example, it was suggested that the Committee Note might specify that developments occurring after the advance ruling could not be the subject of an appeal unless their relevance was brought to the trial court's attention by way of motion to strike or other suitable

motion. It was also suggested that the Committee Note refer to other laws that require an appeal to the district court from nondispositive rulings of Magistrate Judges. These suggestions were incorporated into the Committee Note.

The proposed amendment to Evidence Rule 103 that was issued for public comment contained a sentence that purported to codify and extend the Supreme Court's decision in *Luce v. United States.* Under *Luce* a criminal defendant must testify at trial in order to preserve the right to appeal an advance ruling admitting impeachment evidence. Lower courts have extended the *Luce* rule to comparable situations, holding, for example, that if the trial court rules in advance that certain evidence will be admissible if a party pursues a certain claim or defense, then the party must actually pursue that claim or defense at trial in order to preserve a claim of error on appeal. The proposal issued for public comment recognized that any codification of *Luce* would necessarily have to extend to comparable situations.

The public comment on the proposed codification and extension of *Luce* was generally negative. Substantial concerns were expressed about the problematic and largely undefinable impact of *Luce* in civil cases. The Evidence Rules Committee considered these comments and, after substantial discussion and reflection, determined that the comments had merit. The Committee therefore deleted the sentence from the published draft that codified and extended *Luce.* The Committee considered the possibility that deletion of the sentence could create an inference that the proposed amendment purported to overrule *Luce*. The Committee determined that such a construction would be unreasonable, because the proposed amendment concerns *renewal* of objections or offers of proof, but *Luce* concerns fulfillment of a condition precedent to the trial court's ruling. *Luce* does not require renewal of an objection or offer of proof; it requires the occurrence of a trial event that was a condition precedent to the admissibility of evidence. In order to quell any concerns about the effect of the proposed amendment on *Luce,* however, the Committee Note was revised to indicate that the proposed amendment is not intended to affect the rule set forth in *Luce.*

Recommendation — The Evidence Rules Committee recommends that the proposed amendment to Evidence Rule 103, as modified following publication, be approved and forwarded to the Judicial Conference.

B. Action Item — Rule 404(a). Character Evidence. [Rules App. B-26]

The proposed amendment to Evidence Rule 404(a) is designed to provide a more balanced presentation of character evidence when an accused decides to attack the alleged victim's character. Under current law, an accused who attacks the alleged victim's character does not open the door to an attack on his own character. The current rule therefore permits the defendant to attack an alleged victim's character without giving the jury the opportunity to consider equally relevant evidence about the accused's own propensity to act in a certain manner.

The Evidence Rules Committee proposed the amendment in response to a provision in the Omnibus Crime Bill that would have amended Evidence Rule 404(a) directly. The Congressional proposal would have permitted the government far more leeway in attacking the accused's character in response to an attack on the alleged victim's character.

The proposed amendment as issued for public comment provided that an attack on the alleged victim's character opened the door to evidence of any of the accused's "pertinent" character traits. Public comment on this proposal suggested that the language should be narrowed to permit only an attack on the "same" character trait that the accused raised as to the victim. The Committee agreed that this modification was necessary to prevent a potentially overbroad use of character evidence. The public comment on the proposal, as so modified, was substantially positive.

Recommendation — The Evidence Rules Committee recommends that the proposed amendment to Evidence Rule 404(a), as modified following publication, be approved and forwarded to the Judicial Conference.

C. Action Item — Rule 701. Opinion Testimony by Lay Witnesses. [Rules App. B-35]

The proposed amendment to Evidence Rule 701 seeks to prevent parties from proffering an expert as a lay witness in an attempt to evade the gatekeeper and reliability requirements of Rule 702. As issued for public comment, the proposed amendment provided that testimony cannot be admitted under Rule 701 if it is based on "scientific, technical or other specialized knowledge." The language of the draft issued for public comment intentionally tracked the language defining expert testimony in Rule 702.

The public comment on the proposal was largely positive. Some members of the public went on record as opposing the proposal, but in fact their comments were directed at the proposed amendment to Evidence Rule 702. The major source of objection directed specifically to the proposed amendment to Rule 701 has come from the Department of Justice. DOJ argued that it is appropriate to have overlap between Rules 701 and 702, so that experts could be permitted to testify as lay witnesses. DOJ also expressed concern that exclusion under Rule 701 of all testimony based on "specialized knowledge" would result in many more witnesses having to qualify as experts — leading to deleterious consequences because the government would have to identify many of those witnesses in advance of trial under the Civil and Criminal Rules governing disclosure.

At its April meeting, the Evidence Rules Committee carefully considered the objections of the Justice Department, and decided to revise the proposed amendment to address the concern

that all testimony based on any kind of specialized knowledge would have to be treated as expert testimony. The proposed amendment, as revised, provides that testimony cannot qualify under Rule 701 if it is based on "scientific, technical or other specialized knowledge *within the scope of Rule 702.*" The Committee Note was also revised to emphasize that Rule 701 does not prohibit lay witness testimony on matters of common knowledge that traditionally have been the subject of lay opinions. The Committee believes that the proposed amendment, as revised, will help to protect against evasion of the Rule 702 reliability requirements, without requiring parties to qualify as experts those witnesses who traditionally and properly have been considered as providing lay witness testimony.

Recommendation — The Evidence Rules Committee recommends that the proposed amendment to Evidence Rule 701, as modified following publication, be approved and forwarded to the Judicial Conference.

D. Action Item — Rule 702. Testimony by Experts. [Rules App. B-53]

The proposed amendment to Evidence Rule 702 is in response to the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* It attempts to address the conflict in the courts about the meaning of *Daubert* and also attempts to provide guidance for courts and litigants as to the factors to consider in determining whether an expert's testimony is reliable. The proposal is also a response to bills proposed in Congress that purported to "codify" *Daubert*, but that, in the Committee's view, raised more problems than they solved. The proposed amendment to Evidence Rule 702 specifically extends the trial court's *Daubert* gatekeeping function to all expert testimony, as affirmed by the Supreme Court in *Kumho Tire Co. v. Carmichael*, requires a showing of reliable methodology and sufficient basis, and provides that the expert's methodology must be applied properly to the facts of the case. The Committee has prepared an extensive Committee Note that will provide guidance for courts and litigants in determining whether expert testimony is sufficiently reliable to be admissible.

The public comment on the proposed amendment was mixed. Those in favor of the proposal believed that it was important to codify the *Daubert* principles by using general language such as that chosen in the proposed amendment. They noted that many courts, even after *Daubert,* had done little screening of dubious expert testimony. Those opposed to the proposed amendment argued that it would 1) permit trial judges to usurp the role of the jury; 2) lead to a proliferation of challenges to expert testimony; 3) allow judges to reject one of two competing methodologies in the same field of expertise; and 4) result in the wholesale rejection of experience-based expert testimony.

The Evidence Rules Committee considered all of these comments in detail. It determined that most of the concerns were not directed toward the proposal itself, but rather toward the case law that the proposal codifies, most importantly *Daubert* and *Kumho*. In order to allay concerns

about the potential misuse of the amended Rule, however, the Committee revised the Committee Note to clarify that the amendment was not intended to usurp the role of the jury, nor to provide an excuse to challenge every expert, nor to prohibit experience-based expert testimony. The Note was also revised to emphasize that the Rule is broad enough to permit testimony from two or more competing methodologies in the same field of expertise. Finally, in response to public comment, the text of the proposal was revised slightly to avoid a potential conflict with Rule 703, which governs the reliability of inadmissible information used as the basis of an expert's opinion.

The Supreme Court granted certiorari in *Kumho* before the Standing Committee authorized the proposed amendment to Rule 702 to be released for public comment. *Kumho* was decided shortly after the public comment period ended. At its April meeting, the Evidence Rules Committee carefully considered the impact of *Kumho* on the proposed amendment. The Committee unanimously found that the Court's analysis in *Kumho* was completely consistent with, and supportive of, the approach taken by the proposed amendment. The Court in *Kumho* held that the gatekeeper function applies to all expert testimony; that the specific *Daubert* factors might apply to non-scientific expert testimony; and that the Rule 702 reliability standard must be applied flexibly, depending on the field of expertise. The proposed amendment precisely tracks *Kumho* in all these respects. The Court in *Kumho* emphasized the same overriding standard as that set forth in the Committee Note to the proposed amendment, i.e., that an expert must employ the same degree of intellectual rigor in testifying as he would be expected to employ in his professional life. The Committee also noted that the *Kumho* Court favorably cited the Committee Note to the proposed amendment to Evidence Rule 702 as issued for public comment.

For all these reasons, the Committee decided that the Supreme Court's decision in *Kumho* provided more rather than less reason for proceeding with the proposed amendment. The Committee Note was revised to include a number of references to *Kumho*. The Committee considered whether, in light of *Kumho's* resolution of the applicability of *Daubert* to non-scientific experts, it made sense to amend the Rule. The Committee unanimously agreed that the amendment would perform a great service even after the Court's resolution in *Kumho*. Even after *Kumho*, there are many unresolved questions about the meaning of *Daubert*, such as 1) the standard of proof to be employed by the trial judge in determining reliability; 2) whether the trial court must look at how the expert's methods are applied; and 3) the relationship between the expert's methods and the conclusions drawn by the expert. Moreover, even without any obvious conflicts on the specifics, the courts have divided more generally over how to approach a *Daubert* question. Some courts approach *Daubert* as a rigorous exercise requiring the trial court to scrutinize in detail the expert's basis, methods, and application. Other courts hold that *Daubert* requires only that the trial court assure itself that the expert's opinion is something more than unfounded speculation. The Evidence Rules Committee believes that adoption of the proposed rule change, and the Committee Note, will help to provide uniformity in the *approach* to *Daubert* questions. The proposed amendment and the Committee Note clearly envision a more rigorous and structured approach than some courts are currently employing.

Finally, if the Rule is not amended, there is legitimate cause for concern that Congress

will act to amend Rule 702. Prior codification efforts were shelved partly because of assurances that the Rules Committee was already considering a change to Rule 702. If the Committee fails to act, these congressional efforts may be renewed.

Recommendation — The Evidence Rules Committee recommends that the proposed amendment to Evidence Rule 702, as modified following publication, be approved and forwarded to the Judicial Conference.

E. Action Item — Rule 703. Bases of Opinion Testimony by Experts. [Rules App. B-99]

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

The public comment on the proposed amendment was largely positive. Most comments agreed that under current practice, Rule 703 is all too often used as a device for evading exclusionary rules of evidence, and that the balancing test set forth in the proposal is necessary to prevent this abuse. Negative comments expressed concern that the proposal did not specify how the balancing test would apply in rebuttal, and did not mention whether a proponent might be able to introduce inadmissible information on direct examination in order to remove the sting of an anticipated attack on the expert's basis. In response to these comments, the Committee Note was revised to emphasize that the balancing test set forth in the amendment is flexible enough to accommodate each of these situations.

Other public comments suggested that the amendment clarify why inadmissible information relied upon by the expert might have probative value that would be weighed under the amendment's balancing test. In response to these comments, the Committee revised the text of the amendment to provide that the trial judge must assess the inadmissible information's "probative value in assisting the jury to evaluate the expert's opinion." Finally, the Committee adopted the suggestions of the Style Subcommittee of the Standing Committee, and made stylistic improvements to the proposal as it was released for public comment.

Recommendation — The Evidence Rules Committee recommends that the proposed amendment to Evidence Rule 703, as modified following publication, be approved and forwarded to the Judicial Conference.

F. Action Item — Rule 803(6). Records of Regularly Conducted Activity. [Rules App. B-120]

Under current law, a foreign record of regularly conducted activity can be admitted in a criminal case without the necessity of calling a foundation witness. 18 U.S.C. § 3505 provides that foreign business records may be admitted if they are certified by a qualified witness, under circumstances in which the law of the foreign country would punish a false certification. In contrast, the foundation for all other records admissible under Evidence Rule 803(6) must be established by a testifying witness. The intent of the proposed amendment to Evidence Rule 803(6) is to provide for uniform treatment of business records, and to save the parties the expense and inconvenience of producing live witnesses for what is often perfunctory testimony. The approach taken by the proposed amendment, permitting a foundation for business records to be made through certification, is in accord with a trend in the states. The proposed amendment to Rule 803(6) is integrally related to the proposed amendment to Evidence Rule 902, discussed below.

The public comment on the proposed amendment to Evidence Rule 803(6) was almost uniformly positive. The Committee made no changes to the text or Note of the proposal that was issued for public comment.

Recommendation — The Evidence Rules Committee recommends that the proposed amendment to Evidence Rule 803(6), as issued for publication, be approved and forwarded to the Judicial Conference.

G. Action Item — Rule 902. Self-authentication. [Rules App. B-126]

The Evidence Rules Committee recognized that if certification of business records is to be permitted, Evidence Rule 902 must be amended to provide a procedure for self-authentication of such records. In that sense, the proposed amendments to Rules 803(6) and 902 are part of a single package — the amendment to Rule 902 is only necessary if the amendment to Rule 803(6) is adopted, and conversely the amendment to Rule 803(6) would be a nullity if the amendment to Rule 902 were rejected.

The proposed amendment to Evidence Rule 902 sets forth the procedural requirements for preparing a declaration of a custodian or other qualified witness that will establish a sufficient foundation for the admissibility of business records. Public comment on the proposed amendment was almost uniformly positive. Some comments suggested minor changes in the

language of the text, to provide more consistency in the terms "certification" and "declaration," and to refer to independent statutes and rules governing the procedures for a proper certification. The Evidence Rules Committee has revised the proposal that was issued for public comment in response to these suggestions. The Committee also incorporated suggested changes from the Style Subcommittee of the Standing Committee.

Recommendation — The Evidence Rules Committee recommends that the proposed amendment to Evidence Rule 902, as modified following publication, be approved and forwarded to the Judicial Conference.

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PROPOSED AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE*

Rule 103. Rulings on Evidence

1 (a) Effect of erroneous ruling. — Error may not be
2 predicated upon a ruling which admits or excludes evidence
3 unless a substantial right of the party is affected, and
4 (1) Objection. — In case the ruling is one admitting
5 evidence, a timely objection or motion to strike appears of
6 record, stating the specific ground of objection, if the
7 specific ground was not apparent from the context; or
8 (2) Offer of proof. — In case the ruling is one
9 excluding evidence, the substance of the evidence was
10 made known to the court by offer or was apparent from
11 the context within which questions were asked.

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

12 Once the court makes a definitive ruling on the record
13 admitting or excluding evidence, either at or before trial, a
14 party need not renew an objection or offer of proof to preserve
15 a claim of error for appeal.

16 (b) Record of offer and ruling. — The court may add any
17 other or further statement which shows the character of the
18 evidence, the form in which it was offered, the objection
19 made, and the ruling thereon. It may direct the making of an
20 offer in question and answer form.

21 (c) Hearing of jury. — In jury cases, proceedings shall be
22 conducted, to the extent practicable, so as to prevent
23 inadmissible evidence from being suggested to the jury by any
24 means, such as making statements or offers of proof or asking
25 questions in the hearing of the jury.

26 (d) Plain error. — Nothing in this rule precludes taking
27 notice of plain errors affecting substantial rights although they
28 were not brought to the attention of the court.

COMMITTEE NOTE

The amendment applies to all rulings on evidence whether they occur at or before trial, including so-called "*in limine*" rulings. One of the most difficult questions arising from *in limine* and other evidentiary rulings is whether a losing party must renew an objection or offer of proof when the evidence is or would be offered at trial, in order to preserve a claim of error on appeal. Courts have taken differing approaches to this question. Some courts have held that a renewal at the time the evidence is to be offered at trial is always required. *See, e.g., Collins v. Wayne Corp.*, 621 F.2d 777 (5th Cir. 1980). Some courts have taken a more flexible approach, holding that renewal is not required if the issue decided is one that (1) was fairly presented to the trial court for an initial ruling, (2) may be decided as a final matter before the evidence is actually offered, and (3) was ruled on definitively by the trial judge. *See, e.g., Rosenfeld v. Basquiat,* 78 F.3d 84 (2d Cir. 1996) (admissibility of former testimony under the Dead Man's Statute; renewal not required). Other courts have distinguished between objections to evidence, which must be renewed when evidence is offered, and offers of proof, which need not be renewed after a definitive determination is made that the evidence is inadmissible. *See, e.g., Fusco v. General Motors Corp.*, 11 F.3d 259 (1st Cir. 1993). Another court, aware of this Committee's proposed amendment, has adopted its approach. *Wilson v. Williams,* 182 F. 3d 562 (7th Cir.1999) (en banc). Differing views on this question create uncertainty for litigants and unnecessary work for the appellate courts.

The amendment provides that a claim of error with respect to a definitive ruling is preserved for review when the party has otherwise satisfied the objection or offer of proof requirements of Rule 103(a). When the ruling is definitive, a renewed objection or offer of proof at the time the evidence is to be offered is more a formalism than a

necessity. *See* Fed.R.Civ.P. 46 (formal exceptions unnecessary); Fed.R.Cr.P. 51 (same); *United States v. Mejia-Alarcon*, 995 F.2d 982, 986 (10th Cir. 1993) ("Requiring a party to renew an objection when the district court has issued a definitive ruling on a matter that can be fairly decided before trial would be in the nature of a formal exception and therefore unnecessary."). On the other hand, when the trial court appears to have reserved its ruling or to have indicated that the ruling is provisional, it makes sense to require the party to bring the issue to the court's attention subsequently. *See, e.g., United States v. Vest,* 116 F.3d 1179, 1188 (7th Cir. 1997) (where the trial court ruled *in limine* that testimony from defense witnesses could not be admitted, but allowed the defendant to seek leave at trial to call the witnesses should their testimony turn out to be relevant, the defendant's failure to seek such leave at trial meant that it was "too late to reopen the issue now on appeal"); *United States v. Valenti,* 60 F.3d 941 (2d Cir. 1995) (failure to proffer evidence at trial waives any claim of error where the trial judge had stated that he would reserve judgment on the *in limine* motion until he had heard the trial evidence).

The amendment imposes the obligation on counsel to clarify whether an *in limine* or other evidentiary ruling is definitive when there is doubt on that point. *See, e.g., Walden v. Georgia-Pacific Corp.,* 126 F.3d 506, 520 (3d Cir. 1997) (although "the district court told plaintiffs' counsel not to reargue every ruling, it did not countermand its clear opening statement that all of its rulings were tentative, and counsel never requested clarification, as he might have done.").

Even where the court's ruling is definitive, nothing in the amendment prohibits the court from revisiting its decision when the evidence is to be offered. If the court changes its initial ruling, or if the opposing party violates the terms of the initial ruling, objection

must be made when the evidence is offered to preserve the claim of error for appeal. The error, if any, in such a situation occurs only when the evidence is offered and admitted. *United States Aviation Underwriters, Inc. v. Olympia Wings, Inc.,* 896 F.2d 949, 956 (5th Cir. 1990) ("objection is required to preserve error when an opponent, or the court itself, violates a motion *in limine* that was granted"); *United States v. Roenigk,* 810 F.2d 809 (8th Cir. 1987) (claim of error was not preserved where the defendant failed to object at trial to secure the benefit of a favorable advance ruling).

A definitive advance ruling is reviewed in light of the facts and circumstances before the trial court at the time of the ruling. If the relevant facts and circumstances change materially after the advance ruling has been made, those facts and circumstances cannot be relied upon on appeal unless they have been brought to the attention of the trial court by way of a renewed, and timely, objection, offer of proof, or motion to strike. *See Old Chief v. United States,* 519 U.S. 172, 182, n.6 (1997) ("It is important that a reviewing court evaluate the trial court's decision from its perspective when it had to rule and not indulge in review by hindsight."). Similarly, if the court decides in an advance ruling that proffered evidence is admissible subject to the eventual introduction by the proponent of a foundation for the evidence, and that foundation is never provided, the opponent cannot claim error based on the failure to establish the foundation unless the opponent calls that failure to the court's attention by a timely motion to strike or other suitable motion. *See Huddleston v. United States,* 485 U.S. 681, 690, n.7 (1988) ("It is, of course, not the responsibility of the judge *sua sponte* to ensure that the foundation evidence is offered; the objector must move to strike the evidence if at the close of the trial the offeror has failed to satisfy the condition.").

Nothing in the amendment is intended to affect the provisions of Fed.R.Civ.P. 72(a) or 28 U.S.C. §636(b)(1) pertaining to

nondispositive pretrial rulings by magistrate judges in proceedings that are not before a magistrate judge by consent of the parties. Fed.R.Civ.P. 72(a) provides that a party who fails to file a written objection to a magistrate judge's nondispositive order within ten days of receiving a copy "may not thereafter assign as error a defect" in the order. 28 U.S.C. §636(b)(1) provides that any party "may serve and file written objections to such proposed findings and recommendations as provided by rules of court" within ten days of receiving a copy of the order. Several courts have held that a party must comply with this statutory provision in order to preserve a claim of error. *See, e.g., Wells v. Shriners Hospital*, 109 F.3d 198, 200 (4th Cir. 1997)("[i]n this circuit, as in others, a party 'may' file objections within ten days or he may not, as he chooses, but he 'shall' do so if he wishes further consideration."). When Fed.R.Civ.P. 72(a) or 28 U.S.C. §636(b)(1) is operative, its requirement must be satisfied in order for a party to preserve a claim of error on appeal, even where Evidence Rule 103(a) would not require a subsequent objection or offer of proof.

Nothing in the amendment is intended to affect the rule set forth in *Luce v. United States,* 469 U.S. 38 (1984), and its progeny. The amendment provides that an objection or offer of proof need not be renewed to preserve a claim of error with respect to a definitive pretrial ruling. *Luce* answers affirmatively a separate question: whether a criminal defendant must testify at trial in order to preserve a claim of error predicated upon a trial court's decision to admit the defendant's prior convictions for impeachment. The *Luce* principle has been extended by many lower courts to other situations. *See United States v. DiMatteo,* 759 F.2d 831 (11th Cir. 1985) (applying *Luce* where the defendant's witness would be impeached with evidence offered under Rule 608). *See also United States v. Goldman,* 41 F.3d 785, 788 (1st Cir. 1994) ("Although *Luce* involved impeachment by conviction under Rule 609, the reasons

given by the Supreme Court for requiring the defendant to testify apply with full force to the kind of Rule 403 and 404 objections that are advanced by Goldman in this case."); *Palmieri v. DeFaria,* 88 F.3d 136 (2d Cir. 1996) (where the plaintiff decided to take an adverse judgment rather than challenge an advance ruling by putting on evidence at trial, the *in limine* ruling would not be reviewed on appeal); *United States v. Ortiz,* 857 F.2d 900 (2d Cir. 1988) (where uncharged misconduct is ruled admissible if the defendant pursues a certain defense, the defendant must actually pursue that defense at trial in order to preserve a claim of error on appeal); *United States v. Bond*, 87 F.3d 695 (5th Cir. 1996) (where the trial court rules *in limine* that the defendant would waive his fifth amendment privilege were he to testify, the defendant must take the stand and testify in order to challenge that ruling on appeal).

The amendment does not purport to answer whether a party who objects to evidence that the court finds admissible in a definitive ruling, and who then offers the evidence to "remove the sting" of its anticipated prejudicial effect, thereby waives the right to appeal the trial court's ruling. *See, e.g., United States v. Fisher,* 106 F.3d 622 (5th Cir. 1997) (where the trial judge ruled *in limine* that the government could use a prior conviction to impeach the defendant if he testified, the defendant did not waive his right to appeal by introducing the conviction on direct examination); *Judd v. Rodman,* 105 F.3d 1339 (11th Cir. 1997) (an objection made *in limine* is sufficient to preserve a claim of error when the movant, as a matter of trial strategy, presents the objectionable evidence herself on direct examination to minimize its prejudicial effect); *Gill v. Thomas,* 83 F.3d 537, 540 (1st Cir. 1996) ("by offering the misdemeanor evidence himself, Gill waived his opportunity to object and thus did not preserve the issue for appeal"); *United States v. Williams*, 939 F.2d 721 (9th Cir. 1991) (objection to impeachment evidence was waived where the defendant was impeached on direct examination).

GAP Report — Proposed Amendment to Rule 103(a)

The Committee made the following changes to the published draft of the proposed amendment to Evidence Rule 103(a):

1. A minor stylistic change was made in the text, in accordance with the suggestion of the Style Subcommittee of the Standing Committee on Rules of Practice and Procedure.

2. The second sentence of the amended portion of the published draft was deleted, and the Committee Note was amended to reflect the fact that nothing in the amendment is intended to affect the rule of *Luce v. United States*.

3. The Committee Note was updated to include cases decided after the proposed amendment was issued for public comment.

4. The Committee Note was amended to include a reference to a Civil Rule and a statute requiring objections to certain Magistrate Judge rulings to be made to the District Court.

5. The Committee Note was revised to clarify that an advance ruling does not encompass subsequent developments at trial that might be the subject of an appeal.

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

1 (a) Character evidence generally. — Evidence of a
2 person's character or a trait of character is not admissible for
3 the purpose of proving action in conformity therewith on a
4 particular occasion, except:
5 (1) Character of accused. — Evidence of a pertinent
6 trait of character offered by an accused, or by the
7 prosecution to rebut the same~~;~~, or if evidence of a trait of
8 character of the alleged victim of the crime is offered by
9 an accused and admitted under Rule 404 (a)(2), evidence
10 of the same trait of character of the accused offered by
11 the prosecution;
12 (2) Character of alleged victim. — Evidence of a
13 pertinent trait of character of the alleged victim of the
14 crime offered by an accused, or by the prosecution to
15 rebut the same, or evidence of a character trait of

16 peacefulness of the alleged victim offered by the
17 prosecution in a homicide case to rebut evidence that the
18 alleged victim was the first aggressor;
19 (3) Character of witness. — Evidence of the character
20 of a witness, as provided in rules 607, 608, and 609.
21 (b) Other crimes, wrongs, or acts. — Evidence of other
22 crimes, wrongs, or acts is not admissible to prove the
23 character of a person in order to show action in conformity
24 therewith. It may, however, be admissible for other purposes,
25 such as proof of motive, opportunity, intent, preparation, plan,
26 knowledge, identity, or absence of mistake or accident,
27 provided that upon request by the accused, the prosecution in
28 a criminal case shall provide reasonable notice in advance of
29 trial, or during trial if the court excuses pretrial notice on
30 good cause shown, of the general nature of any such evidence
31 it intends to introduce at trial.

COMMITTEE NOTE

Rule 404(a)(1) has been amended to provide that when the accused attacks the character of an alleged victim under subdivision (a)(2) of this Rule, the door is opened to an attack on the same character trait of the accused. Current law does not allow the government to introduce negative character evidence as to the accused unless the accused introduces evidence of good character. *See, e.g., United States v. Fountain,* 768 F.2d 790 (7th Cir. 1985) (when the accused offers proof of self-defense, this permits proof of the alleged victim's character trait for peacefulness, but it does not permit proof of the accused's character trait for violence).

The amendment makes clear that the accused cannot attack the alleged victim's character and yet remain shielded from the disclosure of equally relevant evidence concerning the same character trait of the accused. For example, in a murder case with a claim of self-defense, the accused, to bolster this defense, might offer evidence of the alleged victim's violent disposition. If the government has evidence that the accused has a violent character, but is not allowed to offer this evidence as part of its rebuttal, the jury has only part of the information it needs for an informed assessment of the probabilities as to who was the initial aggressor. This may be the case even if evidence of the accused's prior violent acts is admitted under Rule 404(b), because such evidence can be admitted only for limited purposes and not to show action in conformity with the accused's character on a specific occasion. Thus, the amendment is designed to permit a more balanced presentation of character evidence when an accused chooses to attack the character of the alleged victim.

The amendment does not affect the admissibility of evidence of specific acts of uncharged misconduct offered for a purpose other than proving character under Rule 404(b). Nor does it affect the

standards for proof of character by evidence of other sexual behavior or sexual offenses under Rules 412-415. By its placement in Rule 404(a)(1), the amendment covers only proof of character by way of reputation or opinion.

The amendment does not permit proof of the accused's character if the accused merely uses character evidence for a purpose other than to prove the alleged victim's propensity to act in a certain way. *See United States v. Burks,* 470 F.2d 432, 434-5 (D.C.Cir. 1972) (evidence of the alleged victim's violent character, when known by the accused, was admissible "on the issue of whether or not the defendant reasonably feared he was in danger of imminent great bodily harm"). Finally, the amendment does not permit proof of the accused's character when the accused attacks the alleged victim's character as a witness under Rule 608 or 609.

The term "alleged" is inserted before each reference to "victim" in the Rule, in order to provide consistency with Evidence Rule 412.

GAP Report — Proposed Amendment to Rule 404(a)

The Committee made the following changes to the published draft of the proposed amendment to Evidence Rule 404(a):

1. The term "a pertinent trait of character" was changed to "the same trait of character," in order to limit the scope of the government's rebuttal. The Committee Note was revised to accord with this change in the text.

2. The word "alleged" was added before each reference in the Rule to a "victim" in order to provide consistency with Evidence Rule 412. The Committee Note was amended to accord with this change in the text.

3. The Committee Note was amended to clarify that rebuttal is not permitted under this Rule if the accused proffers evidence of the alleged victim's character for a purpose other than to prove the alleged victim's propensity to act in a certain manner.

Rule 701. Opinion Testimony by Lay Witnesses

1 If the witness is not testifying as an expert, the witness'
2 testimony in the form of opinions or inferences is limited to
3 those opinions or inferences which are (a) rationally based on
4 the perception of the witness, ~~and~~ (b) helpful to a clear
5 understanding of the witness' testimony or the determination
6 of a fact in issue~~.~~, and (c) not based on scientific, technical,
7 or other specialized knowledge within the scope of Rule 702.

COMMITTEE NOTE

Rule 701 has been amended to eliminate the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing. Under the amendment, a witness' testimony must be scrutinized under the rules regulating expert opinion to the extent that the witness is providing testimony based on scientific, technical, or other specialized knowledge within the scope of Rule 702. *See generally Asplundh Mfg. Div. v. Benton Harbor Eng'g*, 57 F.3d 1190 (3d Cir. 1995). By channeling testimony that is actually expert testimony to Rule 702, the amendment also ensures that a party will not evade the

expert witness disclosure requirements set forth in Fed.R.Civ.P. 26 and Fed.R.Crim.P.16 by simply calling an expert witness in the guise of a layperson. *See* Joseph, *Emerging Expert Issues Under the 1993 Disclosure Amendments to the Federal Rules of Civil Procedure,* 164 F.R.D. 97, 108 (1996) (noting that "there is no good reason to allow what is essentially surprise expert testimony," and that "the Court should be vigilant to preclude manipulative conduct designed to thwart the expert disclosure and discovery process"). *See also United States v. Figueroa-Lopez*, 125 F.3d 1241, 1246 (9th Cir. 1997) (law enforcement agents testifying that the defendant's conduct was consistent with that of a drug trafficker could not testify as lay witnesses; to permit such testimony under Rule 701 "subverts the requirements of Federal Rule of Criminal Procedure 16(a)(1)(E)").

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

The amendment is not intended to affect the "prototypical example[s] of the type of evidence contemplated by the adoption of Rule 701 relat[ing] to the appearance of persons or things, identity, the manner of conduct, competency of a person, degrees of light or

darkness, sound, size, weight, distance, and an endless number of items that cannot be described factually in words apart from inferences." *Asplundh Mfg. Div. v. Benton Harbor Eng'g*, 57 F.3d 1190, 1196 (3d Cir. 1995).

For example, most courts have permitted the owner or officer of a business to testify to the value or projected profits of the business, without the necessity of qualifying the witness as an accountant, appraiser, or similar expert. *See, e.g., Lightning Lube, Inc. v. Witco Corp.* 4 F.3d 1153 (3d Cir. 1993) (no abuse of discretion in permitting the plaintiff's owner to give lay opinion testimony as to damages, as it was based on his knowledge and participation in the day-to-day affairs of the business). Such opinion testimony is admitted not because of experience, training or specialized knowledge within the realm of an expert, but because of the particularized knowledge that the witness has by virtue of his or her position in the business. The amendment does not purport to change this analysis. Similarly, courts have permitted lay witnesses to testify that a substance appeared to be a narcotic, so long as a foundation of familiarity with the substance is established. *See, e.g., United States v. Westbrook,* 896 F.2d 330 (8th Cir. 1990) (two lay witnesses who were heavy amphetamine users were properly permitted to testify that a substance was amphetamine; but it was error to permit another witness to make such an identification where she had no experience with amphetamines). Such testimony is not based on specialized knowledge within the scope of Rule 702, but rather is based upon a layperson's personal knowledge. If, however, that witness were to describe how a narcotic was manufactured, or to describe the intricate workings of a narcotic distribution network, then the witness would have to qualify as an expert under Rule 702. *United States v. Figueroa-Lopez*, *supra.*

The amendment incorporates the distinctions set forth in *State v. Brown*, 836 S.W.2d 530, 549 (1992), a case involving former Tennessee Rule of Evidence 701, a rule that precluded lay witness testimony based on "special knowledge." In *Brown,* the court declared that the distinction between lay and expert witness testimony is that lay testimony "results from a process of reasoning familiar in everyday life," while expert testimony "results from a process of reasoning which can be mastered only by specialists in the field." The court in *Brown* noted that a lay witness with experience could testify that a substance appeared to be blood, but that a witness would have to qualify as an expert before he could testify that bruising around the eyes is indicative of skull trauma. That is the kind of distinction made by the amendment to this Rule.

GAP Report — Proposed Amendment to Rule 701

The Committee made the following changes to the published draft of the proposed amendment to Evidence Rule 701:

1. The words "within the scope of Rule 702" were added at the end of the proposed amendment, to emphasize that the Rule does not require witnesses to qualify as experts unless their testimony is of the type traditionally considered within the purview of Rule 702. The Committee Note was amended to accord with this textual change.

2. The Committee Note was revised to provide further examples of the kind of testimony that could and could not be proffered under the limitation imposed by the proposed amendment.

Rule 702. Testimony by Experts

1 If scientific, technical, or other specialized knowledge will
2 assist the trier of fact to understand the evidence or to
3 determine a fact in issue, a witness qualified as an expert by
4 knowledge, skill, experience, training, or education, may
5 testify thereto in the form of an opinion or otherwise~~.~~, if (1)
6 the testimony is based upon sufficient facts or data, (2) the
7 testimony is the product of reliable principles and methods,
8 and (3) the witness has applied the principles and methods
9 reliably to the facts of the case.

COMMITTEE NOTE

Rule 702 has been amended in response to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and to the many cases applying *Daubert*, including *Kumho Tire Co. v. Carmichael,* 119 S.Ct. 1167 (1999). In *Daubert* the Court charged trial judges with the responsibility of acting as gatekeepers to exclude unreliable expert testimony, and the Court in *Kumho* clarified that this gatekeeper function applies to all expert testimony, not just testimony based in science. *See also Kumho,* 119 S.Ct. at 1178 (citing the Committee Note to the proposed amendment to Rule 702, which had been released for public comment before the date of the *Kumho* decision). The amendment affirms the trial court's role as gatekeeper

and provides some general standards that the trial court must use to assess the reliability and helpfulness of proffered expert testimony. Consistently with *Kumho,* the Rule as amended provides that all types of expert testimony present questions of admissibility for the trial court in deciding whether the evidence is reliable and helpful. Consequently, the admissibility of all expert testimony is governed by the principles of Rule 104(a). Under that Rule, the proponent has the burden of establishing that the pertinent admissibility requirements are met by a preponderance of the evidence. *See Bourjaily v. United States,* 483 U.S. 171 (1987).

Daubert set forth a non-exclusive checklist for trial courts to use in assessing the reliability of scientific expert testimony. The specific factors explicated by the *Daubert* Court are (1) whether the expert's technique or theory can be or has been tested — that is, whether the expert's theory can be challenged in some objective sense, or whether it is instead simply a subjective, conclusory approach that cannot reasonably be assessed for reliability; (2) whether the technique or theory has been subject to peer review and publication; (3) the known or potential rate of error of the technique or theory when applied; (4) the existence and maintenance of standards and controls; and (5) whether the technique or theory has been generally accepted in the scientific community. The Court in *Kumho* held that these factors might also be applicable in assessing the reliability of non-scientific expert testimony, depending upon "the particular circumstances of the particular case at issue." 119 S.Ct. at 1175.

No attempt has been made to "codify" these specific factors. *Daubert* itself emphasized that the factors were neither exclusive nor dispositive. Other cases have recognized that not all of the specific *Daubert* factors can apply to every type of expert testimony. In addition to *Kumho,* 119 S.Ct. at 1175, *see Tyus v. Urban Search Management,* 102 F.3d 256 (7th Cir. 1996) (noting that the factors

mentioned by the Court in *Daubert* do not neatly apply to expert testimony from a sociologist). *See also Kannankeril v. Terminix Int'l, Inc.,* 128 F.3d 802, 809 (3d Cir. 1997) (holding that lack of peer review or publication was not dispositive where the expert's opinion was supported by "widely accepted scientific knowledge"). The standards set forth in the amendment are broad enough to require consideration of any or all of the specific *Daubert* factors where appropriate.

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

(1) Whether experts are "proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying." *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 43 F.3d 1311, 1317 (9th Cir. 1995).

(2) Whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion. *See General Elec. Co. v. Joiner,* 522 U.S. 136, 146 (1997) (noting that in some cases a trial court "may conclude that there is simply too great an analytical gap between the data and the opinion proffered").

(3) Whether the expert has adequately accounted for obvious alternative explanations. *See Claar v. Burlington N.R.R.,* 29 F.3d 499 (9th Cir. 1994) (testimony excluded where the expert failed to consider other obvious causes for the plaintiff's condition). *Compare Ambrosini v. Labarraque*, 101 F.3d 129 (D.C.Cir. 1996) (the possibility of some uneliminated causes presents a

question of weight, so long as the most obvious causes have been considered and reasonably ruled out by the expert).

(4) Whether the expert "is being as careful as he would be in his regular professional work outside his paid litigation consulting." *Sheehan v. Daily Racing Form, Inc.,* 104 F.3d 940, 942 (7th Cir. 1997). *See Kumho Tire Co. v. Carmichael,* 119 S.Ct. 1167, 1176 (1999) (*Daubert* requires the trial court to assure itself that the expert "employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field").

(5) Whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give. *See Kumho Tire Co. v. Carmichael,* 119 S.Ct.1167, 1175 (1999) (*Daubert's* general acceptance factor does not "help show that an expert's testimony is reliable where the discipline itself lacks reliability, as, for example, do theories grounded in any so-called generally accepted principles of astrology or necromancy."); *Moore v. Ashland Chemical, Inc.,* 151 F.3d 269 (5th Cir. 1998) (en banc) (clinical doctor was properly precluded from testifying to the toxicological cause of the plaintiff's respiratory problem, where the opinion was not sufficiently grounded in scientific methodology); *Sterling v. Velsicol Chem. Corp.,* 855 F.2d 1188 (6th Cir. 1988) (rejecting testimony based on "clinical ecology" as unfounded and unreliable).

All of these factors remain relevant to the determination of the reliability of expert testimony under the Rule as amended. Other factors may also be relevant. *See Kumho,* 119 S.Ct. 1167, 1176 ("[W]e conclude that the trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable."). Yet no single factor is

necessarily dispositive of the reliability of a particular expert's testimony. *See, e.g., Heller v. Shaw Industries, Inc.,* 167 F.3d 146, 155 (3d Cir. 1999) ("not only must each stage of the expert's testimony be reliable, but each stage must be evaluated practically and flexibly without bright-line exclusionary (or inclusionary) rules."); *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 43 F.3d 1311, 1317, n.5 (9th Cir. 1995) (noting that some expert disciplines "have the courtroom as a principal theatre of operations" and as to these disciplines "the fact that the expert has developed an expertise principally for purposes of litigation will obviously not be a substantial consideration.").

A review of the caselaw after *Daubert* shows that the rejection of expert testimony is the exception rather than the rule. *Daubert* did not work a "seachange over federal evidence law," and "the trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system." *United States v. 14.38 Acres of Land Situated in Leflore County, Mississippi,* 80 F.3d 1074, 1078 (5th Cir. 1996). As the Court in *Daubert* stated: "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." 509 U.S. at 595. Likewise, this amendment is not intended to provide an excuse for an automatic challenge to the testimony of every expert. *See Kumho Tire Co. v. Carmichael,* 119 S.Ct.1167, 1176 (1999) (noting that the trial judge has the discretion "both to avoid unnecessary 'reliability' proceedings in ordinary cases where the reliability of an expert's methods is properly taken for granted, and to require appropriate proceedings in the less usual or more complex cases where cause for questioning the expert's reliability arises.").

When a trial court, applying this amendment, rules that an expert's testimony is reliable, this does not necessarily mean that

contradictory expert testimony is unreliable. The amendment is broad enough to permit testimony that is the product of competing principles or methods in the same field of expertise. *See, e.g., Heller v. Shaw Industries, Inc.,* 167 F.3d 146, 160 (3d Cir. 1999) (expert testimony cannot be excluded simply because the expert uses one test rather than another, when both tests are accepted in the field and both reach reliable results). As the court stated in *In re Paoli R.R. Yard PCB Litigation*, 35 F.3d 717, 744 (3d Cir. 1994), proponents "do not have to demonstrate to the judge by a preponderance of the evidence that the assessments of their experts are correct, they only have to demonstrate by a preponderance of evidence that their opinions are reliable. . . . The evidentiary requirement of reliability is lower than the merits standard of correctness." *See also Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1318 (9th Cir. 1995) (scientific experts might be permitted to testify if they could show that the methods they used were also employed by "a recognized minority of scientists in their field."); *Ruiz-Troche v. Pepsi Cola,* 161 F.3d 77, 85 (1st Cir. 1998) ("*Daubert* neither requires nor empowers trial courts to determine which of several competing scientific theories has the best provenance.").

The Court in *Daubert* declared that the "focus, of course, must be solely on principles and methodology, not on the conclusions they generate." 509 U.S. at 595. Yet as the Court later recognized, "conclusions and methodology are not entirely distinct from one another." *General Elec. Co. v. Joiner,* 522 U.S. 136, 146 (1997). Under the amendment, as under *Daubert,* when an expert purports to apply principles and methods in accordance with professional standards, and yet reaches a conclusion that other experts in the field would not reach, the trial court may fairly suspect that the principles and methods have not been faithfully applied. *See Lust v. Merrell Dow Pharmaceuticals, Inc.*, 89 F.3d 594, 598 (9th Cir. 1996). The amendment specifically provides that the trial court must scrutinize

not only the principles and methods used by the expert, but also whether those principles and methods have been properly applied to the facts of the case. As the court noted in *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 745 (3d Cir. 1994), "*any* step that renders the analysis unreliable . . . renders the expert's testimony inadmissible. *This is true whether the step completely changes a reliable methodology or merely misapplies that methodology.*"

If the expert purports to apply principles and methods to the facts of the case, it is important that this application be conducted reliably. Yet it might also be important in some cases for an expert to educate the factfinder about general principles, without ever attempting to apply these principles to the specific facts of the case. For example, experts might instruct the factfinder on the principles of thermodynamics, or bloodclotting, or on how financial markets respond to corporate reports, without ever knowing about or trying to tie their testimony into the facts of the case. The amendment does not alter the venerable practice of using expert testimony to educate the factfinder on general principles. For this kind of generalized testimony, Rule 702 simply requires that: (1) the expert be qualified; (2) the testimony address a subject matter on which the factfinder can be assisted by an expert; (3) the testimony be reliable; and (4) the testimony "fit" the facts of the case.

As stated earlier, the amendment does not distinguish between scientific and other forms of expert testimony. The trial court's gatekeeping function applies to testimony by any expert. *See Kumho Tire Co. v. Carmichael,* 119 S.Ct. 1167, 1171 (1999) ("We conclude that *Daubert's* general holding — setting forth the trial judge's general 'gatekeeping' obligation — applies not only to testimony based on 'scientific' knowledge, but also to testimony based on 'technical' and 'other specialized' knowledge."). While the relevant factors for determining reliability will vary from expertise to

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

The amendment requires that the testimony must be the product of reliable principles and methods that are reliably applied to the facts of the case. While the terms "principles" and "methods" may convey a certain impression when applied to scientific knowledge, they remain relevant when applied to testimony based on technical

or other specialized knowledge. For example, when a law enforcement agent testifies regarding the use of code words in a drug transaction, the principle used by the agent is that participants in such transactions regularly use code words to conceal the nature of their activities. The method used by the agent is the application of extensive experience to analyze the meaning of the conversations. So long as the principles and methods are reliable and applied reliably to the facts of the case, this type of testimony should be admitted.

Nothing in this amendment is intended to suggest that experience alone — or experience in conjunction with other knowledge, skill, training or education — may not provide a sufficient foundation for expert testimony. To the contrary, the text of Rule 702 expressly contemplates that an expert may be qualified on the basis of experience. In certain fields, experience is the predominant, if not sole, basis for a great deal of reliable expert testimony. *See, e.g., United States v. Jones,* 107 F.3d 1147 (6th Cir. 1997) (no abuse of discretion in admitting the testimony of a handwriting examiner who had years of practical experience and extensive training, and who explained his methodology in detail); *Tassin v. Sears Roebuck,* 946 F.Supp. 1241, 1248 (M.D.La. 1996) (design engineer's testimony can be admissible when the expert's opinions "are based on facts, a reasonable investigation, and traditional technical/mechanical expertise, and he provides a reasonable link between the information and procedures he uses and the conclusions he reaches"). *See also Kumho Tire Co. v. Carmichael*, 119 S.Ct.1167, 1178 (1999) (stating that "no one denies that an expert might draw a conclusion from a set of observations based on extensive and specialized experience.").

If the witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts. The trial court's

gatekeeping function requires more than simply "taking the expert's word for it." *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1319 (9th Cir. 1995) ("We've been presented with only the experts' qualifications, their conclusions and their assurances of reliability. Under *Daubert*, that's not enough."). The more subjective and controversial the expert's inquiry, the more likely the testimony should be excluded as unreliable. *See O'Conner v. Commonwealth Edison Co.*, 13 F.3d 1090 (7th Cir. 1994) (expert testimony based on a completely subjective methodology held properly excluded). *See also Kumho Tire Co. v. Carmichael*, 119 S.Ct. 1167, 1176 (1999) ("[I]t will at times be useful to ask even of a witness whose expertise is based purely on experience, say, a perfume tester able to distinguish among 140 odors at a sniff, whether his preparation is of a kind that others in the field would recognize as acceptable.").

Subpart (1) of Rule 702 calls for a quantitative rather than qualitative analysis. The amendment requires that expert testimony be based on sufficient underlying "facts or data." The term "data" is intended to encompass the reliable opinions of other experts. See the original Advisory Committee Note to Rule 703. The language "facts or data" is broad enough to allow an expert to rely on hypothetical facts that are supported by the evidence. *Id.*

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

There has been some confusion over the relationship between Rules 702 and 703. The amendment makes clear that the sufficiency of the basis of an expert's testimony is to be decided under Rule 702. Rule 702 sets forth the overarching requirement of reliability, and an

analysis of the sufficiency of the expert's basis cannot be divorced from the ultimate reliability of the expert's opinion. In contrast, the "reasonable reliance" requirement of Rule 703 is a relatively narrow inquiry. When an expert relies on inadmissible information, Rule 703 requires the trial court to determine whether that information is of a type reasonably relied on by other experts in the field. If so, the expert can rely on the information in reaching an opinion. However, the question whether the expert is relying on a *sufficient* basis of information — whether admissible information or not — is governed by the requirements of Rule 702.

The amendment makes no attempt to set forth procedural requirements for exercising the trial court's gatekeeping function over expert testimony. *See* Daniel J. Capra, *The Daubert Puzzle*, 38 Ga.L.Rev. 699, 766 (1998) ("Trial courts should be allowed substantial discretion in dealing with *Daubert* questions; any attempt to codify procedures will likely give rise to unnecessary changes in practice and create difficult questions for appellate review."). Courts have shown considerable ingenuity and flexibility in considering challenges to expert testimony under *Daubert*, and it is contemplated that this will continue under the amended Rule. *See, e.g., Cortes-Irizarry v. Corporacion Insular*, 111 F.3d 184 (1st Cir. 1997) (discussing the application of *Daubert* in ruling on a motion for summary judgment); *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 736, 739 (3d Cir. 1994) (discussing the use of *in limine* hearings); *Claar v. Burlington N.R.R.*, 29 F.3d 499, 502-05 (9th Cir. 1994) (discussing the trial court's technique of ordering experts to submit serial affidavits explaining the reasoning and methods underlying their conclusions).

The amendment continues the practice of the original Rule in referring to a qualified witness as an "expert." This was done to provide continuity and to minimize change. The use of the term

"expert" in the Rule does not, however, mean that a jury should actually be informed that a qualified witness is testifying as an "expert." Indeed, there is much to be said for a practice that prohibits the use of the term "expert" by both the parties and the court at trial. Such a practice "ensures that trial courts do not inadvertently put their stamp of authority" on a witness's opinion, and protects against the jury's being "overwhelmed by the so-called 'experts'." Hon. Charles Richey, *Proposals to Eliminate the Prejudicial Effect of the Use of the Word "Expert" Under the Federal Rules of Evidence in Criminal and Civil Jury Trials,* 154 F.R.D. 537, 559 (1994) (setting forth limiting instructions and a standing order employed to prohibit the use of the term "expert" in jury trials).

GAP Report — Proposed Amendment to Rule 702

The Committee made the following changes to the published draft of the proposed amendment to Evidence Rule 702:

1. The word "reliable" was deleted from Subpart (1) of the proposed amendment, in order to avoid an overlap with Evidence Rule 703, and to clarify that an expert opinion need not be excluded simply because it is based on hypothetical facts. The Committee Note was amended to accord with this textual change.

2. The Committee Note was amended throughout to include pertinent references to the Supreme Court's decision in *Kumho Tire Co. v. Carmichael*, which was rendered after the proposed amendment was released for public comment. Other citations were updated as well.

3. The Committee Note was revised to emphasize that the amendment is not intended to limit the right to jury trial, nor to permit a challenge to the testimony of every expert, nor to

preclude the testimony of experience-based experts, nor to prohibit testimony based on competing methodologies within a field of expertise.

4. Language was added to the Committee Note to clarify that no single factor is necessarily dispositive of the reliability inquiry mandated by Evidence Rule 702.

Rule 703. Bases of Opinion Testimony by Experts

1 The facts or data in the particular case upon which an
2 expert bases an opinion or inference may be those perceived
3 by or made known to the expert at or before the hearing. If of
4 a type reasonably relied upon by experts in the particular field
5 in forming opinions or inferences upon the subject, the facts
6 or data need not be admissible in evidence <u>in order for the</u>
7 <u>opinion or inference to be admitted</u>. <u>Facts or data that are</u>
8 <u>otherwise inadmissible shall not be disclosed to the jury by</u>
9 <u>the proponent of the opinion or inference unless the court</u>
10 <u>determines that their probative value in assisting the jury to</u>

11 evaluate the expert's opinion substantially outweighs their

12 prejudicial effect.

COMMITTEE NOTE

Rule 703 has been amended to emphasize that when an expert reasonably relies on inadmissible information to form an opinion or inference, the underlying information is not admissible simply because the opinion or inference is admitted. Courts have reached different results on how to treat inadmissible information when it is reasonably relied upon by an expert in forming an opinion or drawing an inference. *Compare United States v. Rollins,* 862 F.2d 1282 (7th Cir. 1988) (admitting, as part of the basis of an FBI agent's expert opinion on the meaning of code language, the hearsay statements of an informant), *with United States v. 0.59 Acres of Land,* 109 F.3d 1493 (9th Cir. 1997) (error to admit hearsay offered as the basis of an expert opinion, without a limiting instruction). Commentators have also taken differing views. *See, e.g.,* Ronald Carlson, *Policing the Bases of Modern Expert Testimony,* 39 Vand.L.Rev. 577 (1986) (advocating limits on the jury's consideration of otherwise inadmissible evidence used as the basis for an expert opinion); Paul Rice, *Inadmissible Evidence as a Basis for Expert Testimony: A Response to Professor Carlson,* 40 Vand.L.Rev. 583 (1987) (advocating unrestricted use of information reasonably relied upon by an expert).

When information is reasonably relied upon by an expert and yet is admissible only for the purpose of assisting the jury in evaluating an expert's opinion, a trial court applying this Rule must consider the information's probative value in assisting the jury to weigh the expert's opinion on the one hand, and the risk of prejudice resulting from the jury's potential misuse of the information for substantive

purposes on the other. The information may be disclosed to the jury, upon objection, only if the trial court finds that the probative value of the information in assisting the jury to evaluate the expert's opinion substantially outweighs its prejudicial effect. If the otherwise inadmissible information is admitted under this balancing test, the trial judge must give a limiting instruction upon request, informing the jury that the underlying information must not be used for substantive purposes. *See* Rule 105. In determining the appropriate course, the trial court should consider the probable effectiveness or lack of effectiveness of a limiting instruction under the particular circumstances.

The amendment governs only the disclosure to the jury of information that is reasonably relied on by an expert, when that information is not admissible for substantive purposes. It is not intended to affect the admissibility of an expert's testimony. Nor does the amendment prevent an expert from relying on information that is inadmissible for substantive purposes.

Nothing in this Rule restricts the presentation of underlying expert facts or data when offered by an adverse party. *See* Rule 705. Of course, an adversary's attack on an expert's basis will often open the door to a proponent's rebuttal with information that was reasonably relied upon by the expert, even if that information would not have been discloseable initially under the balancing test provided by this amendment. Moreover, in some circumstances the proponent might wish to disclose information that is relied upon by the expert in order to "remove the sting" from the opponent's anticipated attack, and thereby prevent the jury from drawing an unfair negative inference. The trial court should take this consideration into account in applying the balancing test provided by this amendment.

This amendment covers facts or data that cannot be admitted for any purpose other than to assist the jury to evaluate the expert's opinion. The balancing test provided in this amendment is not applicable to facts or data that are admissible for any other purpose but have not yet been offered for such a purpose at the time the expert testifies.

The amendment provides a presumption against disclosure to the jury of information used as the basis of an expert's opinion and not admissible for any substantive purpose, when that information is offered by the proponent of the expert. In a multi-party case, where one party proffers an expert whose testimony is also beneficial to other parties, each such party should be deemed a "proponent" within the meaning of the amendment.

GAP Report — Proposed Amendment to Rule 703

The Committee made the following changes to the published draft of the proposed amendment to Evidence Rule 703:

1. A minor stylistic change was made in the text, in accordance with the suggestion of the Style Subcommittee of the Standing Committee on Rules of Practice and Procedure.

2. The words "in assisting the jury to evaluate the expert's opinion" were added to the text, to specify the proper purpose for offering the otherwise inadmissible information relied on by an expert. The Committee Note was revised to accord with this change in the text.

3. Stylistic changes were made to the Committee Note.

4. The Committee Note was revised to emphasize that the balancing test set forth in the proposal should be used to determine whether an expert's basis may be disclosed to the jury either (1) in rebuttal or (2) on direct examination to "remove the sting" of an opponent's anticipated attack on an expert's basis.

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

1 The following are not excluded by the hearsay rule, even
2 though the declarant is available as a witness:
3 * * * * *
4 (6) Records of regularly conducted activity. — A
5 memorandum, report, record, or data compilation, in any
6 form, of acts, events, conditions, opinions, or diagnoses,
7 made at or near the time by, or from information
8 transmitted by, a person with knowledge, if kept in the
9 course of a regularly conducted business activity, and if it
10 was the regular practice of that business activity to make
11 the memorandum, report, record or data compilation, all
12 as shown by the testimony of the custodian or other

13 qualified witness, or by certification that complies with
14 Rule 902(11), Rule 902(12), or a statute permitting
15 certification, unless the source of information or the
16 method or circumstances of preparation indicate lack of
17 trustworthiness. The term "business" as used in this
18 paragraph includes business, institution, association,
19 profession, occupation, and calling of every kind, whether
20 or not conducted for profit.

21 * * * * *

COMMITTEE NOTE

The amendment provides that the foundation requirements of Rule 803(6) can be satisfied under certain circumstances without the expense and inconvenience of producing time-consuming foundation witnesses. Under current law, courts have generally required foundation witnesses to testify. *See, e.g., Tongil Co., Ltd. v. Hyundai Merchant Marine Corp.,* 968 F.2d 999 (9th Cir. 1992) (reversing a judgment based on business records where a qualified person filed an affidavit but did not testify). Protections are provided by the authentication requirements of Rule 902(11) for domestic records, Rule 902(12) for foreign records in civil cases, and 18 U.S.C. § 3505 for foreign records in criminal cases.

GAP Report — Proposed Amendment to Rule 803(6)

The Committee made no changes to the published draft of the proposed amendment to Evidence Rule 803(6).

Rule 902. Self-authentication

1 Extrinsic evidence of authenticity as a condition precedent
2 to admissibility is not required with respect to the following:
3 * * * * *
4 (11) Certified domestic records of regularly conducted
5 activity. — The original or a duplicate of a domestic
6 record of regularly conducted activity that would be
7 admissible under Rule 803(6) if accompanied by a written
8 declaration of its custodian or other qualified person, in
9 a manner complying with any Act of Congress or rule
10 prescribed by the Supreme Court pursuant to statutory
11 authority, certifying that the record —

12 (A) was made at or near the time of the
13 occurrence of the matters set forth by, or from
14 information transmitted by, a person with knowledge
15 of those matters;
16 (B) was kept in the course of the regularly
17 conducted activity; and
18 (C) was made by the regularly conducted activity
19 as a regular practice.
20 A party intending to offer a record into evidence under
21 this paragraph must provide written notice of that
22 intention to all adverse parties, and must make the record
23 and declaration available for inspection sufficiently in
24 advance of their offer into evidence to provide an adverse
25 party with a fair opportunity to challenge them.
26 (12) Certified foreign records of regularly conducted
27 activity. — In a civil case, the original or a duplicate of
28 a foreign record of regularly conducted activity that would

29 be admissible under Rule 803(6) if accompanied by a
30 written declaration by its custodian or other qualified
31 person certifying that the record —
32 (A) was made at or near the time of the occurrence
33 of the matters set forth by, or from information
34 transmitted by, a person with knowledge of those
35 matters;
36 (B) was kept in the course of the regularly
37 conducted activity; and
38 (C) was made by the regularly conducted activity
39 as a regular practice.
40 The declaration must be signed in a manner that, if
41 falsely made, would subject the maker to criminal penalty
42 under the laws of the country where the declaration is
43 signed. A party intending to offer a record into evidence
44 under this paragraph must provide written notice of that
45 intention to all adverse parties, and must make the record

46 and declaration available for inspection sufficiently in

47 advance of their offer into evidence to provide an adverse

48 party with a fair opportunity to challenge them.

COMMITTEE NOTE

The amendment adds two new paragraphs to the rule on self-authentication. It sets forth a procedure by which parties can authenticate certain records of regularly conducted activity, other than through the testimony of a foundation witness. See the amendment to Rule 803(6). 18 U.S.C. § 3505 currently provides a means for certifying foreign records of regularly conducted activity in criminal cases, and this amendment is intended to establish a similar procedure for domestic records, and for foreign records offered in civil cases.

A declaration that satisfies 28 U.S.C. § 1746 would satisfy the declaration requirement of Rule 902(11), as would any comparable certification under oath.

The notice requirement in Rules 902(11) and (12) is intended to give the opponent of the evidence a full opportunity to test the adequacy of the foundation set forth in the declaration.

GAP Report — Proposed Amendment to Rule 902

The Committee made the following changes to the published draft of the proposed amendment to Evidence Rule 902:

1. Minor stylistic changes were made in the text, in accordance with suggestions of the Style Subcommittee of the Standing Committee on Rules of Practice and Procedure.

2. The phrase "in a manner complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority" was added to proposed Rule 902(11), to provide consistency with Evidence Rule 902(4). The Committee Note was amended to accord with this textual change.

3. Minor stylistic changes were made in the text to provide a uniform construction of the terms "declaration" and "certifying."

4. The notice provisions in the text were revised to clarify that the proponent must make both the declaration and the underlying record available for inspection.