TO: **Honorable Lee H. Rosenthal, Chair**
Standing Committee on Rules of Practice and Procedure

FROM: **Robert L. Hinkle, Chair**
Advisory Committee on Evidence Rules

DATE: **May 12, 2008**

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

I. Introduction

The Advisory Committee on Evidence Rules (the "Committee") met on May 1-2, in Boston.

The Committee seeks approval of two proposals, both for release for public comment.

1. Restyled Evidence Rules 101-415 — with the proviso that these rules, if approved, will be held until all the rules are restyled, so that the restyled rules will be released for public comment in a single package.

2. A proposed amendment to Evidence Rule 804(b)(3), the hearsay exception for declarations against penal interest, that would extend the corroborating circumstances requirement — currently applicable only to statements offered by criminal defendants — to statements against penal interest offered by the prosecution.

A complete discussion of these matters can be found in the draft minutes of the Fall 2007 meeting, attached as Appendix C to this Report

II. Action Items

A. Restyled Evidence Rules 101-415

At its Fall 2007 meeting the Committee agreed upon a protocol and a timetable for its project to restyle the Evidence Rules. The Committee established a step-by-step process for restyling that is substantially the same as that employed in previous restyling projects. Those steps are: 1) draft by Professor Kimble; 2) comments by the Reporter; 3) response by Professor Kimble and changes to the draft where necessary; 4) expedited review by Advisory Committee members and redraft by Professor Kimble if necessary; 5) review by the Style Subcommittee of the Standing Committee; 6) review by the Advisory Committee; and 7) review by the Standing Committee to determine whether to release the restyled rules for public comment.

The Committee agreed that the Evidence Rules will be divided into three parts, and the process described above will therefore be conducted in three separate stages The Committee also agreed that the entire package of restyled rules should be submitted for public comment at one time

The Committee has established a working principle for whether a change is one of "style" (in which event the final determination is made by the Style Subcommittee) or one of "substance" (in which event the final decision is for the Committee). A change is "substantive" if:

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

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

3. It changes the structure of a rule so as to alter the way in which courts and litigants have thought about, and argued about, questions of admissibility (e.g , merging Rules 104(a) and 104(b) into a single subdivision); or

4 It changes what Professor Kimble has referred to as a "sacred phrase" — "phrases that have become so familiar as to be fixed in cement."

At the Spring 2008 meeting the Committee reviewed a draft of the first third of the Evidence Rules (Rules 101-415) The draft had been approved by the Style Subcommittee of the Standing Committee

At the meeting, the Committee reviewed each rule to determine whether any of the proposed changes were of substance rather than style The Committee also reviewed each rule to determine

whether to recommend that a change, even though one of style, might be reconsidered by the Style Subcommittee of the Standing Committee. The Committee determined that a number of proposed changes were substantive, including some changes to Rules 102, 106, 401, 403, 404, 410, 412, and 413-15. The Committee also made a number of style suggestions to the Rules. A complete description of these changes and suggestions can be found in the Minutes of the Spring 2008 Committee meeting, attached to this Report as Appendix C. The Committee also resolved to maintain a list of "global" questions to maintain consistent terminology. Some of the global questions include how to refer to the government and the defendant in a criminal case, and how to use such terms as "case", "proceeding" and "action"

After implementing changes of substance and recommending changes of style, the Committee unanimously voted to refer the restyled Rules 101-415 to the Standing Committee, with the recommendation that they be released for public comment when the complete set of Evidence Rules has been restyled.

The proposed restyled Rules 101-415 are attached to this Report as Appendix A — they are presented in a "side-by-side" version, with the existing rule in the left column and the restyled rule in the right

The template Committee Note to each of the restyled rules will read as follows:

Committee Note

The language of Rule [ ] has been amended as part of the restyling of the [ ] Rules to make them more easily understood and to make style and terminology consistent throughout the rules These changes are intended to be stylistic only.

The Committee plans to prepare a more detailed Committee Note to Rule 101, which will provide a short description of the process and the goals of restyling. It will be adapted from the Committee Note to the restyled Civil Rule 1.

Recommendation: The Evidence Rules Committee recommends that the proposed restyled Evidence Rules 101-415 be approved for release for public comment, with the release to occur when all the restyled rules have been prepared.

B. Proposed Amendment to Evidence Rule 804(b)(3)

At its Fall 2007 meeting the Evidence Rules Committee voted to consider the possibility of an amendment to Evidence Rule 804(b)(3), the exception to the hearsay rule for declarations against interest In its current form Rule 804(b)(3) requires an accused to provide corroborating circumstances clearly indicating the trustworthiness of a declaration against penal interest for the hearsay to be admissible, but by its terms the Rule imposes no similar requirement on the prosecution The Committee reviewed a proposed amendment that would extend the corroborating circumstances requirement to declarations against penal interest offered by the prosecution The possible need for the amendment arose after the Supreme Court's decision in *Whorton v Bockting*, which held that the Confrontation Clause provides no protection against unreliable hearsay if that hearsay is nontestimonial. If the prosecution has to show only that a declarant made a statement that tended to disserve his interest — i.e., all that is required under the terms of the existing rule — then it might well be that unreliable hearsay could be admitted against an accused.

At the Fall 2007 meeting, the Committee deferred to a request from the Department of Justice representative to wait before proposing an amendment until the Department had time to review the proposal and prepare a position. At the Spring 2008 meeting, the DOJ representative stated that the Department supported publication of an amendment to Rule 804(b)(3) that would extend the corroborating circumstances requirement to declarations against penal interest offered by the government in criminal cases. Committee members accordingly expressed strong interest in proceeding with the amendment to Rule 804(b)(3). Members stated that the rule would provide an important guarantee of reliability in criminal prosecutions, and could rectify confusion and dispute among the courts — because some courts currently apply a corroborating circumstances requirement to statements offered by the government and some do not.

The Committee then discussed whether three issues that had been raised in the case law should be addressed in the text or note to a proposed amendment to Rule 804(b)(3). Those questions are as follows:

1. *Should the corroborating circumstances requirement be extended to civil cases?* Committee members noted that only one reported decision had extended the corroborating circumstances requirement to civil cases, and that there were no other significant reported cases on the subject. Given the dearth of authority, and the different policy questions that might be raised with respect to declarations against penal interest offered in civil cases, the Committee decided unanimously not to address the applicability of the corroborating circumstances requirement to civil cases.

2. *Should the amendment consider the applicability of the Supreme Court's decision in* Crawford v Washington? Under *Crawford v. Washington,* a declaration against penal interest cannot be admitted against an accused if it is testimonial. Committee members considered whether to provide a textual limitation in Rule 804(b)(3), i e , that "testimonial"

declarations against penal interest are not admissible against the accused. The Committee determined that this language was unnecessary, because federal courts after *Crawford* have uniformly held that if a statement is testimonial, it by definition cannot satisfy the admissibility requirements of Rule 804(b)(3) A statement is "testimonial" when it is made to law enforcement officers with the primary motivation that it will be used in a criminal prosecution — but such a statement cannot be a declaration against penal interest because the Supreme Court held in *Williamson v United States* that statements made to law enforcement officers cannot qualify under the exception as a matter of evidence law Because of the fit between the hearsay exception and the right to confrontation, Committee members saw no need to refer to the *Crawford* standard in the text of the rule — especially since to do so could create a negative inference with respect to the hearsay exceptions that are not amended. The Committee agreed, however, to add language to the Committee Note to explain why the text of the Rule does not address *Crawford*

3 Should the amendment resolve some disputes in the courts about the meaning of "corroborating circumstances"? Committee members noted that there are a few decisions that define "corroborating circumstances" as prohibiting any consideration of independent evidence that corroborates the assertions of the hearsay declarant. These courts appear to be relying on pre-*Crawford* Confrontation Clause jurisprudence that is no longer applicable. Members noted, however, that the disagreement in the courts about the meaning of "corroborating circumstances" did not run very deep, and that the few courts that are relying on outmoded constitutional law are likely to change their approach when the issue is directly addressed. Eight members of the Committee voted not to include any definition of corroborating circumstances in the text or Committee Note to the proposed amendment. One member dissented.

After discussion, the Committee voted unanimously to refer the proposed amendment to Rule 804(b)(3), and the Committee Note, to the Standing Committee, with the recommendation that the amendment be released for public comment. Committee members noted that the Rule would have to be restyled as part of the restyling project, but resolved unanimously that the proposed substantive change should proceed on a separate track and timeline. Thus, Rule 804(b)(3), together with its substantive change if approved, will be restyled together with all the other hearsay exceptions in the third part of the restyling project.

The proposed amendment to Evidence Rule 804(b)(3), together with the proposed Committee Note, is attached as Appendix B to this Report

Recommendation: The Evidence Rules Committee recommends that the proposed amendment to Rule 804(b)(3) be approved for release for public comment.

III. Information Item

Crawford v. Washington and the Hearsay Exceptions in the Evidence Rules

The Committee continues to monitor case law developments after the Supreme Court's decision in *Crawford v Washington*, in which the Court held that the admission of "testimonial" hearsay violates the accused's right to confrontation unless the accused has an opportunity to cross-examine the declarant. Subsequently the Court in *Davis v. Washington* held that a hearsay statement is not testimonial if the primary motivation for making the statement was for some purpose other than for use in a criminal prosecution. And as discussed above, the Court in *Whorton v Bockting* held that non-testimonial hearsay is unregulated by the Confrontation Clause.

Crawford and the subsequent case law raises at least the possibility that some of the hearsay exceptions in the Federal Rules of Evidence might be subject to an unconstitutional application in some circumstances. If that possibility becomes a reality, it may become necessary to propose amendments to bring those hearsay exceptions into compliance with constitutional requirements. At its Fall 2007 meeting, however, the Committee unanimously resolved that there is no need to propose any amendment in response to *Crawford* at this time It is likely that no amendment will be necessary in any event, because the case law is reaching the result that any hearsay statement admissible under a Federal Rules exception is by that fact non-testimonial and therefore admissible under the Confrontation Clause. The admissibility requirements of the Federal Rules hearsay exceptions are being held to screen out "testimonial" hearsay as that term has been construed in *Davis* and by the lower courts. Even if the Federal Rules hearsay exceptions are not coextensive with the Confrontation Clause, an attempt to to codify *Crawford* is unwise at this point, given the rapid development of the case law. The Committee will continue to monitor case law developments under *Crawford* and *Davis*.

IV. Minutes of the Spring 2008 Meeting

The Reporter's draft of the minutes of the Committee's Spring 2008 meeting is attached to this report as Appendix C. These minutes have not yet been approved by the Committee

ADVISORY COMMITTEE ON EVIDENCE RULES

ARTICLE I. GENERAL PROVISIONS **Rule 101. Scope**	ARTICLE I. GENERAL PROVISIONS[1] **Rule 101 — Scope**
These rules govern proceedings in the courts of the United States and before the United States bankruptcy judges and United States magistrate judges, to the extent and with the exceptions stated in rule 1101	These rules apply to proceedings before United States courts The specific courts and proceedings to which the rules apply, along with exceptions, are set out in Rule 1101

[1] The date of this version is May 15, 2008 It is the later of two versions dated May 15, 2008

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

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

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

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

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

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

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

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

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

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

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

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

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial	**(b) Crimes or Other Acts.** **(1)** ***Prohibited Uses.*** Evidence of a crime or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character **(2)** ***Permitted Uses[2]; Notice.*** This evidence may be admissible[3] for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. On request by a defendant in a criminal case, the prosecutor must **(A)** provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial, and **(B)** do so before trial — or during trial if the court, for good cause, excuses lack of pretrial notice

[2] Style Subcommittee comment The Advisory Committee changed this from *Exceptions* The heading is now not parallel with 404(a)(2) & (3), 408(b), 410(b), and 412(b) Notice the consistent pattern that we have tried to use the heading to one subpart says *Prohibited Uses*, and the heading to the following subpart says *Exceptions* We believe that the heading should probably be changed back For now, this could be added to the list of global issues

[3] Style Subcommittee comment The Style Subcommittee believes that it's critically important to be consistent in phrasing the court's discretionary authority to admit evidence See the footnote to Rule 407 In nine other places, the rules now use *the court may admit* 407, 408(b), 411, 412(b)(1), 412(b)(2)(twice), 413(a), 414(a), and 415(a) The Advisory Committee concluded that *may be admissible* is substantive in 404(b)(2), but we think that decision should be reconsidered

Professor Capra comment A majority of the Advisory Committee determined that "may be admissible" is substantive and had to be retained for the following reasons 1) hundreds of cases have established that Rule 404(b) is a rule of "admissibility" and not exclusion, so any change to the language that could even be conceived as changing or narrowing the existing language threatens this uniform case law, 2) Congress carefully considered this language, revising the original Advisory Committee draft, which had provided that the rule "does not exclude" bad act evidence if offered for a proper purpose Congress made the change to place "greater emphasis on admissibility " The Committee was reluctant to change the language carefully chosen by Congress, 3) the change was opposed by the Justice Department, as signaling a less generous approach to bad act evidence, and 4) the language of Rule 404(b), as vetted and cited in so many cases, is a "sacred phrase" and therefore substantive under the restyling protocol

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

Rule 406. Habit; Routine Practice	Rule 406 — Habit; Routine Practice
Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice	Evidence of a person's habit or an organization's routine practice is relevant to prove that on a particular occasion the person or organization acted in accordance with the habit or routine practice This evidence is relevant regardless of whether it is corroborated or whether there was an eyewitness

Rule 407. Subsequent Remedial Measures	Rule 407 — Subsequent Remedial Measures
When, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment	When measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove • negligence, • culpable conduct, • a defect in a product or its design, or • a need for a warning or instruction But the court may admit this evidence[4] for another purpose, such as impeachment or — if disputed — proving ownership, control, or the feasibility of precautionary measures

[4] Style Subcommittee comment In the previous draft, this read *this evidence may be admitted* The Advisory Committee decided that that language did not involve a substantive change Nevertheless, the Advisory Committee preferred *the court may admit this evidence*, and we have made that change in this rule and in 408(b), 411, 412(b)(1) & (2), 413(a), 414(a), and 415(a) *The court may admit* is preferable to *the court need not exclude* for these reasons

- It avoids the double negative (*not exclude*)
- It offers a positive contrast to the negative force of (b)(1)
- It achieves the same result in practice We don't see any semantic difference between the two The longer one is just the negative version of *the court may admit*
- The two most important words in our work are *may* and *must* — the so-called words of authority We have to be consistent in how we use them, without creating various ways of expressing what the court is permitted to do We want the evidence rules to be internally consistent, and we want them to be consistent with all the other restylings, which use *may* to create permission
- If we use *may* and *must* consistently in the evidence rules, it will be highly implausible for anyone to read *may admit* as *must admit*
- Rules 101–415 use *the court may* five times — in 103(c), 201(b), 201(c)(1), 403, and 405 Note 403 in particular *The court may exclude relevant evidence if* That can't be read as *The court must*

Professor Capra comment There is an argument that the change from "This rule does not require exclusion" to "The court may admit" is substantive because it changes the rule from one of exclusion to one providing a positive grant of admissibility It is at least a change in tone that may give an unintended signal to practitioners The Evidence Rules Committee voted, however, that the change was not substantive But the Committee unanimously voted to suggest to the Style Subcommittee that the original language --- "This rule does not require exclusion" --- be retained

Rule 408. Compromise and Offers to Compromise	Rule 408 — Compromise Offers and Negotiations
(a) Prohibited uses. Evidence of the following is not admissible on behalf of any party, when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction **(1)** furnishing or offering or promising to furnish—or accepting or offering or promising to accept—a valuable consideration in compromising or attempting to compromise the claim, and **(2)** conduct or statements made in compromise negotiations regarding the claim, except when offered in a criminal case and the negotiations related to a claim by a public office or agency in the exercise of regulatory, investigative, or enforcement authority	**(a) Prohibited Uses.** Evidence of the following is not admissible — on behalf of any party — either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction **(1)** furnishing, promising, or offering — or accepting, promising to accept, or offering to accept — a valuable consideration in order to compromise the claim, and **(2)** conduct or a statement made during compromise negotiations about the claim — except when offered in a criminal case and when the negotiations related to a claim by a public office or agency in the exercise of its regulatory, investigative, or enforcement authority
(b) Permitted uses. This rule does not require exclusion if the evidence is offered for purposes not prohibited by subdivision (a) Examples of permissible purposes include proving a witness's bias or prejudice; negating a contention of undue delay, and proving an effort to obstruct a criminal investigation or prosecution	**(b) Exceptions.** The court may admit[5] this evidence for another purpose, such as proving a witness's bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution

[5] The change in language from "this rule does not require exclusion" to "the court may admit" is discussed in the footnote to rule 407

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

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

Rule 411. Liability Insurance	Rule 411 — Liability Insurance
Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness	Evidence that a person did or did not have liability insurance is not admissible to prove that the person acted negligently or otherwise wrongfully But the court may admit[6] this evidence for another purpose, such as proving agency, ownership, control, or a witness's bias or prejudice

[6] The change in language from "this rule does not require exclusion" to "the court may admit" is discussed in the footnote to rule 407

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

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

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

Rule 414. Evidence of Similar Crimes in Child Molestation Cases	Rule 414 — Similar Crimes in Child-Molestation Cases
(a) In a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant's commission of another offense or offenses of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant	**(a) Permitted Uses.** In a criminal case in which a defendant is accused of child molestation, the court may admit evidence that the defendant committed any other act of child molestation The evidence may be considered on any matter to which it is relevant
(b) In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause	**(b) Disclosure.** If the prosecutor intends to offer this evidence, the prosecutor must disclose it to the defendant, including witnesses' statements or a summary of the expected testimony The prosecutor must do so at least 15 days before trial or at a later time that the court allows for good cause.
(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule	**(c) Effect on Other Rules.** This rule does not limit the admission or consideration of evidence under any other rule

(d) For purposes of this rule and Rule 415, "child" means a person below the age of fourteen, and "offense of child molestation" means a crime under Federal law or the law of a State (as defined in section 513 of title 18, United States Code) that involved - **(1)** any conduct proscribed by chapter 109A of title 18, United States Code, that was committed in relation to a child, **(2)** any conduct proscribed by chapter 110 of title 18, United States Code, **(3)** contact between any part of the defendant's body or an object and the genitals or anus of a child, **(4)** contact between the genitals or anus of the defendant and any part of the body of a child, **(5)** deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on a child, or **(6)** an attempt or conspiracy to engage in conduct described in paragraphs (1)–(5)	**(d) Definition of "Child" and "Child Molestation."** In this rule and Rule 415 **(1)** "child" means a person below the age of 14, and **(2)** "child molestation" means a crime under federal law or under state law (as "state" is defined in 18 U S C § 513) involving **(A)** any conduct prohibited by 18 U S C chapter 109A and committed with a child, **(B)** any conduct prohibited by 18 U S C chapter 110, **(C)** contact between any part of the defendant's body — or an object — and a child's genitals or anus, **(D)** contact between the defendant's genitals or anus and any part of a child's body, **(E)** deriving sexual pleasure or gratification from inflicting death, bodily injury, or physical pain on a child, or **(F)** an attempt or conspiracy to engage in conduct described in paragraphs (A)–(E)

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

PROPOSED AMENDMENT TO THE FEDERAL RULES OF EVIDENCE*

Rule 804. Hearsay Exceptions; Declarant Unavailable

* * * * *

(b) Hearsay exceptions. — The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

* * * * *

(3) **Statement against interest.** — A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have

*New material is underlined, matter to be omitted is lined through

made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered ~~to exculpate the accused~~ in a criminal case is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

* * * * *

Committee Note

The second sentence of Rule 804(b)(3) has been amended to provide that the corroborating circumstances requirement applies to all declarations against penal interest offered in criminal cases. A number of courts have applied the corroborating circumstances requirement to declarations against penal interest offered by the prosecution, even though the text of the Rule did not so provide. *See, e.g., United States v. Alvarez,* 584 F.2d 694, 701 (5thCir. 1978) ("by transplanting the language governing exculpatory statements onto the analysis for admitting inculpatory hearsay, a unitary standard is derived which offers the most workable basis for applying Rule 804(b)(3)"); *United States v. Shukri,* 207 F.3d 412 (7th Cir 2000) (requiring corroborating circumstances for against-penal-interest statements offered by the government). A unitary approach to declarations against penal interest assures both the prosecution and the accused that the Rule will not be abused and that only reliable hearsay statements will be admitted under the exception.

The Committee found no need to address the relationship between Rule 804(b)(3) and the Confrontation Clause. The Supreme Court in *Crawford v Washington*, 541 U.S. 36, 53-54 (2004), held that the Confrontation Clause bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." Courts after *Crawford* have held that for a statement to be admissible under Rule 804(b)(3), it must be made in informal circumstances and not knowingly to a law enforcement officer — and those very requirements of admissibility assure that the statement is not testimonial under *Crawford See, e g., United States v. Johnson,* 495 F 3d 951 (8th Cir. 2007) (accomplice's statements implicating himself and the defendant in a crime were not testimonial as they were made under informal circumstances to another prisoner, with no involvement of law enforcement; for the same reasons, the statements were admissible under Rule 804(b)(3)); *United States v. Franklin,* 415 F.3d 537 (6th Cir. 2005) (admissions of crime made informally to a friend were not testimonial, and for the same reason they were admissible under Rule 804(b)(3)).

The amendment does not address the use of the corroborating circumstances for declarations against penal interest offered in civil cases.