Advisory Committee on Evidence Rules

Minutes of the Meeting of April 6-7, 1998

New York, N.Y.

The Advisory Committee on the Federal Rules of Evidence met on April 6th and 7th at Fordham Law School in New York City.

The following members of the Committee were present:

Hon. Fern M. Smith, Chair

Hon. David C. Norton

Hon. Milton I. Shadur

Hon. Jerry E. Smith

Hon. James T. Turner

Professor Kenneth S. Broun

Mary F. Harkenrider, Esq.

Gregory P. Joseph, Esq.

Frederic F. Kay, Esq.

John M. Kobayashi, Esq.

Dean James K. Robinson

Professor Daniel J. Capra, Reporter

Also present were:

Hon. Frank W. Bullock, Jr., Liaison to the Standing Committee on

Rules of Practice and Procedure

Hon. David S. Doty, Liaison to the Civil Rules Committee

Hon. David D. Dowd, Liaison to the Criminal Rules Committee

Professor Daniel R. Coquillette, Reporter, Standing Committee on

Rules of Practice and Procedure

Professor Leo Whinery, Reporter, Uniform Rules of Evidence

Drafting Committee

Roger Pauley, Esq., Justice Department

Sol Schreiber, Esq. Member, Standing Committee on Rules of Practice and Procedure

Peter G. McCabe, Esq. Secretary, Standing Committee on Rules of Practice and Procedure

John K. Rabiej, Esq., Chief, Rules Committee Support Office

Joe Cecil, Esq., Federal Judicial Center

Al Cortese, Esq., Product Liability Advisory Council

Opening Business

The Chair opened the meeting by asking for approval of the minutes of the October, 1997 meeting. These minutes were unanimously approved. The Chair noted with regret that Judge Shadur and Dean Robinson will be leaving the Committee. She thanked them for all their excellent service, and expressed her wish that they would attend the October, 1998 meeting.

The Chair then reported on actions taken at the January, 1998 Standing Committee meeting. The Standing Committee approved all of the Evidence Rules Committee's proposed amendments to be

released for public comment. The proposed amendments are to Rules 103, 404(a), 803(6), and 902. The proposed amendments will be released for public comment on or about August 15, 1998.

Rule 702

Judge Shadur presented the report of the *Daubert* subcommittee, which was charged with the task of drafting proposed amendments to the rules on experts in light of the Supreme Court's decision in *Daubert*. Judge Shadur noted the basic premises from which the subcommittee began:

1. Any change in the rules should constitute a minimal departure from the existing language in the rules. Otherwise courts and litigants might think there is more change in the rule than there really is, and important precedent construing well-established language might be lost.

2. The trial court's gatekeeping function should apply to all expert testimony, not only scientific expert testimony.

3. Testimony that is functionally expert testimony should not be admitted under the more permissive standards of lay testimony under Rule 701.

4. Rule 703, which permits an expert to rely on inadmissible information, should not be used as a "backdoor" means of admitting otherwise inadmissible evidence.

Judge Shadur reviewed the subcommittee proposal for Rule 702. The proposal requires a determination of reliability at three distinct points. First, the opinion must be based on sufficient and reliable information. Second, the expert must employ reliable principles and methodology. Third, the expert must apply the principles and methodology reliably to the facts of the case.

Substantial discussion ensued on a number of possible modifications to the proposal. Among the possibilities discussed were:

1. Collapsing the three separate reliability requirements into one or two standards.

2. Changing the reference in the rule from "methodology" to "methods" and clarifying that the Rule is to apply to all expert testimony, including that of law enforcement agents in criminal cases.

3. Changing the reference from "principles and methodology" to "principles or methodology."

The Committee also considered the suggestions of the style subcommittee of the Standing Committee. The style subcommittee version collapsed the three separate reliability requirements into two, and the discussion among Committee members was that it was better to emphasize the three separate requirements of basis, principles/methodology, and application. Also, the style subcommittee version rewrote the entire rule, and the Committee was of the opinion that the existing language of the rule should be maintained to the extent possible.

Finally, the Committee reconsidered whether Rule 702 needed to be amended at all, and whether the subcommittee's version was an improvement on the existing rule. There was general agreement that Rule 702 needs to be amended, in light of the conflict in the courts over the meaning and application of *Daubert*, and particularly in light of congressional attempts to amend Rule 702 with problematic language.

A motion was made to adopt the subcommittee's proposed amendment of Rule 702, as amended in the course of Committee discussion, and to recommend to the Standing Committee that the proposal be issued for public comment. This motion was approved with nine in favor and one dissent.

The Committee then turned to the draft Advisory Committee Note to Rule 702. Several stylistic

suggestions were made and adopted, and language was included to clarify that the phrase "principles and methods" was not intended to preclude the testimony of law enforcement agents in criminal cases. Further language was added to clarify that the reference in the rule to "facts or data" is intended to permit an expert to rely on opinions of other experts.

A motion was made to adopt the Advisory Committee Note to Rule 702 as amended. This motion was unanimously approved.

A copy of the proposed amendment to Rule 702, and the proposed Advisory Committee Note to Rule 702, is attached to these minutes.

Rule 701

Judge Shadur presented the proposal of the *Daubert* subcommittee, which would preclude the use of Rule 701 if the witness' testimony relies on "scientific, technical or other specialized knowledge". The proposed language is intended to track that of Rule 702. The goal of the amendment is to channel all expert testimony into Rule 702, thus preventing a party from evading the expert witness disclosure and reliability requirements through the artifice of proffering an expert as a lay witness.

Members of the Justice Department opposed the proposal. They suggested that the term "specialized knowledge" is vague, and that many reversals will occur when trial courts characterize testimony as not based on specialized knowledge when in fact it is. They also questioned whether Rule 702 should apply when the witness, who is testifying to what a lay witness could testify to, is in fact an expert. For example, what if a family friend, who gives an opinion on the competence of an individual, happens to be a psychiatrist?

Several members of the Committee responded to these concerns. They observed that the proposal does not distinguish between types of witnesses but rather between types of testimony. Thus, a family friend who is a psychiatrist need not be qualified as an expert in giving lay opinion testimony as to the competence of a friend. If, however, the proponent emphasizes the witness' specialized training or expertise, then it is only fair that the proponent should qualify the witness as an expert. Committee members pointed out that the proposed amendment will not have a substantial effect on trial practice. A proponent who wants to rely on a witness' expertise would need to establish a foundation even if Rule 701 were not amended.

Concern was also expressed that under the amendment, witnesses would often be precluded from testifying because of a party's failure to comply with the disclosure obligations of Civil Rule 26. The response was that if a witness is not specially retained as an expert, Rule 26 poses no extra discovery obligations; and if the witness *is* specially retained to give what is tantamount to expert testimony, then it is inappropriate to evade the Rule 26 disclosure requirements by proffering the witness under Rule 701. It was also observed that the rule change would actually benefit lawyers, by requiring them to determine in advance whether a witness would qualify as an expert.

One member suggested, as an alternative, that a gatekeeping function, similar to that of Rule 702, be placed in Rule 701. But it was observed that this would not be an improvement on the proposal. A gatekeeping function could not apply readily to most witness testimony that is truly lay testimony--e.g., "the car was speeding." This means that a distinction would have to be made between prototypical lay witness testimony and testimony based on scientific, technical or other specialized knowledge. Thus the same problem of distinguishing between lay and expert testimony will arise if a gatekeeping function were placed in Rule 701. Moreover, the subcommittee's proposed amendment to Rule 701 has two purposes--to assure that all witness testimony based on specialized knowledge is reliable, and to assure that all such testimony is subject to the disclosure obligations applicable to experts under Civil Rule 26 and Criminal Rule 16. Importing a gatekeeping function into Rule 701 might effectuate the former goal, but it would do nothing to effectuate the latter, because the disclosure rules cover only testimony that is offered under Evidence Rule 702.

The Committee considered the proposal of the Standing Committee's Subcommittee on Style. This proposal approved the language added by the *Daubert* Subcommittee, but restructured the existing rule. Committee members generally agreed that it would be better to preserve the existing language, and substantial precedent thereunder, to the extent possible.

A motion was made to adopt the *Daubert* Subcommittee proposal to amend Rule 701, and to recommend to the Standing Committee that the proposal be issued for public comment. Eight members voted in favor, one against, and one abstained.

The Committee moved on to the proposed Advisory Committee Note to an amended Rule 701. The Note emphasizes that the amendment does not distinguish between expert and lay witnesses, but rather between expert and lay testimony. It specifies that any part of a witness' testimony based on scientific, technical or specialized knowledge is subject to the reliability requirements of Rule 702 and the corresponding disclosure requirements of the Civil and Criminal Rules. At the suggestion of some Committee members, a paragraph was added to the Note to indicate that the term "specialized

knowledge" is taken from and intended to have the same meaning as the identical phrase in Rule 702. The added language also clarifies that the amendment is not intended to effect prototypical lay witness testimony, such as opinions concerning sound, size, distance, etc.

A motion was made to adopt the Advisory Committee Note to Rule 701, as amended. Eight members voted in favor, one against, and one abstained.

A copy of the proposed amendment to Rule 701, and the proposed Advisory Committee Note, is attached to these minutes.

Rule 703

Judge Shadur presented the proposal of the subcommittee to amend Rule 703. The amendment would, in certain circumstances, prevent the disclosure to the jury of inadmissible information relied on by an expert in reaching an opinion. Judge Shadur observed that the goal of the proposed amendment is to prevent the use of Rule 703 as a backdoor means of admitting otherwise inadmissible evidence. However, Judge Shadur and many other members expressed concern with the subcommittee's invocation of Rule 403 as the means to keep out otherwise inadmissible evidence. There was general agreement that the Rule 403 test, which presumes admissibility, would not be protective enough. Therefore, Committee members suggested that the subcommittee's proposal be changed to provide that otherwise inadmissible information relied upon by an expert can only be disclosed to the jury if the probative value of the information substantially outweighed its prejudicial effect.

Concern was expressed that a simple reference to probative value and prejudicial effect would be too vague, and that the rule should specify how the otherwise inadmissible information could be probative and how it could be prejudicial. Several Committee members responded to this criticism by noting that there is no such specification in any other Evidence Rule that provides for a balancing of probative value and prejudicial effect. Moreover, the Committee Note sets out the relevant factors.

One Committee member suggested that it might be problematic to refer specifically to the jury in the Rule, because the Evidence Rules are generally applicable to both judge and jury trials. Other Committee members responded, however, that Rule 403 itself specifically mentions the risk of misleading the jury,

and that the very point of the amendment to Rule 703 is to prevent a proponent from using the Rule as a backdoor means of getting otherwise inadmissible information before the jury. No such concern arises in a bench trial.

The Committee considered whether the proposed language, as amended, would be better placed in Rule 705, which specifically deals with disclosure of an expert's basis of information. But it was generally agreed that the problem of disclosure of otherwise *inadmissible* information to the jury has been treated under Rule 703, and therefore that amending Rule 705 rather than Rule 703 would cause confusion.

Committee members generally agreed that the Rule should make clear that the limitation on admitting evidence under Rule 703 should apply only to the proponent of the expert. The adversary should be free to permit the jury to consider any aspect of an expert's basis. The subcommittee proposal was therefore modified to clarify that the limitations in the Rule applied only when the proponent of the expert offered otherwise inadmissible information relied upon by that expert.

Finally, the Committee considered the suggestions of the Standing Committee's Subcommittee on Style. The Committee again decided against any attempt to change or restructure the existing language in the rule.

A motion was made to adopt the *Daubert* Subcommittee's proposal to amend Rule 703, as modified, and to recommend to the Standing Committee that the Rule be issued for public comment. Eight members voted in favor and two dissented.

The Committee then discussed the proposed Advisory Committee Note to Rule 703. It was suggested that a paragraph be added to the Note to clarify that the reference in the Rule to the "proponent" would apply in multiparty cases to all parties similarly situated to the party who actually calls the expert. A motion was made to adopt the Committee Note, as modified. The motion was unanimously approved.

Attorney Conduct Rules

The Chair noted that the Civil Rules Committee at its recent meeting recommended that an ad hoc committee, made up of two representatives from each of the advisory committees, be formed to consider the proposed Federal Rules of Attorney Conduct. The Evidence Rules Committee unanimously agreed with the recommendation of the Civil Rules Committee. The Chair appointed Judge Jerry Smith and the

Reporter to serve as representatives to the ad hoc committee.

A short discussion ensued on some of the issues that the ad hoc committee would have to work through. Several Committee members expressed concern about the current version of proposed Rule 10, which permits the government to contact represented parties in certain circumstances. These members were of the opinion that the current version of Rule 10 was too permissive and would permit government overreaching. Professor Coquillette, the Reporter to the Standing Committee, noted that the Attorney Conduct Rules are still a work in progress, and whether or not Rule 10 is adopted, the rulemaking project will have a salutary effect in that it will bring some type of uniformity (whether horizontal or vertical) to the rules of professional responsibility in the federal courts. Professor Coquillette expressed support for an ad hoc committee, noting that significant thought must given to whether the proposed Rules should be adopted and whether they need modification. This work is better done by an ad hoc committee than by each of the Advisory Committees as a whole. Professor Coquillette noted that the Criminal Rules Committee has also agreed with the ad hoc committee approach.

Professor Coquillette expressed his thanks to the Evidence Rules Committee for the substantial work that it has already done on the Attorney Conduct Rules. The Evidence Rules Committee has provided a detailed list of suggestions as to how the proposed Attorney Conduct Rules and commentary can be improved, and these suggestions have been incorporated into the latest working draft of the Rules.

Uniform Rules

Professor Whinery, the Reporter for the Uniform Rules of Evidence Drafting Committee, reported on developments in the Uniform Rules project. The first reading of the working draft will be made this summer at the national meeting of the Uniform Laws Commissioners. The Uniform Rules Committee has generally followed the Federal Rules of Evidence, but Professor Whinery noted that there are some marked differences. For example, Proposed Uniform Rule 702 establishes a presumption of admissibility for expert testimony that passes the *Frye* test, and a presumption of inadmissibility for expert testimony that does not. Then the Rule provides a number of factors that would be relevant to overcoming the presumption one way or another. Also, the Uniform Rules have been amended throughout to update language that might not accommodate the presentation of evidence in electronic form.

Parent-Child Privileges

The Committee reviewed two bills pending in Congress concerning parent-child privileges. The Senate Bill would direct the Judicial Conference to advise Congress on whether the Federal Rules of Evidence should be amended to include some kind of parent-child privilege. The House Bill would directly amend Evidence Rule 501 to provide a partial privilege for confidential communications between parent and child, and to provide a privilege for a witness to refuse to give testimony against a parent or child.

The Chair expressed concern over what seems to be a piecemeal approach to privileges on the part of Congress. Instead of systematically reviewing the law of privileges, proposals to legislate new privileges seem to proceed on an ad hoc basis in response to newsworthy events. One Committee member noted that some prosecutions tried before him could not have been brought if a parent-child privilege had been in existence.

The Committee approved language that might be used in a letter to Congress in opposition to any kind of parent-child privilege. This language will be referred to the Chair of the Standing Committee, should it be considered appropriate to respond to either of these bills.

Rule 801(d)(1)(B)

The Committee considered a proposal by Judge Bullock, the liaison to the Standing Committee, to amend Evidence Rule 801(d)(1)(B). In response to Judge Bullock's suggestion, the Reporter prepared a proposed amendment to the Rule that would provide a hearsay exemption for any prior consistent statement that would otherwise be admissible to rehabilitate a witness' credibility. In support of the proposal, Judge Bullock noted that the distinction between substantive and rehabilitative use of prior consistent statements is less than clear and is usually not grasped by jurors. Jurors can, however, assess credibility, so it arguably makes no sense to instruct the jury that a prior consistent statement can be used for credibility but not for its truth.

Committee members generally agreed with the proposal on the merits, but resolved unanimously not to propose an amendment at this time. The Supreme Court, in *Tome v. United States,* recently construed Rule 801(d)(1)(B), and members wished to avoid the perception that the proposed amendment was designed to overrule *Tome*. The Chair observed that the Uniform Rules draft codifies *Tome*, thus bringing the Uniform Rules in line with current federal law. Such salutary uniformity should not be disturbed unless the current rule has created substantial problems for courts and litigants. Under the current Rule, the worst thing that happens is that the jury receives an instruction that has little effect. The Reporter noted that the current Rule is not creating substantial problems in the federal courts. The Committee resolved to table the proposal, and directed the Reporter to monitor the post-*Tome* case law.

Computerized Evidence

At the October, 1997 Evidence Rules Committee meeting, the Reporter was directed to report at the next meeting on whether the Evidence Rules need to be amended to accommodate technological advances in the presentation of evidence. For the April, 1998 meeting the Reporter provided the Committee a memorandum, noting that more than twenty Evidence Rules have language that refer to "paper-oriented" evidence, e.g., "record", "memorandum", etc. Arguably, these Rules might be problematic for a proponent who wishes to proffer computerized evidence. The Reporter reviewed the case law, however, and concluded that the courts are handling computerized evidence quite well under the broad and flexible Evidence Rules. Committee members expressed the view that tinkering with language may create rather than solve problems, especially since the current rules seem to be working well. One Committee member noted that the same concerns about technology might have been raised years ago with videotaped presentations; yet the federal courts have had no problem in handling videotaped evidence under the current rules.

It was also observed that any attempt to amend the rules to accommodate electronic evidence would have to proceed along one of three paths, each of which is problematic. One possibility is that each of the problematic rules could be amended directly; but this would mean that more than twenty rules amendments would have to be proposed. Alternatively, the definitions section of Evidence Rule 1001 could be modernized to apply to all the other Rules. The problem with this solution would be that the definitions section would be in the Best Evidence Rule--not the first place a lawyer would look for it. A third possibility would be to add an independent definitions section to the Evidence Rules. But to do that just for computerized evidence would be odd; on the other hand, it would certainly not seem worth the effort to promulgate an all-encompassing definitions section, after 25 years of litigation under the Evidence Rules without such a section.

The Committee unanimously agreed that it would not at this time recommend any amendment to the Evidence Rules with respect to computerized evidence. The Reporter agreed to monitor developments in the case law concerning computerized evidence.

E-mail Comments

The Committee addressed a proposal by the Standing Committee Subcommittee on Technology, for a

two-year trial period in which comments on the Rules could be made by e-mail. During this two-year period, Reporters would not be required to summarize individual comments; the Rules Support Office would acknowledge each comment by e-mail, and would post a generic explanation of action of the Advisory Committees in response to comments received. Committee members expressed some concern as to how an e-mail comment system would work. Concern was also expressed that comments made by e-mail may not be as careful and considered as comments by mail. On the other hand, the Committee noted that substantial benefits could accrue from greater public input into the Rules process, and that in the long run it might be easier to respond to e-mail comments than to written comments. The Committee unanimously resolved to support the proposal of the Technology Subcommittee for a trial period for e-mail comments.

Civil Rule 44

At the October, 1997 meeting, the Reporter was directed to consider whether Civil Rule 44 should be abrogated in light of its overlap with certain Evidence Rules providing for authentication of official records--especially Evidence Rule 902. The Reporter conferred with the Reporter to the Civil Rules Committee, researched the relevant case law, and analyzed Civil Rule 44 and its relationship to the Evidence Rules in substantial detail. The Reporter provided the Committee with a memorandum on the subject for the April meeting. That memorandum came to the following basic conclusions: 1. Courts and litigants have not had a problem with the overlap between Civil Rule 44 and the Evidence Rules. 2. In some cases, especially in deportation proceedings, Civil Rule 44 is relied upon as a means of authenticating official records, without reference to the Evidence Rules; while this may not be necessary, any repeal of Civil Rule 44 would upset settled expectations in these areas. 3. There are a few situations in which authentication might be permitted under Civil Rule 44 and not under the Evidence Rules. 4. Abrogation of Civil Rule 44 would also affect the Bankruptcy Rules and the Criminal Rules, both of which refer to Rule 44.

After considering the Reporter's memorandum, and the fact that no problems have been created by the coexistence of Civil Rule 44 and the Evidence Rules, the Committee decided unanimously not to proceed with any effort to abrogate Civil Rule 44.

Shortening the Rulemaking Process

At the request of the Standing Committee, the Evidence Rules Committee considered how and whether the rulemaking process could be shortened. There was general concern that the process is too long, and that the length of the process encourages Congress to intervene with legislation rather than wait for the

rulemaking process to grind to its conclusion. While it is often proclaimed that the process needs to be as long as it is to assure careful deliberation, the fact is that much of the time in the process is simply waiting time in which no cognitive thought is given to the rules. For example, the Evidence Rules Committee's proposals to amend Rules 103, 404, 803(6) and 902 were approved in January by the Standing Committee to be issued for public comment--yet the public comment period does not begin until August 15th.

John Rabiej noted that much of the problem with the length of the process is due to legislation specifying that the Supreme Court has until May 1 to transmit the rules to Congress, and that the Judicial Conference meetings are to be held in March and September. This adds a number of months to the process because the Judicial Conference can only propose rules changes after its September meeting--proposing rules changes after the March Judicial Conference meeting would not give the Supreme Court enough time to consider the changes.

One possibility considered by the Committee is to shorten the six month public comment period. This solution might be especially fruitful with respect to technical or non-controversial changes. Many members believed that a two-tier structure might work: a six month comment period for substantial or controversial rules changes, and a much shorter period for technical or non-controversial changes.

The Reporter noted that the rules process can actually take longer than three years. He pointed out that the Evidence Rules Committee's proposal to amend Evidence Rule 103 was delayed for an entire year because the Standing Committee sent it back to the Evidence Rules Committee for redrafting. The Standing Committee had no apparent substantive concerns with the proposal. It was suggested that if the Standing Committee's only objections to an Advisory Committee proposal are on stylistic or drafting grounds, then the proposal should be issued for public comment. Any drafting problems can be corrected in the public comment process, thus shaving a year off what would otherwise be a four-year rulemaking process. The Committee was in unanimous agreement that drafting objections should not delay the release for public comment of a proposed rule. The Committee was also favorably disposed to two alternative proposals: 1. A policy permitting the Advisory Committee to respond to Standing Committee objections within 30 days of the Standing Committee meeting.2. A policy permitting Advisory Committees to publish their proposals for public comment without the necessity for approval by the Standing Committee.

The Evidence Rules Committee generally agrees with the self-study report that the current rulemaking process is too long, and the Committee expressed its interest and willingness to participate in any suggestions or efforts to shorten the process.

New Matters

A Committee member suggested that the Committee might consider how the scope provisions of Rule 1101 are operating. In particular, the Committee might look at whether the exclusions provided in Rule 1101 are necessary, or whether it might now be appropriate to extend the applicability of the Federal Rules to certain other proceedings. The Reporter agreed to investigate the subject and report to the Committee at the next meeting.

Next Meeting

The next meeting of the Evidence Rules Committee is scheduled for October 22nd and 23rd in Washington, D.C. The Committee agreed that if its proposals to amend Rules 701-703 are issued for public comment, the first day of the meeting will be a public hearing on these Rules.

The meeting was adjourned at 10:45 a.m., Tuesday, April 7th

Respectfully submitted,

Daniel J. Capra

Reed Professor of Law