COLORADO SUPREME COURT

EVIDENCE COMMITTEE

AGENDA

June 1, 2001, at 1:30 P.M.
Supreme Court Conference Room (5th Floor)

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1. Approval of Minutes of March 2, 2001, meeting.

2. CRE 103(a) - Effect of Erroneous Ruling.
   Prof. Mueller.
   Pages 1-9.

3. CRE 404(a) - Character Evidence Generally.
   Bob Russel and Liz Griffin.
   Pages 10-18.

4. CRE 803(6) - Records of Regularly Conducted Activity.
   Proposed CRE 902(11) and (12) - Self-Authentication of Records of Regularly Conducted Activity.
   Dave DeMuro.
   Pages 19-30.

5. CRE 701 et seq. - Opinion Testimony.
   Judge Bockman.
   Attached are copies of the new federal rules, the current Colorado rules, and People v. Shreck, (Colo. 4/23/01).
   Pages 31-50.

6. Other Business.

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MEMORANDUM

TO: Members of the Colorado Supreme Court Committee on the Rules of Evidence

FROM: David R. DeMuro

RE: Report on CRE 103(a)

DATE: May 24, 2001

We discussed at the last meeting the idea of recommending that the Colorado Supreme Court adopt the amendment made to FRE 103(a). Attached are copies of the federal rule, the federal committee comments on the amendment, and the current Colorado rule.

Prof. Christopher Mueller has prepared a proposed version of Rule 103 (with the proposed addition in capital letters), including a Committee Comment. This is also attached for your consideration.

ORDER OF APRIL 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 amendments made thereby under respective rules, post.]

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.

HISTORICAL NOTES

Effective Date and Application of Rules

The Federal Rules of Evidence were adopted by order of the Supreme Court on Nov. 20, 1972, transmitted to Congress by the Chief Justice on Feb. 5, 1973, and to have become effective on July 1, 1973. Pub.L. 93–12, Mar. 30, 1973, 87 Stat. 9, provided that the proposed rules "shall have no force or effect except to the extent, and with such amendments, as they may be expressly approved by Act of Congress". Pub.L. 93–595, Jan. 2, 1975, 88 Stat. 1926, enacted the Federal Rules of Evidence proposed by the Supreme Court, with amendments made by Congress, to take effect on July 1, 1975.

The Rules have been amended Oct. 16, 1975, Pub.L. 94–113, § 1, 89 Stat. 576, eff. Oct. 31, 1975; Dec. 12, 1975, Pub.L. 94–149, § 1, 89 Stat. 805; Oct. 28, 1978, Pub.L. 95–540, § 2, 92 Stat. 2046; Nov. 6, 1978, Pub.L. 95–598, Title II, § 251, 92 Stat. 2673, eff. Oct. 1, 1979; Apr. 30, 1979, eff. Dec. 1, 1980; Apr. 2, 1982, Pub.L. 97–164, Title I, § 142, Title IV, § 402, 96 Stat. 45, 57, eff. Oct. 1, 1982; Oct. 12, 1984, Pub.L. 98–473, Title IV, § 406, 98 Stat. 2067; Mar. 2, 1987, eff. Oct. 1, 1987; Apr. 25, 1988, eff. Nov. 1, 1988; Nov. 18, 1988, Pub.L. 100–690, Title VII, §§ 7046, 7075, 102 Stat. 4400, 4405; Jan. 26, 1990, eff. Dec. 1, 1990; Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 29, 1994, eff. Dec. 1, 1994; Apr. 11, 1997, eff. Dec. 1, 1997; Apr. 24, 1998, eff. Dec. 1, 1998; April 17, 2000, eff. Dec. 1, 2000.

ARTICLE I. GENERAL PROVISIONS

HISTORICAL NOTES

Change of Name

United States magistrate appointed under section 631 of Title 28, Judiciary and Judicial Procedure, to be known as United States magistrate judge after Dec. 1, 1990, with any reference to United States magistrate or magistrate in Title 28, in any other Federal statute, etc., deemed a reference to United States magistrate judge appointed under section 631 of Title 28, see section 321 of Pub.L. 101–650, set out as a note under section 631 of Title 28.

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.
(Pub.L. 93–595, § 1, Jan. 2, 1975, 88 Stat. 1929; Mar. 2, 1987, eff. Oct. 1, 1987; Apr. 25, 1988, eff. Nov. 1, 1988; Apr. 22, 1993, eff. Dec. 1, 1993.)

ADVISORY COMMITTEE NOTES

1972 Proposed Rules

Rule 1101 specifies in detail the courts, proceedings, questions, and stages of proceedings to which the rules apply in whole or in part.

1987 Amendments

United States bankruptcy judges are added to conform this rule with Rule 1101(b) and Bankruptcy Rule 9017.

1988 Amendments

The amendment is technical. No substantive change is intended.

1993 Amendments

This revision is made to conform the rule to changes made by the Judicial Improvements Act of 1990.

HISTORICAL NOTES

Change of Name

United States magistrate appointed under section 631 of Title 28, Judiciary and Judicial Procedure, to be known as United States magistrate judge after Dec. 1, 1990, with any reference to United States magistrate or magistrate in Title 28, in any other Federal statute, etc., deemed a reference to United States magistrate judge appointed under section 631 of Title 28, see section 321 of Pub.L. 101–650, set out as a note under section 631 of Title 28.

Rule 102. Purpose and Construction

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.
(Pub.L. 93–595, § 1, Jan. 2, 1975, 88 Stat.1929.)

ADVISORY COMMITTEE NOTES

1972 Proposed Rules

For similar provisions see Rule 2 of the Federal Rules of Criminal Procedure, Rule 1 of the Federal Rules of Civil Procedure, California Evidence Code § 2, and New Jersey Evidence Rule 5.

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.

(Pub.L. 93–595, § 1, Jan. 2, 1975, 88 Stat. 1929; Apr. 17, 2000, eff. Dec. 1, 2000.)

ADVISORY COMMITTEE NOTES

1972 Proposed Rules

Note to Subdivision (a). Subdivision (a) states the law as generally accepted today. Rulings on evidence cannot be assigned as error unless (1) a substantial right is affected, and (2) the nature of the error was called to the attention of the judge, so as to alert him to the proper course of action and enable opposing counsel to take proper corrective measures. The objection and the offer of proof are the techniques for accomplishing these objectives. For similar provisions see Uniform Rules 4 and 5; California Evidence Code §§ 353 and 354; Kansas Code of Civil Procedure §§ 60–404 and 60–405. The rule does not purport to change the law with respect to harmless error. See 28 USC § 2111, F.R.Civ.P. 61, F.R.Crim.P. 52, and decisions construing them. The status of constitutional error as harmless or not is treated in Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), reh. denied id. 987, 87 S.Ct. 1283, 18 L.Ed.2d 241.

Note to Subdivision (b). The first sentence is the third sentence of Rule 43(c) of the Federal Rules of Civil Procedure virtually verbatim. Its purpose is to reproduce for an appellate court, insofar as possible, a true reflection of what occurred in the trial court. The second sentence is in part derived from the final sentence of Rule 43(c). It is designed to resolve doubts as to what testimony the witness would have in fact given, and, in nonjury cases, to provide the appellate court with material for a possible final disposition of the case in the event of reversal of a ruling which excluded evidence. See 5 Moore's Federal Practice § 43.11 (2d ed. 1968). Application is made discretionary in view of the practical impossibility of formulating a satisfactory rule in mandatory terms.

Note to Subdivision (c). This subdivision proceeds on the supposition that a ruling which excludes evidence in a jury case is likely to be a pointless procedure if the excluded evidence nevertheless comes to the attention of the jury. *Bruton v. United States*, 389 U.S. 818, 88 S.Ct. 126, 19 L.Ed.2d 70 (1968). Rule 43(c) of the Federal Rules of Civil Procedure provides: "The court may require the offer to be made out of the hearing of the jury." *In re McConnell*, 370 U.S. 230, 82 S.Ct. 1288, 8 L.Ed.2d 434 (1962), left some doubt whether questions on which an offer is based must first be asked in the presence of the jury. The subdivision answers in the negative. The judge can foreclose a particular line of testimony and counsel can protect his record without a series of questions before the jury, designed at best to waste time and at worst "to waft into the jury box" the very matter sought to be excluded.

Note to Subdivision (d). This wording of the plain error principle is from Rule 52(b) of the Federal Rules of Criminal Procedure. While judicial unwillingness to be constructed by mechanical breakdowns of the adversary system has been more pronounced in criminal cases, there is no scarcity of decisions to the same effect in civil cases. In general, see Campbell, Extent to Which Courts of Review Will Consider Questions Not Properly Raised and Preserved, 7 Wis.L.Rev. 91, 160 (1932); Vestal, Sua Sponte Consideration in Appellate Review, 27 Fordham L.Rev. 477 (1958–59); 64 Harv.L.Rev. 652 (1951). In the nature of things the application of the plain error rule will be more likely with respect to the admission of evidence than to exclusion, since failure to comply with normal requirements of offers of proof is likely to produce a record which simply does not disclose the error.

2000 Amendment

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 evi-

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.

* * *

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

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

(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.

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 *n 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

(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.

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):

ARTICLE I. GENERAL PROVISIONS

RULE 101. SCOPE

These rules govern proceedings in all courts in the State of Colorado, to the extent and with the exceptions stated in Rule 1101.

RULE 102. PURPOSE AND CONSTRUCTION

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.

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.

(b) Record of Offer and Ruling. The court may add any other or further statement which shows the character of 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 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.

(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.

(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, if he so requests.

(d) Testimony by Accused. The accused does not, by testifying upon a preliminary matter, subject himself to cross-examination as to other issues in the case.

7

PROPOSED

CRE 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.

Committee Comment

This change tracks the change in FRE 103 that took effect on December 1, 2000. Hence FRE 103 and CRE 103 remain identical.

In both the federal system and Colorado, the law prior to the amendment was unclear on the question whether a party who obtains a pretrial ruling on an evidence issue must renew an offer or objection when the issue arises a trial. *Compare* Uptain v. Huntington Lab, Inc. 723 P.2d 1322, 1329 (Colo. 1986) *and* Bennett v. Greeley Gas Company, 969 P.2d 754, 758 (Colo Ct. App. 1998) (unsuccessful pretrial motions to exclude evidence preserved objection for purposes of appeal) *with Higgs*

v. District Court (Douglas County), 713 P.2d 840, 859 (Colo. 1985) (unsuccessful pretrial motion to exclude "a broad array of evidence" did not preserve claim of error when evidence was admitted at trial).

Under CRE 103 as amended, if a trial judge makes a definitive pretrial ruling that evidence will be admitted at trial, the party who made an objection that otherwise complies with CRE 103 in the pretrial proceedings need not renew that objection to preserve a claim of error on appeal. Similarly, if a trial judge makes a definitive pretrial ruling that evidence will be excluded at trial, a party who made an offer of proof that otherwise complies with CRE 103 need not renew that offer of proof at trial.

The burden is upon the party who would rely on a prior ruling to show that it was definitive, and if the circumstances or terms of the ruling leave room for doubt, a lawyer wishing to rely on the ruling must seek clarification. If a trial judge declines to rule, or reserves judgment on the issue, or states that the matter will be considered when it arises during trial, then renewed offers and objections are necessary to preserve claims of error. Whether or not a ruling is definitive, the trial judge may revisit the matter at appropriate times at trial. If the judge decides the issue differently upon revisiting it, the parties must renew or restate any objection or offer of proof in order to preserve claims of error.

CRE 103 as amended does not address the question whether a party who wishes to exclude impeaching evidence preserves a right of review if the party does not take the stand after the trial judge rules that the evidence may be used if the party testifies, or declines to rule that the evidence will be excluded. In the federal system, the rule is that a party who does not testify waives any claim of error, specifically in connection with the use of prior convictions to impeach and in other areas as well. In Colorado, the issue has not been resolved, and amended CRE 103 does not address this question. In he federal system, see Luce v. United States, 469 U.S. 38 (1984) (if accused declines to testify, there is no claim of error in pretrial ruling that would permit use of prior convictions to impeach if accused testifies); United States v. Bond, 87 F.3d 695, 700-701 (5th Cir. 1996) (in declining to testify after court ruled that doing so would waive fifth amendment privilege, defense waived claim of error). In Colorado, see People v. Apodaca (Colo. 1985) 712 P.2d 467 (refusing to apply *Luce* where defense raises constitutional challenge to use of prior conviction); People v. Henderson, 745 P.2d 265 (similar).

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May 2, 2001

MEMORANDUM

TO: Rules of Evidence Committee

FROM: Bob Russel
Assistant Solicitor General
Appellate Division

RE: CRE 404

Introduction. The subcommittee met on March 30 to consider proposed changes to CRE 404(a). After lengthy discussion, the subcommittee voted as follows: (a) Judge Rebecca Bromley and Bob Russel voted to recommend changes; (b) Elizabeth Griffin voted to recommend no change; (c) Professor Sheila Hyatt abstained.

Proposed changes to CRE 404. The majority voted to incorporate all of the amendments that were made to FRE 404:

> 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 his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

(1) Character of Accused. Evidence of a pertinent trait of his 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 13-90-101.

(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 that he acted 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.

Proposed changes to committee notes. The majority recommends adopting the committee notes that accompany the amendments to FRE 404(a), with further changes as follows:

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), **§ 16-10-301, C.R.S., or § 18-6-801.5, C.R.S.** ~~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 amendment does not permit proof of the accused's character if the accused uses character evidence -

- **For a purpose other than to prove the alleged victim's propensity to act in a certain way. (For example, the accused may introduce evidence that knew about the alleged victim's violent character at the time of incident to show that he reasonably believed that he was in danger of imminent unlawful physical force.)**
- **To attack the alleged victim's character as a witness under Rule 608.**
- **To attack the alleged victim's ability to perceive or recall events. For example, cross-examination about the alleged victim's drug or alcohol use may be proper to demonstrate an impairment of the alleged victim's ability to perceive, remember, or narrate.**

In order to provide consistency with the FRE 404(a), the amendment employs the phrase "the same trait of character" instead of "a pertinent trait of character." The federal committee chose this language to limit the scope of the government's rebuttal.

The term "alleged" is inserted before each reference to "victim" in the Rule, in order to provide consistency with **FRE 404(a) and** ~~Evidence Rule~~ 412.

Reasons to adopt the amendments:

A. The proposed rule change will affect criminal prosecutions for homicide and assault (including domestic assault) when the defendant asserts self-defense and claims that the victim was the initial aggressor. In such cases, it is important that the jury hear the whole story. One cannot expect the jury to fairly evaluate evidence bearing upon initial aggression when the evidence is limited to one of the two participants.

B. Colorado gains when its rules conform to the federal rules. Courts and counsel benefit from the guidance provided by federal decisions and attendant commentary.

C. Character evidence may be less reliable and probative than other kinds of evidence. The proposed change may actually reduce reliance on such evidence.

1. The proposed change may reduce the frequency with which character evidence enters criminal trials:
   - Under the present version, the accused has nothing to lose by trying to show that the victim was a volatile, violent, or truculent person. The jury may credit the character evidence and find that the victim was the initial aggressor.
   - Under the proposed version, the accused must think twice before injecting character evidence into the trial. By placing the victim's character at issue, the accused risks exposing that he too is a volatile, violent, or truculent person.
2. The proposed change may cause the trier of fact to view character evidence more critically:
   - The jury may be inclined to accept character evidence at face value if it hears that the victim was a volatile or violent person, and hears nothing about the accused. (The jury receives the erroneous impression that there is nothing to tell about the accused's character.)
   - But if the jury hears that both the victim and the accused have the same character, it is more likely to set aside character evidence entirely, and focus instead on the overt acts and statements of the victim and the accused.

MEMORANDUM

TO: Evidence Rules Committee

FROM: Liz Griffin

RE: CRE 404(a) subcommittee--minority view

DATE: May 18, 2001

At the subcommittee meeting on March 30, Judge Bromley and Bob Russel voted to adopt the federal changes to Rule 404(a). I voted not to adopt them. Professor Hyatt participated in discussions, but abstained from voting at that time. Bob Russel's memorandum sets out the proposed amendment and arguments in favor of its adoption.

This memorandum presents arguments opposing adoption. In the alternative, in the event the committee is inclined to amend CRE 404(a), this memorandum suggests the addition of a few clarifying words that would alleviate the potential for confusion and error created by the federal amendment.

I. Reasons not to adopt the federal changes to rule 404(a)

A) The amendment creates a substantial potential for constitutional violations and reversal of convictions on appeal. Specifically, one who is charged with a crime and faces loss of liberty at the hands of the state has the fundamental due process right to a fair trial, and the fundamental right to a fair and impartial jury. The proposed amendment may lead to the admission of bad character evidence which unfairly biases the jury, or leads the jury to convict based on something other than proof beyond a reasonable doubt of defendant's guilt of the charged offense—e.g., based on a belief that he is a dangerous or bad person, and should be incarcerated to prevent future acts in conformity with his bad character; based on a belief that a person of bad character would be more likely to commit the charged crime; because of a desire to punish him for being a bad person.

B) The amendment creates a substantial risk that unduly prejudicial evidence, and possibly even irrelevant evidence, will be admitted in violation of CRE 401-03. Because the added language addresses the character evidence issue in such a specific manner, there is a risk that courts may read CRE 404(a) as a stand-alone provision which wholly governs the issue, and supercedes the relevancy requirements of CRE 401 and 402, as well as CRE 403's provision for the exclusion of relevant evidence when 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." Such errors in turn may lead to reversals on appeal even absent a constitutional violation, particularly if preserved by objection. See, e.g., Old Chief v. United States, 519 U.S. 172 (1997); Oaks v. People, 150 Colo. 64, 371 P.2d 443 (Colo. 1962); People v. Goldsberry, 181 Colo. 406, 509 P.2d 801 (Colo. 1973); People v. Lee, 630 P.2d 583 (Colo. 1981), cert. denied, 454 U.S. 1162 (1982).

C) The tit for tat approach suggested by the amendment does not make sense, because the defendant and the victim are not similarly situated. An alleged victim is not a party to a criminal case. The jury in a criminal case decides only the defendant's fate; i.e., the jury is in a position to directly punish the defendant, but not the victim, based on bad character evidence. Finally, only the defendant, as the person facing a deprivation of his liberty, had the constitutional rights to a fair trial and impartial jury.

D) Colorado should decide whether to change CRE 404(a) based on whether a change is necessary and prudent for Colorado; the mere fact that the federal rule has been changed is not reason by itself to change our long-standing rule. Choosing not to adopt a change being made to the federal rule will not impair our courts' ability to interpret the Colorado rule. The Colorado courts have interpreted CRE 404(a) in its current form for many years, and are more than capable of continuing to do so.

E) In fact, preserving the rule would result in far less uncertainty and confusion than would changing it. If Colorado were to adopt the federal amendment, the courts would have little or no federal or state case law to guide their interpretation of the Rule. If no changes are made to CRE 404(a), in contrast, Colorado courts may continue to rely on the large number of state and federal cases and commentary pre-dating the amendment at issue.

II. Suggested changes to the amendment, should the committee vote to adopt it

A) Any adoption of the "tit for tat" provision should expressly limit its application to the one situation in which it arguably applies, and at which the federal amendment was aimed—cases in which the defendant claims self-defense, and presents evidence of the alleged victim's character for violence. Members of the subcommittee were able to think of only one other situation in which the tit for tat provision might logically apply. Rather than opening a can of worms of unknown content, therefore, it would be more prudent to expressly limit the provision to the one situation where it arguably does logically apply.

This could be accomplished, for example, by rephrasing the amendment as follows (my language is underlined):

> 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 his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:
>
> (1) *Character of accused.* – Evidence of a pertinent trait of his 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~~ the alleged victim's character for violence 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;

B) At the very least, the rule itself should state that "the same trait of character of the accused" is admissible only when the trait is relevant, and its admission complies with CRE 403. Making these requirements express would not result in any difference between the Colorado and federal rules; buried in the committee comments to the federal rule is the

requirement that the "same character trait" of the accused must be "equally relevant" in order to be admissible.

This could be accomplished as follows (my addition is underlined):

> (1) *Character of accused.* – Evidence of a pertinent trait of his 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, <u>if its probative value is not substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.</u>

or in the alternative:

> ...evidence of the same trait of character of the accused offered by the prosecution, <u>if relevant and admissible under CRE 403.</u>

Placing a relevancy requirement directly into the rule should reduce the potential for due process violations and reversals on appeal because of the erroneous admission of irrelevant and unduly prejudicial bad character evidence against the accused.

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MEMORANDUM

TO: Members of the Colorado Supreme Court Committee on the Rules of Evidence

FROM: David R. DeMuro

RE: Report on CRE 803(6) and 902(11) and (12)

DATE: May 24, 2001

At the last meeting, I volunteered to put together a proposal for the adoption in Colorado of the changes and additions to FRE 803(6) and 902(11) and (12). Attached are copies of the new federal rule, a page from the federal committee report that discusses these rules, the current Colorado rules, and my proposed Colorado rules.

The purpose of the proposed change to CRE 803(6) and the addition of sections (11) and (12) to 902 is to make the "business records" exception to the hearsay rule a little easier by allowing the records to come into evidence with a certified statement, rather than through a live witness who supplies the foundation. My proposal for Rule 803(6) is to make the same change made in the comparable federal rule. As to Rule 902(11), I have made slight changes in the introductory portion of the rule to refer to Colorado and the Colorado Supreme Court rather than Congress and the U.S. Supreme Court. I have also added the word "certified" to get away from the federal statute on written declarations, 28 U.S.C. § 1746. The proposed Rule 902(12) is the same as the federal addition.

I ask that the committee vote to recommend the adoption of these changes and new rules to the Colorado Supreme Court.

course, be used for impeaching the credibility of a witness. When the prior inconsistent statement is one made by a defendant in a criminal case, it is covered by Rule 801(d)(2).

Note to Subdivision (d)(1)(C). The House bill provides that a statement is not hearsay if the declarant testifies and is subject to cross-examination concerning the statement and the statement is one of identification of a person made after perceiving him. The Senate amendment eliminated this provision.

The Conference adopts the Senate amendment. House Report No. 93–1597.

1987 Amendment

The amendments are technical. No substantive change is intended.

1997 Amendment

Rule 801(d)(2) has been amended in order to respond to three issues raised by *Bourjaily v. United States*, 483 U.S. 171 (1987). First, the amendment codifies the holding in *Bourjaily* by stating expressly that a court shall consider the contents of a coconspirator's statement in determining "the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered." According to *Bourjaily*, Rule 104(a) requires these preliminary questions to be established by a preponderance of the evidence.

Second, the amendment resolves an issue on which the Court had reserved decision. It provides that the contents of the declarant's statement do not alone suffice to establish a conspiracy in which the declarant and the defendant participated. The court must consider in addition the circumstances surrounding the statement, such as the identity of the speaker, the context in which the statement was made, or evidence corroborating the contents of the statement in making its determination as to each preliminary question. This amendment is in accordance with existing practice. Every court of appeals that has resolved this issue requires some evidence in addition to the contents of the statement. *See, e.g., United States v. Beckham*, 968 F.2d 47, 51 (D.C.Cir. 1992); *United States v. Sepulveda*, 15 F.3d 1161, 1181–82 (1st Cir.1993), *cert. denied*, 114 S.Ct. 2714 (1994); *United States v. Daly*, 842 F.2d 1380, 1386 (2d Cir.), *cert. denied*, 488 U.S. 821 (1988); *United States v. Clark*, 18 F.3d 1337, 1341–42 (6th Cir.), *cert. denied*, 115 S.Ct. 152 (1994); *United States v. Zambrana*, 841 F.2d 1320, 1344–45 (7th Cir.1988); *United States v. Silverman*, 861 F.2d 571, 577 (9th Cir.1988); *United States v. Gordon*, 844 F.2d 1397, 1402 (9th Cir.1988); *United States v. Hernandez*, 829 F.2d 988, 993 (10th Cir. 1987), *cert. denied*, 485 U.S. 1013 (1988); *United States v. Byrom*, 910 F.2d 725, 736 (11th Cir.1990).

Third, the amendment extends the reasoning of Bourjaily to statements offered under subdivisions (C) and (D) of Rule 801(d)(2). In Bourjaily, the Court rejected treating foundational facts pursuant to the law of agency in favor of an evidentiary approach governed by Rule 104(a). The Advisory Committee believes it appropriate to treat analogously preliminary questions relating to the declarant's authority under subdivision (C), and the agency or employment relationship and scope thereof under subdivision (D).

GAP Report on Rule 801. The word "shall" was substituted for the word "may" in line 19. The second sentence of the committee note was changed accordingly.

HISTORICAL NOTES

For legislative history and purpose of Pub.L. 94–113, see 1975 U.S.Code Cong. and Adm.News, p. 1092.

Effective and Applicability Provisions

1975 Acts. Section 2 of Pub.L. 94–113 provided that: "This Act [enacting cl. (c) of subd. (d)] shall become effective on the fifteenth day after the date of the enactment of this Act [Oct. 16, 1975]."

Rule 802. Hearsay Rule

Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.

(Pub.L. 93–595, § 1, Jan. 2, 1975, 88 Stat. 1939.)

ADVISORY COMMITTEE NOTES

1972 Proposed Rules

The provision excepting from the operation of the rule hearsay which is made admissible by other rules adopted by the Supreme Court or by Act of Congress continues the admissibility thereunder of hearsay which would not qualify under these Evidence Rules. The following examples illustrate the working of the exception:

Federal Rules of Civil Procedure

Rule 4(g): proof of service by affidavit.

Rule 32: admissibility of depositions.

Rule 43(e): affidavits when motion based on facts not appearing of record.

Rule 56: affidavits in summary judgment proceedings.

Rule 65(b): showing by affidavit for temporary restraining order.

Federal Rules of Criminal Procedure

Rule 4(a): affidavits to show grounds for issuing warrants.

Rule 12(b)(4): affidavits to determine issues of fact in connection with motions.

Acts of Congress

10 U.S.C. § 7730: affidavits of unavailable witnesses in actions for damages caused by vessel in naval service, or towage or salvage of same, when taking of testimony or bringing of action delayed or stayed on security grounds.

29 U.S.C. § 161(4): affidavit as proof of service in NLRB proceedings.

38 U.S.C. § 5206: affidavit as proof of posting notice of sale of unclaimed property by Veterans Administration.

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:

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(1) **Present sense impression.** A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

(2) **Excited utterance.** A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) **Then existing mental, emotional, or physical condition.** A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(4) **Statements for purposes of medical diagnosis or treatment.** Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

(5) **Recorded recollection.** A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(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.

(7) **Absence of entry in records kept in accordance with the provisions of paragraph (6).** Evidence that a matter is not included in the memoranda reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) **Public records and reports.** Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

(9) **Records of vital statistics.** Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

(10) **Absence of public record or entry.** To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

(11) **Records of religious organizations.** Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) **Marriage, baptismal, and similar certificates.** Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(13) **Family records.** Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

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assurances of regularity, bearing in mind that the entire matter is open to exploration before the trier of fact. In general, see McCormick § 193; 7 Wigmore § 2155; Annot., 71 A.L.R. 5, 105 id. 326.

Example (7). Public records are regularly authenticated by proof of custody, without more. McCormick § 191; 7 Wigmore §§ 2158, 2159. The example extends the principle to include data stored in computers and similar methods, of which increasing use in the public records area may be expected. See California Evidence Code §§ 1532, 1600.

Example (8). The familiar ancient document rule of the common law is extended to include data stored electronically or by other similar means. Since the importance of appearance diminishes in this situation, the importance of custody or place where found increases correspondingly. This expansion is necessary in view of the widespread use of methods of storing data in forms other than conventional written records.

Any time period selected is bound to be arbitrary. The common law period of 30 years is here reduced to 20 years, with some shift of emphasis from the probable unavailability of witnesses to the unlikeliness of a still viable fraud after the lapse of time. The shorter period is specified in the English Evidence Act of 1938, 1 & 2 Geo. 6, c. 28, and in Oregon R.S.1963, § 41.360(34). See also the numerous statutes prescribing periods of less than 30 years in the case of recorded documents. 7 Wigmore § 2143.

The application of Example (8) is not subject to any limitation to title documents or to any requirement that possession, in the case of a title document, has been consistent with the document. See McCormick § 190.

Example (9). Example (9) is designed for situations in which the accuracy of a result is dependent upon a process or system which produces it. X rays afford a familiar instance. Among more recent developments is the computer, as to which see Transport Indemnity Co. v. Seib, 178 Neb. 253, 132 N.W.2d 871 (1965); *State v. Veres*, 7 Ariz.App. 117, 436 P.2d 629 (1968); *Merrick v. United States Rubber Co.*, 7 Ariz.App. 433, 440 P.2d 314 (1968); Freed, Computer Print–Outs as Evidence, 16 Am.Jur.Proof of Facts 273; Symposium, Law and Computers in the Mid–Sixties, ALI–ABA (1966); 37 Albany L.Rev. 61 (1967). Example (9) does not, of course, foreclose taking judicial notice of the accuracy of the process or system.

Example (10). The example makes clear that methods of authentication provided by Act of Congress and by the Rules of Civil and Criminal Procedure or by Bankruptcy Rules are not intended to be superseded. Illustrative are the provisions for authentication of official records in Civil Procedure Rule 44 and Criminal Procedure Rule 27, for authentication of records of proceedings by court reporters in 28 U.S.C. § 753(b) and Civil Procedure Rule 80(c), and for authentication of depositions in Civil Procedure Rule 30(f).

Rule 902. Self-authentication

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

(1) Domestic public documents under seal. A document bearing a seal purporting to be that of the United States, or of any State, district, Commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.

(2) Domestic public documents not under seal. A document purporting to bear the signature in the official capacity of an officer or employee of any entity included in paragraph (1) hereof, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.

(3) Foreign public documents. A document purporting to be executed or attested in an official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position (A) of the executing or attesting person, or (B) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation. A final certification may be made by a secretary of an embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification.

(4) Certified copies of public records. A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) of this rule or complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority.

(5) Official publications. Books, pamphlets, or other publications purporting to be issued by public authority.

(6) Newspapers and periodicals. Printed materials purporting to be newspapers or periodicals.

(7) Trade inscriptions and the like. Inscriptions, signs, tags, or labels purporting to have been

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affixed in the course of business and indicating ownership, control, or origin.

(8) **Acknowledged documents.** Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments.

(9) **Commercial paper and related documents.** Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law.

(10) **Presumptions under Acts of Congress.** Any signature, document, or other matter declared by Act of Congress to be presumptively or prima facie genuine or authentic.

(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.

(Pub.L. 93–595, § 1, Jan. 2, 1975, 88 Stat. 1944; Mar. 2, 1987, eff. Oct. 1, 1987; Apr. 25, 1988, eff. Nov. 1, 1988; Apr. 17, 2000, eff. Dec. 1, 2000.)

ADVISORY COMMITTEE NOTES

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Case law and statutes have, over the years, developed a substantial body of instances in which authenticity is taken as sufficiently established for purposes of admissibility without extrinsic evidence to that effect, sometimes for reasons of policy but perhaps more often because practical considerations reduce the possibility of unauthenticity to a very small dimension. The present rule collects and incorporates these situations, in some instances expanding them to occupy a larger area which their underlying considerations justify. In no instance is the opposite party foreclosed from disputing authenticity.

Note to Paragraph (1). The acceptance of documents bearing a public seal and signature, most often encountered in practice in the form of acknowledgments or certificates authenticating copies of public records, is actually of broad application. Whether theoretically based in whole or in part upon judicial notice, the practical underlying considerations are that forgery is a crime and detection is fairly easy and certain. 7 Wigmore § 2161, p. 638; California Evidence Code § 1452. More than 50 provisions for judicial notice of official seals are contained in the United States Code.

Note to Paragraph (2). While statutes are found which raise a presumption of genuineness of purported official signatures in the absence of an official seal, 7 Wigmore § 2167; California Evidence Code § 1453, the greater ease of effecting a forgery under these circumstances is apparent. Hence this paragraph of the rule calls for authentication by an officer who has a seal. Notarial acts by members of the armed forces and other special situations are covered in paragraph (10).

Note to Paragraph (3). Paragraph (3) provides a method for extending the presumption of authenticity to foreign official documents by a procedure of certification. It is derived from Rule 44(a)(2) of the Rules of Civil Procedure but is broader in applying to public documents rather than being limited to public records.

Note to Paragraph (4). The common law and innumerable statutes have recognized the procedure of authenticating copies of public records by certificate. The certificate qualifies as a public document, receivable as authentic when in conformity with paragraph (1), (2), or (3). Rule 44(a) of the Rules of Civil Procedure and Rule 27 of the Rules of Criminal Procedure have provided authentication procedures of this nature for both domestic and foreign public records. It will be observed that the certification procedure here provided extends only to public records, reports, and recorded

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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.

* * *

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

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 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.

witnesses of its own selection. An expert witness shall not be appointed by the court unless he consents to act. A witness so appointed shall be informed of his duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of his findings, if any; his deposition may be taken by any party; and he may be called to testify by the court or any party. He shall be subject to cross-examination by each party, including a party calling him as a witness.

(b) Compensation. Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and civil actions and proceedings involving just compensation under the fifth amendment. In other civil actions and proceedings the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs.

(c) Disclosure of Appointment. In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that the court appointed the expert witness.

(d) Parties' Experts of Own Selection. Nothing in this rule limits the parties in calling expert witnesses of their own selection.

ARTICLE VIII. HEARSAY

RULE 801. DEFINITIONS

The following definitions apply under this article:

(a) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him to be communicative.

(b) Declarant. A "declarant" is a person who makes a statement.

(c) Hearsay. "Hearsay" is a statement other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) Statements Which Are Not Hearsay. A statement is not hearsay if—

(1) *Prior Statement by Witness.* The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony, or (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving him, or

(2) *Admission by Party-Opponent.* The statement is offered against a party and is (A) the party's own statement in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy. The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).

Amended eff. Jan. 1, 1999.

Committee Comment

The last sentence of this Rule was added to track a corresponding change in F.R.E. 801(d)(2).

RULE 802. HEARSAY RULE

Hearsay is not admissible except as provided by these rules or by the civil and criminal procedural rules applicable to the courts of Colorado or by any statutes of the State of Colorado.

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:

(1) Spontaneous Present Sense Impression. A spontaneous statement describing or explaining an event or condition made while the declarant was perceiving the event or condition.

(2) Excited Utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) Then Existing Mental, Emotional, or Physical Condition. A statement of the declarant's then

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existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(4) **Statements for Purposes of Medical Diagnosis or Treatment.** Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

(5) **Recorded Recollection.** A past recollection recorded when it appears that the witness once had knowledge concerning the matter and: (A) can identify the memorandum or record, (B) adequately recalls the making of it at or near the time of the event, either as recorded by the witness or by another, and (C) can testify to its accuracy. The memorandum or record may be read into evidence but may not itself be received unless offered by an adverse party.

(6) **Records of Regularly Conducted Activity.** A memorandum report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnosis, 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, 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.

(7) **Absence of Entry in Records Kept in Accordance With the Provisions of Paragraph (6).** Evidence that a matter is not included in the memoranda reports, records, or data compilations in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) **Public Records and Reports.** Unless the sources of information or other circumstances indicate lack of trustworthiness, records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law.

(9) **Records of Vital Statistics.** Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

(10) **Absence of Public Record or Entry.** To prove the absence of a record, report, statement, or data compilation, in any form, or the non-occurrence or non-existence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with Rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

(11) **Records of Religious Organizations.** Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) **Marriage, Baptismal, and Similar Certificates.** Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(13) **Family Records.** Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

(14) **Records of Documents Affecting an Interest in Property.** The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded or filed document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute

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based upon familiarity not acquired for purposes of the litigation.

(3) *Comparison by Trier or Expert Witness.* Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.

(4) *Distinctive Characteristics and the Like.* Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

(5) *Voice Identification.* Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

(6) *Telephone Conversations.* Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (B) in the case of business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

(7) *Public Records or Reports.* Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.

(8) *Ancient Documents or Data Compilation.* Evidence that a document or data compilation, in any form, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence 20 years or more at the time it is offered.

(9) *Process or System.* Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

(10) *Methods Provided by Statute or Rule.* Any method of authentication or identification provided by Colorado Rules of Procedure, or by statute of the State of Colorado.

RULE 902. SELF-AUTHENTICATION

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

(1) Domestic Public Documents Under Seal. A document bearing a seal purporting to be that of the United States, or of any State, district, Commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer or agency thereof, and a signature purporting to be an attestation or execution.

(2) Domestic Public Documents Not Under Seal. A document purporting to bear the signature in his official capacity of an officer or employee of any entity included in paragraph (1) hereof, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.

(3) Foreign Public Documents. A document purporting to be executed or attested in his official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of signature and official position (A) of the executing or attesting person, or (B) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification.

(4) Certified Copies of Public Records. A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) of this rule or complying with any Federal or Colorado Rule of Procedure, or with any Act of the United States Congress, or any statute of the State of Colorado.

(5) Official Publications. Books, pamphlets, or other publications purporting to be issued by public authority.

(6) Newspapers and Periodicals. Printed materials purporting to be newspapers or periodicals.

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(7) **Trade Inscriptions and the Like.** Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin.

(8) **Acknowledged Documents.** Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments.

(9) **Commercial Paper and Related Documents.** Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law.

(10) **Presumptions Under Legislative Act.** Any signature, document, or other matter declared by Act of the Congress of the United States, or by any statute of the State of Colorado to be presumptively or *prima facie* genuine or authentic.

RULE 903. SUBSCRIBING WITNESS' TESTIMONY UNNECESSARY

The testimony of a subscribing witness is not necessary to authenticate a writing unless required by the laws of the jurisdiction whose laws govern the validity of the writing.

ARTICLE X. CONTENTS OF WRITINGS, RECORDINGS AND PHOTOGRAPHS

RULE 1001. DEFINITIONS

For purposes of this article the following definitions are applicable:

(1) **Writings and Recordings.** "Writings" and "recordings" consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation.

(2) **Photographs.** "Photographs" include still photographs, X-ray films, video tapes, and motion pictures.

(3) **Original.** An "original" of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An "original" of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an "original".

(4) **Duplicate.** A "duplicate" is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduce the original.

RULE 1002. REQUIREMENT OF ORIGINAL

To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute of the State of Colorado or of the United States.

RULE 1003. ADMISSIBILITY OF DUPLICATES

A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.

RULE 1004. ADMISSIBILITY OF OTHER EVIDENCE OF CONTENTS

The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if:

(1) **Originals Lost or Destroyed.** All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or

(2) **Original Not Obtainable.** No original can be obtained by any available judicial process or procedure; or

(3) **Original in Possession of Opponent.** At a time when an original was under the control of the party against whom offered, he was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and he does not produce the original at the hearing; or

(4) **Collateral Matters.** The writing, recording, or photograph is not closely related to a controlling issue.

RULE 1005. PUBLIC RECORDS

The contents of an official record, or of a document authorized to be recorded, or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with Rule 902 or testified to be correct by a witness who has compared it with the

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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.

* * *

PROPOSED

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 certified written declaration of its custodian or other qualified person, in a manner complying with any Colorado statute or rule prescribed by the Colorado Supreme Court, 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.

ARTICLE VII. OPINIONS AND EXPERT TESTIMONY

Rule 701. Opinion Testimony by Lay Witnesses

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (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.

(Pub.L. 93–595, § 1, Jan. 2, 1975, 88 Stat.1937; Mar. 2, 1987, eff. Oct. 1, 1987; Apr. 17, 2000, eff. Dec. 1, 2000.)

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The rule retains the traditional objective of putting the trier of fact in possession of an accurate reproduction of the event.

Limitation (a) is the familiar requirement of first-hand knowledge or observation.

Limitation (b) is phrased in terms of requiring testimony to be helpful in resolving issues. Witnesses often find difficulty in expressing themselves in language which is not that of an opinion or conclusion. While the courts have made concessions in certain recurring situations, necessity as a standard for permitting opinions and conclusions has proved too elusive and too unadaptable to particular situations for purposes of satisfactory judicial administration. McCormick § 11. Moreover, the practical impossibility of determining by rule what is a "fact," demonstrated by a century of litigation of the question of what is a fact for purposes of pleading under the Field Code, extends into evidence also. 7 Wigmore § 1919. The rule assumes that the natural characteristics of the adversary system will generally lead to an acceptable result, since the detailed account carries more conviction than the broad assertion, and a lawyer can be expected to display his witness to the best advantage. If he fails to do so, cross-examination and argument will point up the weakness. See Ladd, Expert Testimony, 5 Vand.L.Rev. 414, 415–417 (1952). If, despite these considerations, attempts are made to introduce meaningless assertions which amount to little more than choosing up sides, exclusion for lack of helpfulness is called for by the rule.

The language of the rule is substantially that of Uniform Rule 56(1). Similar provisions are California Evidence Code § 800; Kansas Code of Civil Procedure § 60–456(a); New Jersey Evidence Rule 56(1).

1987 Amendments

The amendments are technical. No substantive change is intended.

2000 Amendments

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

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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

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.

(Pub.L. 93–595, § 1, Jan. 2, 1975, 88 Stat. 1937; Apr. 17, 2000, eff. Dec. 1, 2000.)

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An intelligent evaluation of facts is often difficult or impossible without the application of some scientific, technical, or other specialized knowledge. The most common source of this knowledge is the expert witness, although there are other techniques for supplying it.

Most of the literature assumes that experts testify only in the form of opinions. The assumption is logically unfounded. The rule accordingly recognizes that an expert on the stand may give a dissertation or exposition of scientific or other principles relevant to the case, leaving the trier of fact to apply them to the facts. Since much of the criticism of expert testimony has centered upon the hypothetical question, it seems wise to recognize that opinions are not indispensable and to encourage the use of expert testimony in non-opinion form when counsel believes the trier can itself draw the requisite inference. The use of opinions is not abolished by the rule, however. It will continue to be permissible for the experts to take the further step of suggesting the inference which should be drawn from applying the specialized knowledge to the facts. See Rules 703 to 705.

Whether the situation is a proper one for the use of expert testimony is to be determined on the basis of assisting the trier. "There is no more certain test for determining when experts may be used than the common sense inquiry whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute." Ladd, Expert Testimony, 5 Vand.L.Rev. 414, 418 (1952). When opinions are excluded, it is because they are unhelpful and therefore superfluous and a waste of time. 7 Wigmore § 1918.

The rule is broadly phrased. The fields of knowledge which may be drawn upon are not limited merely to the "scientific" and "technical" but extend to all "specialized" knowledge. Similarly, the expert is viewed, not in a narrow sense, but as a person qualified by "knowledge, skill, experience, training or education." Thus within the scope of the rule are not only experts in the strictest sense of the word, e.g., physicians, physicists, and architects, but also the large group sometimes called "skilled" witnesses, such as bankers or landowners testifying to land values.

2000 Amendments

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

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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" injury 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.

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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.

(Pub.L. 93–595, § 1, Jan. 2, 1975, 88 Stat.1937; Mar. 2, 1987, eff. Oct. 1, 1987; Apr. 17, 2000, eff. Dec. 1, 2000.)

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Facts or data upon which expert opinions are based may, under the rule, be derived from three possible sources. The first is the firsthand observation of the witness with opinions based thereon traditionally allowed. A treating physician affords an example. Rheingold, The Basis of Medical Testimony, 15 Vand.L.Rev. 473, 489 (1962). Whether he must first relate his observations is treated in Rule 705. The second source, presentation at the trial, also reflects existing practice. The technique may be the familiar hypothetical question or having the expert attend the trial and hear the testimony establishing the facts. Problems of determining what testimony the expert relied upon, when the latter technique is employed and the testimony is in conflict, may be resolved by resort to Rule 705. The third source contemplated by the rule consists of presentation of data to the expert outside of court and other than by his own perception. In this respect the rule is designed to broaden the basis for expert opinions beyond that current in many jurisdictions and to bring the judicial practice into line with the practice of the experts themselves when not in court. Thus a physician in his own practice bases his diagnosis on information from numerous sources and of considerable variety, including statements by patients and relatives, reports and opinions from nurses, technicians and other doctors, hospital records, and X rays. Most of them are admissible in evidence, but only with the expenditure of substantial time in producing and examining various authenticating witnesses. The physician makes life-and-death decisions in reliance upon them. His validation, expertly performed and subject to cross-examination, ought to suffice for judicial purposes. Rheingold, *supra*, at 531; McCormick § 15. A similar provision is California Evidence Code § 801(b).

The rule also offers a more satisfactory basis for ruling upon the admissibility of public opinion poll evidence. Attention is directed to the validity of the techniques employed rather than to relatively fruitless inquiries whether hearsay is involved. See Judge Feinberg's careful analysis in Zippo Mfg. Co. v. Rogers Imports, Inc., 216 F.Supp. 670 (S.D.N.Y. 1963). See also Blum et al., The Art of Opinion Research: A Lawyer's Appraisal of an Emerging Service, 24 U.Chi.L.Rev. 1 (1956); Bonynge Trademark Surveys and Techniques and Their Use in Litigation, 48 A.B.A.J. 329 (1962); Zeisel, The Uniqueness of Survey Evidence, 45 Cornell L.Q. 322 (1960); Annot., 76 A.L.R.2d 919.

If it be feared that enlargement of permissible data may tend to break down the rules of exclusion unduly, notice should be taken that the rule requires that the facts or data "be of a type reasonably relied upon by experts in the particular field." The language would not warrant admitting in evidence the opinion of an "accidentologist" as to the point of impact in an automobile collision based on statements of bystanders since this requirement is not satisfied. See Comment, Cal.Law Rev.Comm'n, Recommendation Proposing an Evidence Code 148–150 (1965).

1987 Amendments

The amendment is technical. No substantive change is intended.

2000 Amendments

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 704. Opinion on Ultimate Issue

(a) Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

(b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.

(Pub.L. 93–595, § 1, Jan. 2, 1975, 88 Stat. 1937; Pub.L. 98–473, Title IV, § 406, Oct. 12, 1984, 98 Stat. 2067.)

ADVISORY COMMITTEE NOTES

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The basic approach to opinions, lay and expert, in these rules is to admit them when helpful to the trier of fact. In order to render this approach fully effective and to allay any doubt on the subject, the so-called "ultimate issue" rule is specifically abolished by the instant rule.

The older cases often contained strictures against allowing witnesses to express opinions upon ultimate issues, as a particular aspect of the rule against opinions. The rule was unduly restrictive, difficult of application, and generally served only to deprive the trier of fact of useful information. 7 Wigmore §§ 1920, 1921; McCormick § 12. The basis usually assigned for the rule, to prevent the witness from "usurping the province of the jury," is aptly characterized as "empty rhetoric." 7 Wigmore § 1920, p. 17. Efforts to meet the felt needs of particular situations led to odd verbal circumlocutions which were said not to violate the rule. Thus a witness could express his estimate of the criminal responsibility of an accused in terms of sanity or insanity, but not in terms of ability to tell right from wrong or other more modern standard. And in cases of medical causation, witnesses were sometimes required to couch their opinions in cautious phrases of "might or could," rather than "did," though the result was to deprive many opinions of the positiveness to which they were entitled, accompanied by the hazard of a ruling of insufficiency to support a verdict. In other instances the rule was simply disregarded, and, as concessions to need, opinions were allowed upon such matters as intoxication, speed, handwriting, and value, although more precise coincidence with an ultimate issue would scarcely be possible.

Many modern decisions illustrate the trend to abandon the rule completely. People v. Wilson, 25 Cal.2d 341, 153 P.2d 720 (1944), whether abortion necessary to save life of patient; *Clifford-Jacobs Forging Co. v. Industrial Comm.*, 19 Ill.2d 236, 166 N.E.2d 582 (1960), medical causation; *Dowling v. L. H. Shattuck*, Inc., 91 N.H. 234, 17 A.2d 529 (1941), proper method of shoring ditch; *Schweiger v. Solbeck*, 191 Or. 454, 230 P.2d 195 (1951), cause of landslide. In each instance the opinion was allowed.

The abolition of the ultimate issue rule does not lower the bars so as to admit all opinions. Under Rules 701 and 702, opinions must be helpful to the trier of fact, and Rule 403 provides for exclusion of evidence which wastes time. These provisions afford ample assurances against the admission of opinions which would merely tell the jury what result to reach, somewhat in the manner of the oath-helpers of an earlier day. They also stand ready to exclude opinions phrased in terms of inadequately explored legal criteria. Thus the question, "Did T have capacity to make a will?" would be excluded, while the question, "Did T have sufficient mental capacity to know the nature and extent of his property and the natural objects of his bounty and to formulate a

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rational scheme of distribution?" would be allowed. McCormick § 12.

For similar provisions see Uniform Rule 56(4); California Evidence Code § 805; Kansas Code of Civil Procedure § 60–456(d); New Jersey Evidence Rule 56(3).

Rule 705. Disclosure of Facts or Data Underlying Expert Opinion

The expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

(Pub.L. 93–595, § 1, Jan. 2, 1975, 88 Stat. 1938; Mar. 2, 1987, eff. Oct. 1, 1987; Apr. 22, 1993, eff. Dec. 1, 1993.)

ADVISORY COMMITTEE NOTES

1972 Proposed Rules

The hypothetical question has been the target of a great deal of criticism as encouraging partisan bias, affording an opportunity for summing up in the middle of the case, and as complex and time consuming. Ladd, Expert Testimony, 5 Vand.L.Rev. 414, 426–427 (1952). While the rule allows counsel to make disclosure of the underlying facts or data as a preliminary to the giving of an expert opinion, if he chooses, the instances in which he is required to do so are reduced. This is true whether the expert bases his opinion on data furnished him at secondhand or observed by him at firsthand.

The elimination of the requirement of preliminary disclosure at the trial of underlying facts or data has a long background of support. In 1937 the Commissioners on Uniform State Laws incorporated a provision to this effect in their Model Expert Testimony Act, which furnished the basis for Uniform Rules 57 and 58. Rule 4515, N.Y. CPLR (McKinney 1963), provides:

"Unless the court orders otherwise, questions calling for the opinion of an expert witness need not be hypothetical in form, and the witness may state his opinion and reasons without first specifying the data upon which it is based. Upon cross-examination, he may be required to specify the data * * *."

See also California Evidence Code § 802; Kansas Code of Civil Procedure §§ 60–456, 60–457; New Jersey Evidence Rules 57, 58.

If the objection is made that leaving it to the cross-examiner to bring out the supporting data is essentially unfair, the answer is that he is under no compulsion to bring out any facts or data except those unfavorable to the opinion. The answer assumes that the cross-examiner has the advance knowledge which is essential for effective cross-examination. This advance knowledge has been afforded, though imperfectly, by the traditional foundation requirement. Rule 26(b)(4) of the Rules of Civil Procedure, as revised, provides for substantial discovery in this area, obviating in large measure the obstacles which have been raised in some instances to discovery of findings, underlying data, and even the identity of the experts. Friedenthal Discovery and Use of an Adverse Party's Expert Information, 14 Stan.L.Rev. 455 (1962).

These safeguards are reinforced by the discretionary power of the judge to require preliminary disclosure in any event.

1987 Amendment

The amendment is technical. No substantive change is intended.

1993 Amendment

This rule, which relates to the manner of presenting testimony at trial, is revised to avoid an arguable conflict with revised Rules 26(a)(2)(B) and 26(e)(1) of the Federal Rules of Civil Procedure or with revised Rule 16 of the Federal Rules of Criminal Procedure, which require disclosure in advance of trial of the basis and reasons for an expert's opinions.

If a serious question is raised under Rule 702 or 703 as to the admissibility of expert testimony, disclosure of the underlying facts or data on which opinions are based may, of course, be needed by the court before deciding whether, and to what extent, the person should be allowed to testify. This rule does not preclude such an inquiry.

Rule 706. Court Appointed Experts

(a) Appointment. The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless the witness consents to act. A witness so appointed shall be informed of the witness' duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of the witness' findings, if any; the witness' deposition may be taken by any party; and the witness may be called to testify by the court or any party. The witness shall be subject to cross-examination by each party, including a party calling the witness.

(b) Compensation. Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and civil actions and proceedings involving just compensation under the fifth amendment. In other civil actions and proceedings the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs.

(c) Disclosure of appointment. In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that the court appointed the expert witness.

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

(Pub.L. 93–595, § 1, Jan. 2, 1975, 88 Stat.1938; Mar. 2, 1987, eff. Oct. 1, 1987.)

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The practice of shopping for experts, the venality of some experts, and the reluctance of many reputable experts to involve themselves in litigation, have been matters of deep concern. Though the contention is made that court appointed experts acquire an aura of infallibility to which they are not entitled, Levy, Impartial Medical Testimony—Revisited, 34 Temple L.Q. 416 (1961), the trend is increasingly to provide for their use. While experience indicates that actual appointment is a relatively infrequent occurrence, the assumption may be made that the availability of the procedure in itself decreases the need for resorting to it. The ever-present possibility that the judge may appoint an expert in a given case must inevitably exert a sobering effect on the expert witness of a party and upon the person utilizing his services.

The inherent power of a trial judge to appoint an expert of his own choosing is virtually unquestioned. *Scott v. Spanjer Bros., Inc.*, 298 F.2d 928 (2d Cir.1962); *Danville Tobacco Assn. v. Bryant–Buckner Associates*, Inc., 333 F.2d 202 (4th Cir.1964); Sink, The Unused Power of a Federal Judge to Call His Own Expert Witnesses, 29 S.Cal.L.Rev. 195 (1956); 2 Wigmore § 563, 9 *id.* § 2484; Annot., 95 A.L.R.2d 383. Hence the problem becomes largely one of detail.

The New York plan is well known and is described in Report by Special Committee of the Association of the Bar of the City of New York: Impartial Medical Testimony (1956). On recommendation of the Section of Judicial Administration, local adoption of an impartial medical plan was endorsed by the American Bar Association. 82 A.B.A.Rep. 184–185 (1957). Descriptions and analyses of plans in effect in various parts of the country are found in Van Dusen, A United States District Judge's View of the Impartial Medical Expert System, 32 F.R.D. 498 (1963); Wick and Kightlinger, Impartial Medical Testimony Under the Federal Civil Rules: A Tale of Three Doctors, 34 Ins. Counsel J. 115 (1967); and numerous articles collected in Klein, Judicial Administration and the Legal Profession 393 (1963). Statutes and rules include California Evidence Code §§ 730–733; Illinois Supreme Court Rule 215(d), Ill.Rev.Stat.1969, c. 110A, § 215(d); Burns Indiana Stats.1956, § 9–1702; Wisconsin Stats.Annot.1958, § 957.27.

In the federal practice, a comprehensive scheme for court appointed experts was initiated with the adoption of Rule 28 of the Federal Rules of Criminal Procedure in 1946. The Judicial Conference of the United States in 1953 considered court appointed experts in civil cases, but only with respect to whether they should be compensated from public funds, a proposal which was rejected. Report of the Judicial Conference of the United States 23 (1953). The present rule expands the practice to include civil cases.

Note to Subdivision (a). Subdivision (a) is based on Rule 28 of the Federal Rules of Criminal Procedure, with a few changes, mainly in the interest of clarity. Language has been added to provide specifically for the appointment either on motion of a party or on the judge's own motion. A provision subjecting the court appointed expert to deposition procedures has been incorporated. The rule has been revised to make definite the right of any party, including the party calling him, to cross-examine.

Note to Subdivision (b). Subdivision (b) combines the present provision for compensation in criminal cases with what seems to be a fair and feasible handling of civil cases, originally found in the Model Act and carried from there into Uniform Rule 60. See also California Evidence Code §§ 730–731. The special provision for Fifth Amendment compensation cases is designed to guard against reducing constitutionally guaranteed just compensation by requiring the recipient to pay costs. See Rule 71A(*l*) of the Rules of Civil Procedure.

Note to Subdivision (c). Subdivision (c) seems to be essential if the use of court appointed experts is to be fully effective. Uniform Rule 61 so provides.

Note to Subdivision (d). Subdivision (d) is in essence the last sentence of Rule 28(a) of the Federal Rules of Criminal Procedure.

1987 Amendment

The amendments are technical. No substantive change is intended.

ARTICLE VIII. HEARSAY

ADVISORY COMMITTEE NOTES

1972 Proposed Rules

Introductory Note; The Hearsay Problem. The factors to be considered in evaluating the testimony of a witness are perception, memory, and narration. Morgan, Hearsay Dangers and the Application of the Hearsay Concept, 62 Harv. L.Rev. 177 (1948), Selected Writings on Evidence and Trial 764, 765 (Fryer ed. 1957); Shientag, Cross–Examination—A Judge's Viewpoint, 3 Record 12 (1948); Strahorn, A Reconsideration of the Hearsay Rule and Admissions, 85 U.Pa. L.Rev. 484, 485 (1937), Selected Writings, *supra*, 756, 757; Weinstein, Probative Force of Hearsay, 46 Iowa L.Rev. 331 (1961). Sometimes a fourth is added, sincerity, but in fact it seems merely to be an aspect of the three already mentioned.

In order to encourage the witness to do his best with respect to each of these factors, and to expose any inaccuracies which may enter in, the Anglo–American tradition has evolved three conditions under which witnesses will ideally be required to testify: (1) under oath, (2) in the personal presence of the trier of fact, (3) subject to cross-examination.

(1) Standard procedure calls for the swearing of witnesses. While the practice is perhaps less effective than in an earlier time, no disposition to relax the requirement is apparent, other than to allow affirmation by persons with scruples against taking oaths.

RULE 613. PRIOR STATEMENTS OF WITNESSES

(a) Examining Witness Concerning Prior Inconsistent Statements for Impeachment Purposes. Before a witness may be examined for impeachment by prior inconsistent statement the examiner must call the attention of the witness to the particular time and occasion when, the place where, and the person to whom he made the statement. As a part of that foundation, the examiner may refer to the witness statement to bring to the attention of the witness any purported prior inconsistent statement. The exact language of the prior statement may be given.

Where the witness denies or does not remember making the prior statement, extrinsic evidence, such as a deposition, proving the utterance of the prior evidence is admissible. However, if a witness admits making the prior statement, additional extrinsic evidence that the prior statement was made is inadmissible.

Denial or failure to remember the prior statement is a prerequisite for the introduction of extrinsic evidence to prove that the prior inconsistent statement was made.

RULE 614. CALLING AND INTERROGATION OF WITNESSES BY COURT

(a) Calling by Court. The court may, on its own motion or at the suggestion of a party, call witnesses and all parties are entitled to cross-examine witnesses thus called.

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

(c) Objections. Objections to the calling of witnesses by the court or to interrogation by it may be made at the time or at the next available opportunity when the jury is not present.

RULE 615. EXCLUSION OF WITNESSES

At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of his cause.

ARTICLE VII. OPINIONS AND EXPERT TESTIMONY

RULE 701. OPINION TESTIMONY BY LAY WITNESSES

If the witness is not testifying as an expert, his 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 his testimony or the determination of a fact in issue.

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.

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 him 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.

RULE 704. OPINION ON ULTIMATE ISSUE

Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

RULE 705. DISCLOSURE OF FACTS OR DATA UNDERLYING EXPERT OPINION

The expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

Amended eff. Nov. 16, 1995.

RULE 706. COURT APPOINTED EXPERTS

(a) Appointment. The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert

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witnesses of its own selection. An expert witness shall not be appointed by the court unless he consents to act. A witness so appointed shall be informed of his duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of his findings, if any; his deposition may be taken by any party; and he may be called to testify by the court or any party. He shall be subject to cross-examination by each party, including a party calling him as a witness.

(b) Compensation. Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and civil actions and proceedings involving just compensation under the fifth amendment. In other civil actions and proceedings the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs.

(c) Disclosure of Appointment. In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that the court appointed the expert witness.

(d) Parties' Experts of Own Selection. Nothing in this rule limits the parties in calling expert witnesses of their own selection.

ARTICLE VIII. HEARSAY

RULE 801. DEFINITIONS

The following definitions apply under this article:

(a) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him to be communicative.

(b) Declarant. A "declarant" is a person who makes a statement.

(c) Hearsay. "Hearsay" is a statement other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) Statements Which Are Not Hearsay. A statement is not hearsay if—

(1) *Prior Statement by Witness.* The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony, or (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving him, or

(2) *Admission by Party-Opponent.* The statement is offered against a party and is (A) the party's own statement in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy. The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).

Amended eff. Jan. 1, 1999.

Committee Comment

The last sentence of this Rule was added to track a corresponding change in F.R.E. 801(d)(2).

RULE 802. HEARSAY RULE

Hearsay is not admissible except as provided by these rules or by the civil and criminal procedural rules applicable to the courts of Colorado or by any statutes of the State of Colorado.

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:

(1) Spontaneous Present Sense Impression. A spontaneous statement describing or explaining an event or condition made while the declarant was perceiving the event or condition.

(2) Excited Utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) Then Existing Mental, Emotional, or Physical Condition. A statement of the declarant's then

provisions, which direct that taxes shall be assessed against "wages paid" during the calendar year, would be controlling if the income we had before us were "wages" within the normal meaning of that term; but it is not. The question we face is whether *damages awards compensating an employee for lost wages* should be regarded for tax purposes as wages paid when the award is received, or rather as wages paid when they would have been paid but for the employer's unlawful actions. (The parties have stipulated that the damages awards should be regarded as taxable "wages paid" of some sort, see also *Social Security Bd.* v. *Nierotko, supra,* at 364–370.) The proper treatment of such damages awards is an issue the statute does not address, and hence it is an issue left to the reasonable resolution of the administering agency, here the Internal Revenue Service. In *Nierotko*, which we decided at a time when it was common for courts to fill statutory gaps that would now be left to the agency, we provided one rule for purposes of the benefits provisions. The Internal Revenue Service has since provided another rule for purposes of the tax provisions. Both rules are reasonable; neither is compelled; and neither involves a direct application of the statutory term "wages paid" which would require (or at least strongly suggest) a uniform result. I therefore concur in the Court's judgment deferring to the Government's regulations.

FULL-TEXT STATE OPINIONS

CRIMINAL LAW AND PROCEDURE

DNA evidence employing multiplexing method should be admitted at trial because it is scientifically reliable.

Cite as 2001 DJCAR 1995

SUPREME COURT, STATE OF COLORADO

Original Proceeding Pursuant to C.A.R. 21
Boulder County District Court, No. 98CR2475
Honorable Daniel C. Hale, Judge
Case No. 00SA105

IN RE:
Plaintiff:
THE PEOPLE OF THE STATE OF COLORADO,
v.
Defendant:
MICHAEL EUGENE SHRECK.

April 23, 2001

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JUSTICE RICE delivered the Opinion of the Court.

The prosecution in this case initiated this original proceeding pursuant to C.A.R. 21, seeking relief from a trial court order granting the defendant's motion to bar DNA evidence. The trial court held that under *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923), the multiplex technique employed by the commercial testing kits used by the Colorado Bureau of Investigation ("CBI") in 1999 was not yet generally accepted at that time by the relevant scientific community. Thus, the trial court ruled that the DNA evidence at issue in this case, which was derived from those kits, was not admissible against the defendant. We issued a rule to show cause why the trial court's order should not be vacated, and the defendant responded.

We now hold that CRE 702, rather than *Frye*, governs a trial court's determination as to whether scientific or other expert testimony should be admitted. Such an inquiry should focus on the reliability and relevance of the proffered evidence and requires a determination as to

(1) the reliability of the scientific principles, (2) the qualifications of the witness, and (3) the usefulness of the testimony to the jury. We also hold that when a trial court applies CRE 702 to determine the reliability of scientific evidence, its inquiry should be broad in nature and consider the totality of the circumstances of each specific case. In doing so, a trial court may consider a wide range of factors pertinent to the case at bar. The factors mentioned in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 593-94 (1993), and by other courts may or may not be pertinent, and thus are not necessary to every CRE 702 inquiry. In light of this liberal inquiry, a trial court should also apply its discretionary authority under CRE 403 to ensure that the probative value of the evidence is not substantially outweighed by unfair prejudice. Finally, we hold that under CRE 702, a trial court must issue specific findings as it applies the CRE 702 and 403 analyses.

We further hold that under CRE 702, the multiplex testing techniques at issue in this case were sufficiently reliable to warrant admission of the DNA evidence derived from their use. Accordingly, we make the rule absolute and direct the trial court to vacate its order barring such evidence.

I. SCIENTIFIC BACKGROUND

We described the scientific principles and techniques underlying DNA typing in *Fishback v. People*, 851 P.2d 884, 885 (Colo. 1993). We now review those principles and techniques in the context of the particular method of DNA typing at issue in this case.

Within the nucleus of each human cell are twenty-three pairs of chromosomes composed of deoxyribonucleic acid ("DNA"), which contains the coded information that provides the genetic material determining the physical structure and characteristics for each individual. No two individuals, except identical twins, have the same DNA structure. A DNA molecule is shaped like a double helix, which resembles a twisted ladder. The sides of the ladder are composed of phosphate and sugar molecules and the rungs are composed of a pair of organic compounds called bases. Two bases form a single rung called a base pair. The order in which these base pairs appear in the ladder is the genetic code of that individual. There are approximately three billion base pairs in a human being, 99% of which are the same in each person. However, certain sections of DNA vary from person to person. These areas are called polymorphisms. DNA typing concerns the examination of two types of polymorphisms: length and sequence.

One method of detecting and measuring length variations is called restriction fragment length polymorphism ("RFLP") analysis. The RFLP procedure isolates DNA in a blood sample so that certain polymorphisms can be located in the DNA. RFLP is a widely accepted and scientifically validated method of testing that has generally been found to be admissible in state and federal courts. *United States v. Hicks*, 103 F.3d 837, 846-47 (9th Cir. 1996); *United States v. Chischilly*, 30 F.3d 1144, 1153-56 (9th Cir. 1994); *United States v. Lowe*, 954 F. Supp. 401, 416 (D. Mass. 1996); *Fishback*, 851 P.2d at 893.

Polymerase chain reaction ("PCR") is a process by which DNA fragments too small to be suitable for RFLP analysis can be analyzed. Under the PCR process, these DNA fragments are duplicated many times, thus allowing very small samples to be accurately tested. PCR also permits testing in a relatively short time in comparison to prior methods that required the decay of radioactive materials. Finally, unlike RFLP testing, which destroys the sample, PCR processing allows a technician to reproduce and verify test results by creating a larger sample for testing.

The D1S80 test is a hybrid of the PCR and RFLP methods. It detects fragment length polymorphisms once the DNA fragment has been amplified through the PCR procedure.

Another form of PCR testing involves the use of locations on the DNA strand containing short tandem repeats ("STR") of baseline patterns. STR testing reveals length differences between chromosomes on different people with the same base pair sequences. There are thirteen locations at which the number of STRs are known to vary from person to person. Thus, if all thirteen locations of the known and questioned sample are identical, a match is considered to have been made.

When STR loci are amplified through the PCR process separately and run on a separate gel, the system is called "monoplex." Multiplex systems add more than one set of PCR primers to a reaction so as to be able to amplify several loci together and run them simultaneously. Monoplex systems and multiplex systems that amplify and run three loci simultaneously, ("triplex"), have been in use for many years.

The commercial kits used to perform the STR testing at issue in this case were manufactured by Perkins Elmer Biosystems ("PE"). These kits, called AmpFLSTR Profiler Plus ("Profiler Plus") and AmpFLSTR Cofiler ("Cofiler"), employ a combination sixplex and nineplex system that is able to read all thirteen locations at the same time.[1] In January 1999, when they were used in this case, the kits were relatively new to the market.

II. FACTS AND PROCEDURAL HISTORY

The defendant in this case has been in and out of jail since 1983. In April 1990, he was on parole and living in the Boulder area when a University of Colorado student was sexually assaulted. Although a rape kit was used on the victim, the crime was never solved. In 1998, the case was reopened and the CBI performed a DNA analysis using several PCR-based tests on the rape kit samples. A 1991 blood sample from the defendant was analyzed against the rape kit results. The CBI concluded that the probability that the contributor to the rape kit sample was not the defendant was one in 11,000. An analysis of a new blood sample from the defendant revealed identical results.

Several months later, the CBI performed more tests on the samples, this time using the Profiler Plus and Cofiler kits. By combining the Profiler Plus and Cofiler results with the earlier tests, the CBI determined that the defendant could not be excluded as a contributor to the rape kit sample. The CBI also determined that the probability that the contributor was not the defendant but a random third person was one in 5.3 quadrillion.[2] Based on the DNA results, a positive photo line-up identification by the victim, and the fact that the defendant had been on parole and living in the area at the time of the crime, the defendant was arrested and charged with second degree kidnapping, two counts of sexual assault in the first degree, two counts of criminal attempt to commit murder in the first degree, assault in the second degree, and as a habitual criminal.

The defendant moved to bar the use of the DNA evidence at trial on the grounds that (1) PCR and the PCR-based tests employed in this case were not generally accepted as reliable by the relevant scientific community; (2) STR tests in general and the STR multiplex technique employed by the Profiler Plus and Cofiler kits were not generally accepted; and (3) the methods of collection, preservation and handling of the samples, and the statistical methods used to determine the probability of a match were not generally accepted.

Applying the *Frye* standard as adopted in Colorado by *People v. Anderson*, 637 P.2d 354, 358 (Colo. 1981), and as explained in *People v. Lindsey*, 892 P.2d 281, 288-89 (Colo. 1995), and *Fishback v. People*, 851 P.2d 884, 890 (Colo. 1993), the trial court held that admissibility of the DNA evidence at issue required a showing that the technologies and methods used were generally accepted in the relevant scientific community. After reviewing the evidence, rulings from other jurisdictions, and scientific commentary and journals, the trial court concluded that PCR and the PCR-based tests used in this case, as well as the handling and statistical methods used, were generally accepted in the scientific community. The court also concluded that although PCR-based STR testing is different from other PCR-based tests, it is generally accepted as to monoplex and triplex applications.

The court, however, ruled that because the multiplex system at issue in this case involves a combination nineplex and sixplex system using new loci and primers, it differs from previous STR tests in a critical way, thus triggering a new *Frye* analysis. The trial court determined that the evidence of validation and peer review offered by the prosecution failed to meet guidelines published by the Technical Working Group on DNA Analysis Methods ("TWGDAM"). Thus, the court concluded that the multiplex technique employed by the Profiler Plus and Cofiler systems is not generally accepted and that the DNA evidence resulting from its use is therefore inadmissible. Alternatively, the trial court concluded under *Daubert*, that the Profiler Plus and Cofiler systems were not sufficiently reliable under CRE 702 to warrant admission of the DNA evidence derived from their use.

The prosecution petitioned for a writ in the nature of prohibition pursuant to C.A.R. 21. We issued a rule to show cause why the trial court's order should not be vacated, and the defendant responded. We now hold that CRE 702 governs a trial court's determination as to whether scientific evidence should be admitted. Under CRE 702, we hold that the multiplex STR testing techniques at issue in this case are sufficiently reliable and relevant to warrant admission. Accordingly, we make the rule absolute and direct the trial court to vacate its order barring the DNA evidence derived from these tests.

III. ANALYSIS

We have not previously addressed the admissibility of PCR or STR-based DNA testing, or the specific multiplex testing systems at issue here. Thus, this case presents us with the opportunity to address these matters of first impression. In doing so, we consider the appropriate standard governing the admissibility of scientific evidence. Our review includes an analysis of relevant Colorado case law, similar cases in other jurisdictions, and academic commentary.

A. Standard of Review

Under C.A.R. 21, we may, in our discretion, grant relief when (1) the trial court is proceeding without or in excess of its jurisdiction, or (2) it has abused its discretion, and (3) when no other adequate remedy exists. C.A.R. 21; *People v. District Court*, 898 P.2d 1058, 1060 (Colo. 1995). In this case, the prosecution's ability to present its case has been impaired by the exclusion of the DNA evidence in question. *Id.* Because double jeopardy would bar a retrial if the defendant were acquitted, no other adequate remedy exists. *People v. District Court*, 664 P.2d 247, 251 (Colo. 1983). As discussed below, we hold that the trial court erred in finding that the DNA evidence derived from the multiplex STR systems at issue in this case was inadmissible, and that its exclusion of the evidence was an abuse of discretion. Thus, relief under C.A.R. 21 is appropriate here.

B. Admissibility of Scientific Evidence Generally

Prior to 1993, the widely accepted standard for admitting novel scientific evidence in both federal and state courts was the standard articulated in *Frye*. *Daubert*, 509 U.S. at 585 (noting that, "In the 70 years since its formulation in the *Frye* case, the 'general acceptance' test has been the dominant standard for determining the admissibility of novel scientific evidence at trial."). This standard requires that "the thing from which [expert testimony is deduced] be sufficiently established to have gained general acceptance in the particular field to which it belongs." *Frye*, 293 F. at 1014. Applying this standard, the *Frye* court concluded that the systolic blood pressure deception test had not yet gained enough recognition among scientific authorities to warrant admission of its results. *Id.*

Most courts have interpreted *Frye* as requiring general acceptance of both (1) the underlying theory supporting the scientific conclusion and, (2) the techniques and experiments employing that theory.[3] The court in *People v. Castro*, 545 N.Y.S.2d 985, 986 (N.Y. Sup. Ct. 1989), however, held that a third requirement should apply in the complex area of DNA identification: that the actual testing procedures employed properly apply the accepted scientific techniques in analyzing the forensic samples at issue. Other courts have held that questions concerning testing procedures and the accuracy of particular test results go to the weight, rather than admissibility of the evidence. *See, e.g., Chischilly*, 30 F.3d at 1154; *United States v. Bonds*, 12 F.3d 540, 563 (6th Cir. 1993); *United States v. Shea*, 957 F. Supp. 331, 341 (D.N.H. 1997), *aff'd*, 159 F.3d 37 (1st Cir. 1998).

In 1993, the United States Supreme Court held in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, that *Frye*'s general acceptance test had been superseded by the adoption of Federal Rule of Evidence 702.[4] 509 U.S. at 587. The Court reasoned that *Frye*'s "rigid general acceptance requirement is at odds with the liberal thrust of the Federal Rules and their general approach of relaxing the traditional barriers to opinion testimony." *Id.* at 588. The *Daubert* Court held that admissibility of scientific evidence under the Federal Rules of Evidence requires that the trial judge ensure that the evidence be both relevant and reliable. *Id.* at 589. The Court thus held that under Rule 702, the reasoning or methodology underlying the testimony must be scientifically valid, and that such reasoning or methodology may properly be applied to the facts of the case. *Id.* at 592. The Court

then set forth a non-exclusive list of factors, including general acceptance, to guide a trial court in making this determination. *Id.* at 593-94. The Court concluded its analysis by noting that the "inquiry envisioned by Rule 702 is . . . a flexible one," and that the focus of the inquiry should be scientific validity as it pertains to evidentiary relevance and reliability. *Id.* at 594.

Recently, the United States Supreme Court expanded *Daubert*'s general holding concerning the trial judge's gatekeeping function to testimony based not only on scientific knowledge, but also to testimony based on technical and "other specialized" knowledge. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 142 (1999). The Court stressed, however, that the inquiry was a flexible one, and held that the factors listed in *Daubert* were neither exclusive nor mandatory. *Id.*

C. Admissibility of Scientific Evidence in Colorado

Before reaching the relative merits of *Frye* and Rule 702 for determining the admissibility of scientific evidence, we review our previous treatment of these standards in Colorado. The *Frye* standard was first adopted in Colorado in *People v. Anderson*, 637 P.2d at 358. In *Anderson*, this court held that polygraph results and the testimony of polygraph examiners were per se inadmissible in a criminal trial because the scientific theory or technique of the polygraph was not sufficiently advanced to permit its use at trial as competent evidence of credibility. *Id.*

We limited the applicability of *Frye*, however, in *People v. Hampton*, 746 P.2d 947, 951 (Colo. 1987), where we applied CRE 702, rather than *Frye*, to determine the admissibility of rape trauma syndrome evidence. There, we reasoned that *Frye* was only applicable to novel scientific devices and processes involving the manipulation of physical evidence, and that *Frye* had only been applied in Colorado to polygraph tests. *Id.* at 950-51. Thus, we held that CRE 702, rather than *Frye*, governed the admission of testimony regarding rape trauma syndrome. *Id.*

Similarly, in *Campbell v. People*, 814 P.2d 1, 7 (Colo. 1991), we applied CRE 702, rather than *Frye*, in determining whether eyewitness identification evidence should be admitted. In that case, we explicitly held that *Frye* was only applicable to cases involving novel scientific devices or processes involving the evaluation of physical evidence. *Id.* at 8. Because no such scientific device or process was at issue in *Campbell*, we held that CRE 702's more liberal standard for admissibility should have been applied to the eyewitness identification evidence. *Id.*

We first addressed the admissibility of DNA evidence in Colorado in *Fishback v. People*, where we held that DNA evidence, unlike the evidence at issue in *Hampton* and *Campbell*, is "precisely the sort of scientific evidence which requires application of the *Frye* test." 851 P.2d at 890. In concluding that the *Frye* test governed our inquiry, we reasoned that the highly technical and sophisticated techniques involved in DNA typing, and its relative novelty at the time, qualified it as "a novel scientific process involving the evaluation of physical evidence." *Id.* We also held that general acceptance of both the underlying theory or principle, and of the techniques used to apply that principle was required under *Frye*. *Id.* at 891. Applying this standard, we concluded that the theory underlying DNA typing, the techniques employed in RFLP analysis, and the statistical techniques employed in that case were generally accepted among the relevant scientific communities. *Id.* at 892-93.

In *Lindsey v. People*, we again considered the admissibility of DNA evidence in Colorado courts. 892 P.2d at 281. At issue in that case was the statistical method used to analyze DNA results. *Id.* at 285. Although we acknowledged that the United States Supreme Court had abandoned *Frye*'s general acceptance test in *Daubert*, we concluded that we were not bound by *Daubert*'s non-constitutional construction of the Federal Rules of Evidence. *Id.* at 288. Thus, we applied *Frye*, as interpreted in *Fishback*, to hold that the DNA statistical frequency analysis employed in that case was generally accepted. *Id.* at 288-95. In doing so, we noted that general acceptance could be considered broadly to mean accepted in a reasonably inclusive manner, and including a consideration of rulings from other jurisdictions and the general state of science. *Id.* at 289. We expressly declined, however, to evaluate the relative merits of *Frye* and CRE 702 in determining the admissibility of scientific evidence, noting that the issue was not before us in that case. *Id.* at 288.

In *Brooks v. People*, 975 P.2d 1105, 1106 (Colo. 1999), we declined to apply either *Frye* or *Daubert* to the determination as to whether testimony on the subject of scent tracking evidence was admissible. In doing so, we reasoned that the evidence in question did not involve the type of scientific devices, processes, or theories that are properly subject to *Frye* scrutiny. *Id.* at 1111-12. We were also unwilling to apply *Daubert* for the first time in that case, because we found that the scent-tracking evidence was experience-based specialized knowledge that was not dependent on scientific explanation, remarking that *Daubert* itself limited its holding to the scientific realm. *Id.* at 1113; *see Daubert*, 509 U.S. at 590 n.8. We noted that the decision in *Kumho* applied *Daubert* to technical and other specialized knowledge and that it provided that the *Daubert* factors were not exclusive. However, we opined that it was preferable to avoid debating whether or to what extent *Daubert* was applicable and held instead that CRE 702 and CRE 403 governed our determination as to whether the experience-based knowledge at issue in that case was admissible. *Brooks*, 975 P.2d at 1115.

A review of our previous treatment of *Frye* indicates that we have not fully endorsed its general acceptance standard as the appropriate test for determining the admissibility of scientific evidence in Colorado. After initially adopting *Frye* in the context of *Anderson*, which, like *Frye*, concerned the admissibility of polygraph evidence, we later limited its applicability in *Hampton*, 746 P.2d at 951, and in *Campbell*, 814 P.2d at 7, to novel scientific devices or processes involving the evaluation of physical evidence.

Although we later applied *Frye* in both *Fishback* and *Lindsey* to determine the admissibility of DNA evidence, we did so without evaluating the relative merits of *Frye* and CRE 702.[5] In *Brooks*, we applied the rules of evidence, specifically Rules 702 and 403, rather than *Daubert* or *Frye* to determine the admissibility of experience-based scent-tracking evidence. 975 P.2d at 1106.

In order to determine whether the DNA evidence derived from the multiplex STR technique at issue here was properly barred, we must first address the proper standard governing the admissibility of scientific

evidence in Colorado. Because we have never addressed the relative merits of *Frye* and CRE 702, we now undertake that analysis in an effort to clearly set forth the standard for admitting scientific evidence in Colorado.[6]

Proponents of *Frye*'s general acceptance test argue that it insulates juries from unreliable evidence that has not yet been found reliable by a sufficient number of experts. Joseph G. Petrosinelli, Note, *The Admissibility of DNA Typing:*

> *A New Methodology*, 79 Geo. L.J. 313, 317 (1990). Another justification for the *Frye* test is that it provides a method by which courts can assess the reliability of novel scientific expert testimony. *United States v. Downing*, 753 F.2d 1224, 1235 (3d Cir. 1985). Finally, proponents of *Frye* also argue that the general acceptance test safeguards against the possible prejudicial effects of testimony based upon questionable scientific evidence. *Id.*

Frye's general acceptance test has also, however, been heavily criticized on several grounds. Lawrence B. Ebert, *Frye after Daubert:*

> *The Role of Scientists in Admissibility Issues as Seen through Analysis of the DNA Profiling Cases*, The University of Chicago Law School Rountable, 219 (1993); Petrosinelli, *supra*, at 318; Paul C. Giannelli, *The Admissibility of Novel Scientific Evidence:*

Frye v. United States, a Half-Century Later, 80 Colum. L. Rev. 1197, 1208-23 (1980). Generally, critics have been concerned with *Frye*'s vagueness and its conservatism. *Downing*, 753 F.2d at 1236.

Commentators have found vagueness and ambiguity under *Frye* in determining, for example, (1) precisely what must be generally accepted, (2) the relevant scientific community, (3) how much agreement constitutes general acceptance, and (4) the extent to which *Frye* applies. Ebert, *supra*, at 225; Petrosinelli, *supra*, at 320; Giannelli, *supra*, at 1208-23. Such ambiguity yields inconsistent results and creates uncertainty in decision-making. *Fishback*, 851 P.2d at 896-97 (Mullarkey, J., concurring in the result only).[7]

Furthermore, while some critics have argued that the *Frye* inquiry is too malleable,[8] others have concluded that the *Frye* standard is too rigid and that it unduly restricts the admission of probative evidence from a jury's consideration. *See, e.g., Downing*, 753 F.2d at 1236-37 (noting that some have argued that under *Frye*, courts may be required to exclude much probative and reliable information from the jury's consideration, thereby unnecessarily impeding the truth-seeking function of litigation); *United States v. Sample*, 378 F. Supp. 44, 53 (E.D. Pa. 1974) (noting that general acceptance is a proper requirement for taking judicial notice of scientific facts, but should not be a criterion for the admissibility of scientific evidence); *People v. Leahy*, 882 P.2d 321, 330 (Cal. 1994) (acknowledging that a reliable, readily provable technique could remain unknown and untested by the relevant scientific community, thus delaying its use in the courtroom). We agree that *Frye*'s rigidity may exclude evidence with strong support within the community but that may fall short of "general acceptance" under *Frye*. *Fishback*, 851 P.2d at 897 (Mullarkey, J., concurring in the result only); *Lindsey*, 892 P.2d at 296 (Mullarkey, J., concurring in the result only).

We also find that this rigidity is ill-suited for determining the admissibility of scientific evidence, which, by its nature, is ever-evolving. Under *Frye*, once a scientific principle or discovery becomes generally accepted, it forever remains accepted, despite improvements or other developments in scientific technologies. *Fishback*, 851 P.2d at 897 (Mullarkey, J., concurring in the result only); *Lindsey*, 892 P.2d at 296 (Mullarkey, J., concurring in the result only). Conversely, because it will take time for any scientific technique to become generally accepted, the *Frye* test restricts the admissibility of reliable evidence that may not yet qualify as "generally accepted" under *Frye*. *Brooks*, 975 P.2d at 1112 (noting that *Frye* fails to "address the tough questions that arise on the cutting edge of science, [in that it] requires that the courts wait until science itself determines the validity of the scientific proposition in question."); *Downing*, 753 F.2d at 1236-37; Petrosinelli, *supra*, at 320 (describing this problem with the *Frye* test as a "cultural lag"). Thus, we conclude that *Frye*'s general acceptance test, particularly when viewed rigidly, is unsuitable as the sole dispositive standard for determining the admissibility of scientific evidence in Colorado.[9]

We therefore hold that the rules of evidence, particularly CRE 702[10] and CRE 403, represent a better standard, because their flexibility is consistent with a liberal approach that considers a wide range of issues. *See Downing*, 753 F.2d at 1237 (noting that the language of Rule 702, the spirit of the rules of evidence, and the problems with applying *Frye* "suggest the appropriateness of a more flexible approach to the admissibility of . . . scientific evidence").

The focus of a Rule 702 inquiry is whether the scientific evidence proffered is both reliable and relevant. *Daubert*, 509 U.S. at 589; *see Brooks*, 975 P.2d at 1114 (holding that under CRE 702, evidence that is reasonably reliable and that will assist the trier of fact should be admitted). In determining whether the evidence is reliable, a trial court should consider (1) whether the scientific principles as to which the witness is testifying are reasonably reliable, and (2) whether the witness is qualified to opine on such matters. *Brooks*, 975 P.2d at 1114. In determining whether the evidence is relevant, a trial court should consider whether the testimony would be useful to the jury. *Id.*

A trial court's reliability inquiry under CRE 702 should be broad in nature and consider the totality of the circumstances of each specific case. *Brooks*, 975 P.2d at 1114 (noting that "the relevant factors applicable to a CRE 702 inquiry will likely vary depending on the particular subject matter at hand"); *Campbell*, 814 P.2d at 7-8 (holding that the trial court retains its broad discretion to evaluate on a case-by-case basis whether the testimony in question would assist the trier of fact to understand the evidence or to determine a fact in issue); *see also Kumho*, 526 U.S. at 150 (holding that a trial court's gatekeeping inquiry under Rule 702 must be tied to the facts of a particular case).

Given the flexible, fact-specific nature of the inquiry, we decline to mandate that a trial court consider any particular set of factors when making its determination of reliability. Instead, we hold that the CRE 702 inquiry contemplates a wide range of considerations that may be

pertinent to the evidence at issue. *Downing*, 753 F.2d at 1238 ("The reliability inquiry that we envision is flexible and may turn on a number of considerations, in contrast to the process of 'nose-counting' that would appear to be compelled by a careful reading of *Frye*.").

By way of illustration, however, we recite here the wide range of issues other courts have considered when making a Rule 702 determination. For example, in *Daubert*, the Court articulated the following nonexclusive list of general observations that a trial court might consider: (1) whether the technique can and has been tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the scientific technique's known or potential rate of error, and the existence and maintenance of standards controlling the technique's operation; and (4) whether the technique has been generally accepted. 509 U.S. at 593-94. The Third Circuit has articulated yet other considerations: (1) the relationship of the proffered technique to more established modes of scientific analysis; (2) the existence of specialized literature dealing with the technique; (3) the non-judicial uses to which the technique are put; (4) the frequency and type of error generated by the technique; and (5) whether such evidence has been offered in previous cases to support or dispute the merits of a particular scientific procedure. *Downing*, 753 F.2d at 1238-39.

We hold that a trial court making a CRE 702 reliability determination may, but need not consider any or all of these factors, depending on the totality of the circumstances of a given case. A trial court may also consider other factors not listed here, to the extent that it finds them helpful in determining the reliability of the proffered evidence.

Our determination that a trial court may, but need not consider the factors listed in *Daubert* is consistent with the United States Supreme Court's reasoning in *Kumho Tire Co. v. Carmichael*:

> "[T]he factors identified in *Daubert* may or may not be pertinent in assessing reliability, depending on the nature of the issue, the expert's particular expertise, and the subject of his testimony." 526 U.S. at 150. The Supreme Court in *Kumho* further held that: we can neither rule out, nor rule in, for all cases and for all time the applicability of the factors mentioned in *Daubert*, nor can we now do so for subsets of cases categorized by category of expert or by kind of evidence. Too much depends on the circumstances of the particular case at issue.

Id.[11]

Such reasoning is also consistent with our previous declination to "give any special significance to the *Daubert* factors," in the context of considering evidence we considered to be experience-based specialized knowledge. *Brooks*, 975 P.2d at 1114. In *Brooks*, we held that it was preferable to avoid discussing "whether or to what extent a court should apply the *Daubert* factors," and concluded instead, that the proper focus should be on "whether the evidence is reasonably reliable information that will assist the trier of fact." *Id.*

Any concerns that invalid scientific assertions will be admitted under this liberal standard are assuaged by Rule 702's overarching mandate of reliability and relevance. *See Daubert*, 509 U.S. at 595. Such concerns are also mitigated by "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof." *Id.* at 596. In addition, a trial court making a CRE 702 determination must apply its discretionary authority under CRE 403 to ensure that the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice, confusion of the issues, undue delay, waste of time, or needless presentation of cumulative evidence. *Id.*; *Campbell*, 814 P.2d at 8; *Hampton*, 746 P.2d at 951 n. 8. Finally, a trial court's CRE 702 determination must be based upon specific findings on the record as to the helpfulness and reliability of the evidence proffered. *Brooks*, 975 P.2d at 1114; *Campbell*, 814 P.2d at 8. The trial court must also issue specific findings as to its consideration under CRE 403 as to whether the probative value of the evidence is substantially outweighed by its prejudicial effect. *Brooks*, 975 P.2d at 1114; *Campbell*, 814 P.2d at 8.

To summarize, we conclude that CRE 702, rather than *Frye*, represents the appropriate standard for determining the admissibility of scientific evidence.[12] We hold that under this standard, the focus of a trial court's inquiry should be on the reliability and relevance of the scientific evidence, and that such an inquiry requires a determination as to (1) the reliability of the scientific principles; (2) the qualifications of the witness; and (3) the usefulness of the testimony to the jury. We also hold that when a trial court applies CRE 702 to determine the reliability of scientific evidence, its inquiry should be broad in nature and consider the totality of the circumstances of each specific case. In doing so, a trial court may consider a wide range of factors pertinent to the case at bar. The factors mentioned in *Daubert* and by other courts may or may not be pertinent, and thus are not necessary to every CRE 702 inquiry. In light of this liberal standard, a trial court should also apply its discretionary authority under CRE 403 to ensure that the probative value of the evidence is not substantially outweighed by unfair prejudice. Finally, we hold that under CRE 702, a trial court must issue specific findings as it applies the CRE 702 and 403 analyses.

D. Application of CRE 702 to Evidence at Issue

Having determined that CRE 702 represents the proper standard, we now turn to the issue of whether the evidence derived from the DNA testing techniques at issue in this case is admissible under that standard. The trial court below did not have the benefit of our ruling and instead employed a thorough *Frye* analysis to conclude that the evidence was inadmissible. Alternatively, the trial court applied the *Daubert* factors to reach the same result.[13] Thus, a determination of admissibility under our new standard is required.

Because the record in this case is sufficient for a determination of admissibility under CRE 702, we need not remand the case to the trial court. Instead, we conclude that, under CRE 702's liberal standard for admissibility, the evidence derived from the PE kits at issue here is admissible.

As discussed above, admissibility under CRE 702 is appropriate when (1) the scientific principles at issue are reasonably reliable, (2) the witness is qualified to opine on such principles, and (3) the testimony will be useful to the jury. In this case, the parties do not question the qualification of the witness, nor do they dispute that the evidence will assist the jury. Thus, our main concern is whether the PCR-based multiplex STR system from which the evidence here was derived is sufficiently reliable.

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We begin by discussing the admissibility of PCR and STR-based DNA testing, as we have not previously addressed this issue.[14] The majority of courts in other jurisdictions that have considered the issue have held that DNA evidence derived from the PCR testing method satisfies the standards for admissibility under either *Frye* or Rule 702.[15] Indeed, the National Research Council's Committee on Forensic DNA Science has concluded that the molecular technology on which PCR is based is thoroughly sound, and that the results are highly reproducible when appropriate quality-control methods are followed. *Shea*, 957 F. Supp. at 338-39.

Similarly, as the trial court has acknowledged, the National Institute of Standards and Technology ("NIST") has determined that there are several advantages of using STRs over conventional techniques, and that the use of STRs for genetic mapping and identity testing has become widespread among DNA typing laboratories. John M. Butler & Dennis J. Reeder, *Short Tandem Repeat DNA Internet Database*, http://www.cstl.nist.gov/biotech/strbase/intro.htm. As a result, many courts have found that DNA evidence derived from STR-based testing is admissible either under *Frye*'s general acceptance test or under Rule 702's reliability test.[16] The wide acceptance of PCR and STR testing among scientists and courts in various jurisdictions indicates that the use of such systems in DNA analysis is reliable. Furthermore, the evidence in the record demonstrates that unlike RFLP testing, which destroys the sample, PCR processing allows for easy replication of test results by amplifying the sample. We are therefore convinced that DNA evidence derived from PCR-based testing, and specifically such evidence derived from the STR method is sufficiently reliable under CRE 702 to warrant admission in Colorado.[17]

The evidence at issue in this case was derived from a PCR-based STR multiplex system.[18] Specifically, the Profiler Plus and Cofiler kits at issue here employed a combination sixplex and nineplex system. Having determined that PCR and STR-based testing are reliable under CRE 702, the issue before us now is whether the specific multiplex testing performed in this case is sufficiently reliable under CRE 702 to warrant admission of the evidence derived from their use.

We agree with the trial court's conclusion that, in general, evidence derived from multiplex testing should be admitted. However, we reach this conclusion by applying CRE 702, rather than *Frye*. In doing so, we conclude, based on the scientific evidence presented under the totality of circumstances in this case, that multiplex testing is sufficiently reliable to warrant such admission. Evidence in the record of numerous studies concerning multiplex testing, widespread dissemination of multiplex information, and popular use of multiplex systems supports our conclusion.

According to NIST, multiplex, which involves adding more than one set of PCR primers to the reaction in order to target multiple locations, is an ideal technique for DNA typing because the probability of identical alleles in two individuals decreases with an increase in the number of polymorphic loci examined. Butler, *supra* at *http://www.cstl.nist.gov/biotech/strbase/multiplx.htm*. The NIST website indicates that monoplex and multiplex STRs are used extensively in the forensic field, and the site lists over 900 published articles detailing the use of STRs in population studies, medical research and diagnosis, and in the forensic field.

Indeed, the trial court acknowledged that one advantage to multiplexing is its ability to offer greater discrimination. The trial court also noted that multiplexing requires less material, fewer tests and thus is ideal in the forensic setting and saves time and money. In addition, because fewer tests are required, the risk of contaminating samples is reduced. While testing multiple loci in one test can be problematic because adding more than one set of PCR primers to a reaction may cause primers for one locus to complex with those of other loci, the reproducibility of test results under this process mitigates this risk. Furthermore, the numerous studies concerning multiplex testing and evidence in the record of widespread dissemination of multiplex information support its reliability.

The record indicates that the prosecution submitted fourteen studies addressing the consistency and reliability of the PE kits and their forensic use. Because the majority of the studies were conducted in foreign countries and because they were published in a book that was not well-known, the trial court concluded that they were not sufficiently peer reviewed. The trial court similarly dismissed a study performed in the United States by a well-respected expert in the field, and another validation study included by PE in its user's manual. The record also indicates that information about the multiplex method had been widely disseminated through numerous poster sessions and symposia. Although the trial court found that this failed to establish validation under strict TWGDAM guidelines and thus indicated no general acceptance under *Frye*, we reach a different conclusion under CRE 702. We find that the evidence in the record of numerous studies concerning multiplex, widespread dissemination of multiplex information, and popular use of multiplex systems indicates that multiplex systems are reliable under CRE 702.

The trial court acknowledged that triplexing, which is a form of multiplexing, is generally accepted. However, it nonetheless held that the sixplex and nineplex systems at issue in this case were not sufficiently validated or peer reviewed, and thus evidence derived from their use was inadmissible. We disagree.

As a preliminary matter, we disapprove of the trial court's distinction between the sixplex and nineplex systems at issue in the present case and other multiplex systems not at issue here that have been widely accepted by the scientific community.[19]

Such a fine distinction is not required under CRE 702's liberal standard for admissibility. *See Daubert*, 509 U.S. at 594 ("The inquiry envisioned by Rule 702 is, we emphasize, a flexible one."); *Bonds*, 12 F.3d at 565 (holding that a Rule 702 inquiry is "a flexible and more lenient test that favors the admission of any scientifically valid expert testimony").

We also conclude that questions as to the reliability of the particular type of multiplex kit go to the weight of the evidence, rather than its admissibility. *State v. Russell*, 882 P.2d 747, 768 (Wash. 1994) (holding that general acceptance under *Frye* of PCR kit was not required because the kit is simply one tool for carrying out generally accepted PCR methodology); *see also Hicks*, 103 F.3d at 848 (holding that challenges to laboratory protocols used in PCR testing do not weigh against the admissibility of PCR); *Shea*, 957 F. Supp. at 340 (concluding that concerns about handling and quality control procedures affect the weight that should be given to evidence, rather than its admissibility).

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Finally, we are persuaded that the multiplex systems at issue in this case are sufficiently reliable by their acceptance by several other courts that have considered the issue.

Although our research reveals no appellate court decisions discussing the admissibility of DNA evidence derived from a multiplex system, the parties have submitted copies of several trial court rulings from other jurisdictions that have admitted DNA evidence derived from the very multiplex STR systems at issue here. *State v. Lynch*, No. CR 98-11390 (Ariz. Super. Ct. Aug. 17, 1999) (ruling that Profiler Plus and Cofiler kits were generally accepted under *Frye*); *State v. Hill*, No. 232982 (Cal. Super. Ct. Apr. 18, 2000) (ruling that issue as to whether PE kit is generally accepted goes to weight, not admissibility and concluding that evidence derived from such kit is admissible under *Frye*); *State v. Bertsch*, No. 94F07255 (Cal. Super. Ct. Oct. 20, 1999) (ruling that PE multiplex kits were admissible under *Frye's* general acceptance test); *Commonwealth v. Gaynor*, No. 98-0965-0966 (Mass. Super. Ct. Apr. 13, 2000) (ruling that evidence derived from Profiler Plus and Cofiler kits was admissible under *Daubert*); *State v. Dishmon*, No. 99047345 (Minn. Dist. Ct. Mar. 2, 2000) (ruling that evidence derived from Profiler Plus and Cofiler kits was admissible under *Frye*).

For example, a Minnesota District Court found recently in *State v. Dishmon* that evidence obtained using the Profiler Plus and Cofiler kits was admissible. *Dishmon*, No. 99047345, slip op. at 13. That court concluded that because PCR-STR typing met the *Frye* test, general acceptance of the specific kits used was not required. *Id.* at 8. In the alternative, the court held that evidence presented in that case indicated that the Profiler Plus and Cofiler kits were generally accepted. *Id.* at 9.

Similarly, a Massachusetts court held recently that evidence derived from the Profiler Plus and Cofiler kits was reliable under *Daubert*. *Gaynor*, No. 98-0965-0966, slip op. at 2. That court reasoned, "Because the more recent testing consists of essentially a refinement in the STR system of analysis, which has been determined to be generally accepted in the scientific community, I find the recent test results to be reliable." *Id.* The court also determined that specific concerns about the Profiler Plus and Cofiler kits themselves were issues of weight, rather than admissibility. *Id.* at 5.

We are aware of only one trial court that has found the evidence derived from the Profiler Plus and Cofiler kits to be inadmissible. The Vermont District Court held in *State v. Pfenning* that evidence derived from the Profiler Plus kit was inadmissible because the kit had not been sufficiently validated or subjected to peer review under *Daubert*. No 57-4-96 (Vt. Dist. Ct. Apr. 6, 2000). Because we have determined that compliance with the *Daubert* factors is not determinative as to the question of admissibility, we are not persuaded by *Pfenning* because its analysis focuses on a particular factor under *Daubert*, holding that the absence of that factor defeats admissibility. *See Kumho*, 526 U.S. at 151 (noting that, "It might not be surprising in a particular case . . . that a claim made by a witness has never been the subject of peer review . . . ."); *Heller v. Shaw Indus., Inc.*, 167 F.3d 146, 155 (3d Cir. 1999) (holding that, given the liberal thrust of the rules of evidence and the flexible nature of the *Daubert* inquiry, published studies on general causation are not required for admission of a medical expert's testimony).

Thus, after considering the totality of the circumstances in this case, we conclude that the evidence derived from the PE sixplex and nineplex STR systems is admissible under CRE 702 because (1) multiplex systems are generally reliable; (2) questions as to the reliability of a specific type of multiplex kit go to the weight of the evidence, rather than its admissibility; and (3) the specific multiplex kits used in this case have been deemed reliable by other courts. We also find that the probative value of the evidence derived from the kits used is not substantially outweighed by the danger of unfair prejudice, confusion of the issues, undue delay, waste of time, or needless presentation of cumulative evidence. Therefore, the evidence at issue here meets the requirements of CRE 403 and should be admitted. Accordingly, we make our rule to show cause absolute and order the trial court to vacate its order barring such evidence.

IV. CONCLUSION

We hold that CRE 702, rather than *Frye*, is the appropriate standard for determining the admissibility of scientific evidence in Colorado. We hold that under this standard, the focus of a trial court's inquiry should be on whether the scientific evidence is reasonably reliable and whether it will assist the trier of fact, and that such an inquiry requires a determination as to (1) the reliability of the scientific principles, (2) the qualifications of the witness, and (3) the usefulness of the testimony to the jury. We also hold that when a trial court applies CRE 702 to determine the reliability of scientific evidence, its inquiry should be broad in nature and consider the totality of the circumstances of each specific case. In doing so, a trial court may consider a wide range of factors pertinent to the case at bar. The factors mentioned in *Daubert* and by other courts may or may not be pertinent, and thus are not necessary to every CRE 702 inquiry. In light of this liberal standard, a trial court should also apply its discretionary authority under CRE 403 to ensure that the probative value of the evidence is not substantially outweighed by unfair prejudice. Finally, we hold that under CRE 702, a trial court must issue specific findings as it applies the CRE 702 and 403 analyses.

Applying this standard, we hold that DNA evidence derived from PCR-based testing is admissible under CRE 702. Similarly, we hold that evidence derived from STR systems, including STR multiplex systems, is also admissible under CRE 702. Finally, we conclude that the evidence at issue in this case, which was derived from kits employing a combination sixplex and nineplex system, is sufficiently relevant and reliable under CRE 702 to warrant admission. Accordingly, we make our rule to show cause absolute and we order the trial court to vacate its order barring this evidence.

[1] The Profiler Plus kit reads nine loci while the Cofiler kit reads six loci, two of which are also read by the Profiler Plus kit.

[2] 5.3 quadrillion = 5,300,000,000,000,000 = 5.3×10^{15}

[3] *United States v. Yee*, 134 F.R.D. 161, 194 (N.D. Ohio 1990); *Fishback*, 851 P.2d at 891; *State v. Vandebogart*, 616 A.2d 483, 490 (N.H. 1992); *State v. Ford*, 392 S.E.2d 781, 783 (S.C. 1990).

[4] Federal Rule of Evidence 702 provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or 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." Fed. R. Evid. 702.

[5] In *Fishback*, we noted that the parties did not seriously dispute the applicability of *Frye* in determining the admissibility of DNA typing evidence. *Fishback*, 851 P.2d at 891 (noting also, however, that the notion that *Frye* was superceded by CRE 702 lacked merit because CRE 702 became effective in January 1980 and we adopted *Frye* in *Anderson*, which was decided in November 1981). Similarly, in *Lindsey*, we expressly stated that, "We do not consider the relative merits of the *Frye* test or our corollary state rules of evidence for the simple reason [that] the issue is not now before us." *Lindsey*, 892 P.2d at 288-89 (noting also that *Frye*'s general acceptance test is "not far removed from evaluation required under FRE 702" in that under CRE 702, a court must still screen the evidence to ensure its reliability, which may include consideration of the evidence's general acceptance).

[6] In the absence of such a clear standard, the trial court below applied both a *Frye* and a *Daubert* analysis in determining the admissibility of the DNA evidence at issue. *See Fishback*, 851 P.2d at 896 (Mullarkey, J., concurring in the result only) (noting that, in light of the trial court's analysis under both *Frye* and CRE 702, "the time has come for this court to set forth clearly the standard by which novel scientific evidence should be assessed").

[7] Courts have found that *Frye*'s ambiguity provides an opportunity to manipulate the terms "scientific community" and "general acceptance" in order to reach a desired result. *Downing*, 753 F.2d at 1236.

[8] *Castro*, 545 N.Y.S.2d at 987.

[9] As discussed above, although our decisions in *Fishback* and *Lindsey* relied on *Frye*'s general acceptance test to determine the admissibility of the DNA evidence at issue in those cases, we did not specifically evaluate the merits of *Frye* in relation to CRE 702. To the extent that these decisions are relied upon to argue that *Frye* is the appropriate standard governing the admissibility of scientific evidence, we disapprove.

[10] CRE 702 is identical to the federal rule of the same number. *See supra* note 3.

[11] Commentators have also criticized *Daubert*'s list of factors for its "amorphous structure, [in that it creates] various laundry lists of factors [that] are combined in arbitrary ways by nonexperts to produce unknown probabilities of accuracy to be balanced against unmeasured prejudices." Ebert, *supra*, at 230.

[12] We decline to limit the applicability of CRE 702 to only the *novel* scientific evidence governed previously by *Frye*. Nothing in the text of the rule requires such a limitation, and our holding is consistent with that of the United States Supreme Court in *Daubert*, which expressly applied its holding to all scientific evidence. *Daubert*, 509 U.S. at 593 n. 11.

[13] The trial court analyzed the evidence under the *Daubert* factors without any discussion of CRE 702's reliability or relevance prongs. After a brief discussion of each *Daubert* factor, the trial court concluded that several of them were not met and therefore, the evidence was inadmissible under *Daubert*.

[14] The trial court determined, based on the evidence before it, and rulings from other jurisdictions, that DNA evidence derived from PCR-based STR testing is generally accepted under *Frye* and is thus admissible. As discussed below, we agree that such evidence is admissible, but make our determination under CRE 702.

[15] *Shea*, 957 F. Supp. at 339 (holding that because PCR is based on sound scientific methods and has been generally accepted in both forensic and non-forensic settings, it readily satisfies Rule 702's reliability requirement); *Harmon v. State*, 908 P.2d 434, 440 (Alaska Ct. App. 1995) (holding that under *Frye*, there seems to be little question concerning the scientific acceptance of the theory underlying PCR DNA typing), *overruled on other grounds by, State v. Coon*, 974 P.2d 386, 391 (Alaska 1999); *People v. Wright*, 72 Cal. Rptr. 2d 246, 250 (Cal. Ct. App. 1998) (holding that DNA evidence derived from PCR testing was admissible under *Frye*); *People v. Pope*, 672 N.E.2d 1321, 1327 (Ill. App. Ct. 1996) (holding that PCR-based methods of DQα typing and polymarker typing for DNA identification are generally accepted under *Frye*); *State v. Hill*, 895 P.2d 1238, 1247 (Kan. 1995) (finding no error in the trial court's determination that PCR amplification evidence satisfied *Frye*); *State v. Moore*, 885 P.2d 457, 475 (Mont. 1994) (upholding trial court's finding that PCR testing is sufficiently reliable under Rule 702 for forensic purposes), *overruled on other grounds by, State v. Gollehon*, 906 P.2d 697, 700 (Mont. 1995); *Watts v. State*, 733 So. 2d 214, 223 (Miss. 1999) (holding that PCR testing produces reliable results); *State v. Dishon*, 687 A.2d 1074, 1086 (N.J. Super. Ct. App. Div. 1997) (holding that PCR was reliable because it was found to be generally accepted under *Frye*); *People v. Morales*, 643 N.Y.S.2d 217, 219 (N.Y. App. Div. 1996) (holding that PCR method had gained general acceptance under *Frye*); *Campbell v. State*, 910 S.W.2d 475, 478-79 (Tex. Crim. App. 1995) (holding that underlying theory of PCR DNA testing is valid under Rule 702).

[16] *People v. Allen*, 85 Cal. Rptr. 2d 655, 659-60 (Cal. Ct. App. 1999) (holding that STR testing is generally accepted under *Frye*); *State v. Roth*, 2000 Del. Super. LEXIS 219, at *5 (Del. Super. Ct. May 12, 2000) (holding that single-source STR DNA evidence is reliable under *Daubert*); *State v. Rokita*, No. 5-99-0453, 2000 Ill. App. LEXIS 742, at *14 (Ill. App. Ct. Sept. 8, 2000) (noting that STR-based testing is now generally accepted in the relevant scientific community); *Commonwealth v. Rosier*, 685 N.E.2d 739, 743 (Mass. 1997) (holding that PCR-based tests, including STR, are scientifically valid); *State v. Jackson*, 582 N.W.2d 317, 325 (Neb. 1998) (holding that the trial court correctly determined that PCR-based STR DNA testing used in that case was generally accepted).

[17] *See Brooks*, 975 P.2d at 1114 (holding that evidence is admissible if it is reasonably reliable and will assist the trier of fact).

[18] As discussed above, multiplex systems add more than one set of PCR primers to a reaction so as to be able to amplify and run several loci simultaneously. In contrast, monoplex systems run each STR locus separately.

[19] Indeed, while concluding that only monoplex and triplex STR systems are generally accepted, the trial court noted that the NIST website provides a list of fifty-two validation studies including validations of multiplex STRs, and lists of core STR loci, including monoplex, triplex, tetraplex, quintuplex, pentaplex, and heptaplex loci.