COMMENTS OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS on proposed stylistic changes to Federal Rules of Evidence

Rule 401

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

Committee Note

The language of Rule 401 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

NACDL Comment

The existing rule defines relevancy by asking whether evidence makes the existence of a fact more or less probable "than it would be without the evidence." The proposed stylistic change eliminates the phrase "than it would be without the evidence."

Evidence that may make a fact more or less probable in the abstract, may not do so if it is merely cumulative of existing evidence. The existing rule, in effect, imposes a cumulative limitation in the definition of relevant evidence. Evidence that might be deemed not relevant under the existing rule because it does not make a fact more or less probable "than it would be without the evidence," (because it is merely cumulative), and which would consequently be inadmissible under Rule 402, could be deemed relevant under the rule as it is proposed to be amended and thus admissible under Rule 402. Thus, the proposed stylistic change could affect the result in a ruling on evidence admissibility.

Rule 404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes	Rule 404. Character Evidence; Crimes or Other Acts
(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.	**(b) Crimes or Other Acts.** **(1)** ***Prohibited Uses.*** Evidence of a crime or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character. **(2)** ***Permitted Uses; Notice.*** This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. On request by a defendant in a criminal case, the prosecutor must: **(A)** provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and **(B)** do so before trial — or during trial if the court, for good cause, excuses lack of pretrial notice.

Committee Note

The language of Rule 404 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

NACDL Comment

The existing rule expressly conditions the admission of Rule 404(b) evidence on the prosecution providing notice of the evidence upon request of the accused, as it states that such evidence "may . . . admissible for other purposes, provided that upon request by the accused," the prosecution provides reasonable notice of the general nature of any such evidence. (Emphasis added.)

The proposed stylistic change eliminates the phrase "provided that" and thus removes the express and automatic condition of reasonable notice for the admission of such evidence. The proposed stylistic change could affect the result

in a ruling on evidence admissibility. To retain the prior meaning, a subsection could be added stating that "(C) Failure of the prosecutor to give the notice required by subsection (A), or to provide good cause for that failure under subsection (B), requires exclusion of that evidence in a criminal case."

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

Committee Note

The language of Rule 407 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 407 previously provided that evidence was not excluded if offered for a purpose not explicitly prohibited by the Rule. To improve the language of the Rule, it now provides that the court may admit evidence if offered for a permissible purpose. There is no intent to change the process for admitting evidence covered by the Rule. It remains the case that if offered for an impermissible purpose, it must be excluded, and if offered for a purpose not barred by the Rule, its admissibility remains governed by the general principles of Rules 402, 403, 801, etc.

NACDL Comment

The proposed stylistic change replaces "if controverted" with "if disputed." Requiring that a claimed purpose for which evidence is offered be "controverted" could be read as requiring the opposing party to have offered some affirmative evidence contesting the point, whereas requiring that the purpose be "disputed"

could be read as only requiring that the opposing party argue against the point, or perhaps even not concede it. See, *e.g., Patterson v. Indiana Newspapers, Inc.*, 589 F.3d 357, 359 (7th Cir. 2009) ("The district judge determined that Coffey and Patterson had failed to comply with Local Rule 56.1(b), which requires a [party] opposing a motion for summary judgment to identify the material facts in dispute and cite to admissible evidence controverting the [moving party's] evidence. . . . Because of this noncompliance with the local rules, the judge enforced Local Rule 56.1(e) and for the most part accepted the Star's factual assertions as undisputed.")

Evidence that would not be admissible under the existing rule because the purpose for which it is offered was not controverted (with some evidence) by the opposing party, could be admissible under the proposed amended rule because the purpose for which it is offered is disputed, even if it has not been controverted. Thus, to the extent that the word "disputed" could be interpreted to mean something different than "controverted," the proposed stylistic change could affect the result in a ruling on evidence admissibility. A change of wording seems inadvisable here, where no change of meaning is intended.

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

Committee Note

The language of Rule 411 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 411 previously provided that evidence was not excluded if offered for a purpose not explicitly prohibited by the Rule. To improve the language of the Rule, it now provides that the court may admit evidence if offered for a permissible purpose. There is no intent to change the process for admitting evidence covered by the Rule. It remains the case that if offered for an impermissible purpose, it must be excluded, and if offered for a purpose not barred by the Rule, its admissibility remains governed by the general principles of Rules 402, 403, 801, etc.

NACDL Comment

The proposed stylistic change may affect the result in a ruling on evidence admissibility because it conditions the admission of such evidence for a non-prohibited purpose on the purpose being "disputed," a condition not found in the existing rule. We see no justification for adding this new condition in a restyling that is intended to effect no change of meaning.

ARTICLE VIII. HEARSAY Rule 801. Definitions	ARTICLE VIII. HEARSAY Rule 801. Definitions That Apply to This Article; Exclusions from Hearsay
The following definitions apply under this article: **(a) Statement.** A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.	**(a) Statement.** "Statement" means: **(1)** a person's oral or written assertion; or **(2)** a person's nonverbal conduct, if the person intended it as an assertion.
(b) Declarant. A "declarant" is a person who makes a statement.	**(b) Declarant.** "Declarant" means the person who made the statement.
(c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.	**(c) Hearsay.** "Hearsay" means a prior statement — one the declarant does not make while testifying at the current trial or hearing — that a party offers in evidence to prove the truth of the matter asserted by the declarant.

Committee Note

The language of Rule 801 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

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

NACDL Comment

The proposed stylistic change adds a requirement that only an "oral or written assertion" by a "person" is a statement for purposes of Article VIII; the present rule applies to oral or written assertion without any reference to "persons." This proposed alteration in wording may affect the result in a ruling on evidence admissibility because assertions by government agencies or other non-person entities that are offered for the truth of the matter asserted would not be subject to exclusion on hearsay grounds, whereas such assertions are inadmissible hearsay under the current rule unless an exception applies. See, *e.g., Bridgeway Corp. v. Citibank*, 201 F.3d 134, 143 (2d Cir. 2000) (recognizing that Country Report issued by State Department is hearsay when assertions it contains are offered for the truth, but finding that they are not excludable as hearsay because they come within Fed. R. Evid. 803(8)(C), which allows the admission of '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.' See Fed.R.Evid. 803(8)(C).").
Adding the word "person's" does not clarify the meaning in any way, and may lead to confusion (or worse) in applying the new rule.

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial	Rule 803. Exceptions to the Rule Against Hearsay — Regardless of Whether the Declarant Is Available as a Witness
The following are not excluded by the hearsay rule, even though the declarant is available as a witness:	The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:
(8) Public records and reports. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.	**(8) Public Records**. A record of a public office setting out: (A) the office's activities; (B) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or (C) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation. But this exception does not apply if the source of information or other circumstances indicate a lack of trustworthiness.
(10) Absence of public record or entry. To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.	**(10) Absence of a Public Record.** Testimony — or a certification under Rule 902 — that a diligent search failed to disclose a public record if the testimony or certification is admitted to prove that: (A) the record does not exist; or (B) a matter did not occur or exist, even though a public office regularly kept a record for a matter of that kind.

Committee Note

The language of Rule 803 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent

throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

NACDL Comment

The proposed stylistic change substitutes "record" in place of "[r]ecords, reports, statements, or data compilations" in both subparagraphs (8) and (10). A "record" for purposes of Rules 803, 901, 902 and 1005 is defined by the proposed stylistic change to Fed. R. Evid. 101(b)(4) as follows: "'record' [in Rules 803, 901, 902, and 1005] includes a memorandum, report, or data compilation . . ." (brackets in the original). Under the proposed stylistic change, the hearsay exceptions in subparagraphs (8) and (10) would not necessarily encompass "statements," and thus to the extent a "statement" was not considered to be a memorandum, report or data compilation, the proposed stylistic change could affect the result in a ruling on evidence admissibility. Even recognizing that a definition that says "includes" rather than "means" is not exclusive, the omission of "statements" from Rule 101(b)(4) introduces a degree of unnecessary potential for confusion.

ARTICLE IX. AUTHENTICATION AND IDENTIFICATION Rule 901. Requirement of Authentication or Identification	ARTICLE IX. AUTHENTICATION AND IDENTIFICATION Rule 901. Authenticating or Identifying Evidence
(a) General provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.	**(a) In General.** To authenticate or identify an item of evidence in order to have it admitted, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.
(b) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:	**(b) Examples.** The following are examples only — not a complete list — of evidence that satisfies the requirement:
(7) Public records or reports. Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.	**(7)** ***Evidence About Public Records.*** Evidence that: **(A)** a record is from the public office where items of this kind are kept; or **(B)** a document was lawfully recorded or filed in a public office.

Committee Note

The language of Rule 901 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

NACDL Comment

As with the proposed stylistic changes to Fed. R. Evid. 803 (8) & (10), the proposed stylistic change to Rule 901(b)(7) substitutes "record" in place of a list of items that includes a "statement," and because the definition of "record" in the

proposed stylistic change to Fed. R. Evid. 101(b)(4) does not include a "statement," a statement would not necessarily be included in the authentication example provided by Rule 901(b)(7). Because these are only examples, it is unlikely this proposed stylistic would affect the result in a ruling on evidence admissibility, and is noted here only because it presents another instance in which the proposed definition of "record" does not expressly encompass all of the items it presumably is intended to replace.

ARTICLE XI. MISCELLANEOUS RULES **Rule 1101. Applicability of Rules**	ARTICLE XI. MISCELLANEOUS RULES **Rule 1101. Applicability of the Rules**
(a) Courts and judges.	**(a) To Courts and Judges.** .....
(d) Rules inapplicable. The rules (other than with respect to privileges) do not apply in the following situations: **(1) Preliminary questions of fact.** The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under rule 104. **(2) Grand jury.** Proceedings before grand juries. **(3) Miscellaneous proceedings.** Proceedings for extradition or rendition; preliminary examinations in criminal cases; sentencing, or granting or revoking probation; issuance of warrants for arrest, criminal summonses, and search warrants; and proceedings with respect to release on bail or otherwise.	**(d) Exceptions.** These rules — except for those on privilege — do not apply to the following: **(1)** the court's determination, under Rule 104(a), on a preliminary question of fact governing admissibility; **(2)** grand-jury proceedings; and **(3)** miscellaneous proceedings such as: • extradition or rendition; • issuing an arrest warrant, criminal summons, or search warrant; • a preliminary examination in a criminal case; • sentencing; • granting or revoking probation or supervised release; and • considering whether to release on bail or otherwise.

Committee Note

The language of Rule 1101 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

NACDL Comment

The proposed stylistic change makes the list of "miscellaneous proceedings" to which the Rules do not apply exemplary rather than limiting, by adding the phrase "such as." This proposed stylistic change could affect the result in a ruling on evidence admissibility in any proceeding that is not among those listed in existing Rule 1101(d)(3) which a judge deems to be "miscellaneous" in the same sense and thus encompassed by Rule 1101(d)(3) as it is proposed to be amended. Whether the Rules of Evidence should be applied in other proceedings, whether their application should be discretionary, or whether they should be applied in fewer types of proceedings are complex issues not suited for resolution through a stylistic project. To retain the original meaning, the new rule should say, "that is:" rather than "such as:".

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Respectfully submitted,

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