Advisory Committee on Evidence Rules

Minutes of the Meeting of October 22, 1998

Washington, D.C.

The Advisory Committee on the Federal Rules of Evidence met on October 22, 1998, in the Judicial Conference Center of the Thurgood Marshall Building in Washington, D.C.

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

Hon. Jeffrey L. Amestoy

Professor Kenneth S. Broun

Mary F. Harkenrider, Esq.

Gregory P. Joseph, Esq.

Frederic F. Kay, Esq.

David S. Maring, Esq.

Professor Daniel J. Capra, Reporter

Also present were:

Hon. Anthony J. Scirica, Chair of the Standing Committee on

Rules of Practice and Procedure

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

Hon. James K. Robinson, Justice Department

Roger Pauley, Esq., Justice Department

Professor Stephen A. Saltzburg, American Bar Association Representative

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

Joe Cecil, Esq., Federal Judicial Center

Joseph Spaniol, Esq.

Opening Business

The Chair opened the meeting by welcoming two new members, Chief Justice Jeffrey Amestoy and David Maring. The Chair then asked for approval of the minutes of the April 1998 meeting. These minutes were unanimously approved.

The Chair reported on actions taken at the June 1998 Standing Committee meeting. The Standing

Committee approved the Evidence Rules Committee's proposed amendments to Rules 701, 702, and 703 to be released for public comment. The proposed amendments to Evidence Rules 103, 404(a), 803(6), and 902 had been approved for release for public comment at a previous meeting of the Standing Committee. The Chair recommended that Committee members read the minutes of the Standing Committee meeting, as the minutes give a comprehensive account of all of the cutting edge issues that the Standing Committee is considering.

Public Hearing on Rules Released for Public Comment

The first part of the Evidence Rules Committee meeting was devoted to a public hearing on the Rules that have been released for public comment. The following members of the public gave testimony and engaged in dialogue with the Committee members.

1. *Professor James Duane*, Regent Law School (Rule 103)--Suggesting changes to the Committee Note to Rule 103, and deletion of the Rule's codification of *Luce v. United States* and its progeny.

2. *Roy Katriel, Esq.*, American University Evidence Project (Rule 702)--Suggesting separation of qualification and reliability standards, and articulation of the standard of proof in the text of the Rule.

3. *Libretta Porta, Esq.,* American University Evidence Project (Rule 703)--Suggesting that the Rule be amended to prohibit an expert from relying on inadmissible information, and that a new hearsay exception be added for reliable information used by an expert.

4. *Gerson Smoger, Esq.*, American Trial Lawyers Association (Rule 702)--Opposing the proposed amendment.

5. *Professor Laird Kirkpatrick,* University of Oregon Law School (Rules 103, 404, 701, 702, 703, 902)--Supporting Rule 103 but suggesting deletion of Rule 103's codification of *Luce* and its progeny; suggesting narrowing of character evidence that can be offered as rebuttal under the proposed amendment to Rule 404 and a change to the Committee Note; opposing proposed Rule 701; opposing proposed Rule 702; supporting but suggesting clarifying language for proposed Rule 703; generally

supporting the proposed amendments to Rules 803(6) and 902.

6. *Professor Richard Friedman,* University of Michigan Law School (Rules 103, 404, 701, 702, 703, 902)--Suggesting deletion of Rule 103's codification of *Luce* and its progeny; suggesting narrowing of character evidence that can be offered as rebuttal under the proposed amendment to Rule 404; opposing proposed Rule 701; opposing proposed Rule 702; suggesting clarifying language for proposed Rule 703; generally supporting the proposed amendment to Rules 803(6) and 902.

7. *Stephen Morrison, Esq.*, Lawyers for Civil Justice (Rules 701, 702, 703)--Strongly supporting the proposed amendments to Rules 701, 702, and 703.

Committee Meeting

After the public hearing was concluded, the Committee met to discuss the public comments received both at the hearing and in writing. The Committee also discussed a public comment received concerning the need to amend another Evidence Rule. The discussion of the public comments and the specific rules was not intended to lead to definitive conclusions, because the public comment period is continuing and the Committee looks forward to receiving further suggestions and comments from members of the public. The Committee decided on a tentative basis, however, that certain changes to the proposals might be made in light of some of the public comments.

Rule 103

The Committee considered the public comments received to date on the proposed amendment to Rule 103. One comment suggested that a citation in the Committee Note might be misleading and that a different citation might be more illustrative of why objections to definitive advance rulings need not be renewed. The Committee tentatively agreed to replace the current citation with the suggested one. Another comment suggested that the Committee Note should be amended to emphasize that an advance ruling cannot be relied on if the facts and assumptions underlying the trial court's advance ruling are materially changed at trial. The Committee tentatively agreed to address this matter in the Committee Note.

Each of the three public comments received on the proposed amendment (all from law professors) recommend that the language in the proposal codifying *Luce v. United States* and its progeny should be dropped. None of the commentators seriously suggest that the Rule should be amended to overrule *Luce*--thereby allowing a party to appeal from an adverse advance ruling even if the ruling is dependent on a trial event that never actually occurs. Rather, the commentators suggest that the second sentence of the proposed amendment should be dropped, and the Committee Note changed to state that the Committee was taking no position on whether *Luce* should be applied or extended.

The Committee engaged in an extensive discussion on whether the *Luce* rule should be dropped from the text of the proposed amendment. Some members thought, as they had when the issue was previously discussed, that failing to include any reference to *Luce* in the text of the Rule might lead to the misconception that the *Luce* rule had been abrogated. Others noted that the *Luce* rule has never been questioned by the federal courts and indeed has been extended to comparable situations, e.g., prohibiting a criminal defendant from appealing a ruling that would admit evidence if the defendant pursued a certain defense, where the defendant never pursued that defense at trial.

The Committee agreed to revisit the question of whether the *Luce* language should be retained at its April 1999 meeting, after the end of the public comment period. No motion was made to tentatively change the proposal at this point.

Rule 404(a)

The proposed amendment to Rule 404(a) provides that if an accused attacks the victim's character, this opens the door to an attack on a "pertinent" character trait of the accused. Two members of the public, both law professors, commented that the term "pertinent" is too broad. For example, in a criminal prosecution with multiple counts, a defendant who chose to attack the victim's character in a defense of one count would open himself up to an attack on a character trait that would be pertinent to a completely unrelated count.

After discussion, the Committee agreed in principle and on a tentative basis that the term "pertinent" was too broad. The Committee tentatively agreed that the word "pertinent" should be replaced with the word "same." Under this proposal, the prosecution could rebut an attack on the victim's character only with evidence of the same bad character trait of the defendant. Some concern was expressed that the use of the word "same" might unduly narrow the prosecution's ability to rebut an attack on the victim's character. The Committee agreed to consider any cases or hypotheticals brought to its attention that might indicate that the prosecution's rebuttal power would have to be broader.

Another public comment suggested that the Committee Note add a reference to the fact that an accused might introduce a negative character trait of the victim for a purpose other than to prove that the victim acted in accordance with the character trait. For example, an accused in a self-defense case might introduce the victim's reputation for violence to show that the accused was aware of that reputation and acted accordingly. In such a case, the door would not be opened to a character attack on the defendant. The Committee tentatively agreed that the Committee Note should be amended in accordance with the suggested comment.

Rule 701

Two public comments expressed concern that the proposed Rule's prohibition of lay testimony based on specialized knowledge would result in a change of practice. The commentators contended, for example, that under the proposal a witness who would testify that a certain substance was drugs would have to be qualified and disclosed as an expert.

The Committee considered whether the proposed amendment might have to be changed in light of these public comments. Some members believed that there are two different kinds of specialized knowledge that a witness might use. One type of knowledge is specialized in the sense that not everyone has it, but it is nonetheless something that one needs no training or expertise to attain. Examples include testimony that certain activity occurs on a corner, or that a certain substance is a drug. Another kind of specialized knowledge is that which is beyond common experience, and which requires experience and training to obtain. Examples are testimony that a product failed due to metal fatigue, or that coconspirators were speaking in code.

Several Committee members expressed the opinion that testimony based on particularized knowledge that any member of the public could obtain without training or expertise should be covered by Rule 701, while testimony based on specialized knowledge that is dependent on special skill or training should be covered by Rule 702. Many members thought that this distinction was already made by the proposed amendment to Rule 701, while others thought that a stylistic change might be made to the text to make it more clear that testimony based on common but particularized knowledge is covered by Rule 701 rather than Rule 702. One possibility considered was to state specifically in the Rule that if testimony is expert testimony within the meaning of Rule 702, then it cannot be admitted under Rule 701. The Committee agreed to revisit the possibility of a stylistic change to Rule 701 at the April 1999 meeting, and to consider new proposals in light of any intervening public comment.

Finally, the Committee considered the suggestion of the Style Subcommittee of the Standing Committee to change the title of Rule 701 so as to refer to witnesses in the singular rather than the plural. It was pointed out, however, that someone searching for the rule would probably be considering the question of witnesses in the plural sense rather than the singular. Moreover, if the title is to be changed, it should be changed in such a way as to indicate that the Rule governs not witnesses but testimony. For these reasons, the Committee decided not to adopt the Style Subcommittee's suggestion at this time.

Rule 702

The public comment received so far is, not surprisingly, divided on the merits of the proposal to amend Rule 702. A major intervening development is that the Supreme Court has granted certiorari in *Kumho Tire v. Carmichael*, where the issue is whether the *Daubert* gatekeeping standards apply to the testimony of a tire failure expert who testified largely on the basis of experience. The Committee agreed that the result in *Kumho* could affect the viability of the proposed amendment to Rule 702. But it also agreed that it was premature to reconsider the Rule at this point, since the Supreme Court will not hear argument on the case until December. Several Committee members expressed the hope that the Supreme Court would decide *Kumho* before the April 1999 meeting, so that the Committee would have the opportunity to incorporate the case into the proposed amendment to Rule 702, before that proposal is submitted to the Standing Committee.

The Committee considered the suggestion of the Style Subcommittee to amend the title of Rule 702 in the same manner as the proposed amendment to Rule 701. For the same reasons, the Committee decided not to adopt the Style Subcommittee's suggestion at this time.

One public comment suggested that the proposed amendment to Rule 702 might end up excluding the testimony of experts who purport to educate the factfinder on general background principles only, and who make no attempt to apply their expertise to the facts of the case. The proposed amendment requires that "the witness has applied the principles and methods reliably to the facts of the case." The Committee concluded that this language would not require exclusion of an expert who educates the jury on general principles. Such an expert will have applied the principles and methods reliably to the facts of the case if the testimony fits the facts. The Committee tentatively agreed, however, to amend the Advisory Committee Note to address this question.

The Committee considered and rejected a suggestion from a member of the public that the Rule focus

only on the "case-specific" facts or data that are relied upon by the expert. The Committee unanimously concluded that the expert's reliance on *any* fact, whether or not case-specific, is a matter for scrutiny by the trial court. The Committee also considered and rejected a suggestion from a member of the public that the Committee Note be amended to provide more elaboration of the distinction between Rules 702 and 703. The Committee concluded that the distinction was already well set forth in the Committee Note.

Finally, the Committee tentatively agreed to make two minor changes to the Committee Note to Rule 702, in order to cite some recent case law and academic commentary.

Rule 703

The public comments on Rule 703 have been almost uniformly positive. Two commentators agreed with the Rule but suggested that language might be added to elaborate on why information relied on by an expert might be probative even though it is not in evidence, and why it might be prejudicial. The Committee considered these comments, and tentatively concluded that it was unnecessary to provide this elaboration in the text of the Rule. The Evidence Rules generally refer to probative value and prejudicial effect without elaboration, leaving the balancing of these factors to the discretion of the trial court. Moreover, the Committee Note to the Rule makes clear what the probative value and prejudicial effect are when the expert relies on information not in evidence.

One public commentator proposed that Rule 703 should be amended to prohibit the expert from relying on information not in evidence, and that a new hearsay exception be added to permit reliable information used by an expert to be admitted for its truth. The Committee considered and rejected these suggestions. Committee members noted that the proposal was in one sense too narrow, because it only dealt with hearsay information relied on by an expert, when in reality an expert might use a wide variety of information not in evidence, e.g., character evidence and subsequent remedial measures. On the other hand, the proposal was too broad, because it could permit dubious hearsay to be considered for its truth.

The Committee considered and tentatively approved the changes to the text of the Rule suggested by the Style Subcommittee of the Standing Committee. These changes would make the language of the Rule more direct and concise. The Committee also tentatively agreed to a stylistic change that would clarify that the Rule covers all information not in evidence that is relied upon by an expert.

The Committee tentatively agreed to add language to the Committee Note that would indicate that the

proponent of the expert might be permitted to disclose the information not in evidence relied on by the expert, if the opponent opens the door by attacking the expert's basis.

Finally, the Committee considered and rejected a proposal that the Committee Note be amended to add a laundry list of factors that a trial court might use in assessing the probative value and prejudicial effect of information not in evidence that is relied upon by an expert. The Committee agreed that these matters should be left to the discretion of the trial judge.

Rule 902

The Chair suggested that a stylistic change to proposed Rules 902(11) and 902(12) might be considered in order to provide for a more consistent use of the terms "certification" and "declaration." The Committee tentatively agreed to a stylistic change in each subdivision requiring that the qualified witness make a "written declaration of the custodian thereof or another qualified person certifying that the record" meets the requirements of the Rule. The Committee also tentatively agreed to a stylistic change that would replace a pronoun with a more definite term. Finally, the Committee tentatively agreed to add to the Committee Note a reference to the statute governing declarations filed in a federal court.

The Committee rejected a suggestion from a member of the public that the reference to admissibility under Rule 803(6) be deleted from the proposed amendment to Rule 902. The sense of the Committee was that records offered as self-authenticating under proposed Rules 902(11) and (12) would have to meet the admissibility requirements of Rule 803(6).

Rule 609

Evidence Rule 609 provides that certain convictions are admissible to impeach the character of a witness if a balancing test is met (subdivision (a)(1)), and that other convictions are automatically admissible (subdivision (a)(2)). A public comment was received suggesting that the use of the word "and" between these subdivisions was misleading; the argument was that the use of the word "and" implies that a conviction must meet the requirements of both subdivisions to be admissible, when in fact the subdivisions provide independent paths to admissibility.

The Committee considered this comment and determined that it was not necessary to amend Rule 609. The use of the word "and" clearly indicates that the provisions are independent rather than related--i.e., that both subdivisions provide for admissibility of convictions if their requirements are met.

Rule 1101

At the April 1998 meeting, the Reporter was directed to prepare a memorandum describing the types of actions in which the Federal Rules do not apply. Then the Committee would consider whether it would be appropriate to amend Rule 1101 to either exclude certain actions from or include certain actions within the rubric of the Evidence Rules.

The Reporter submitted a memorandum indicating that there are several types of actions in which the courts have found the Evidence Rules inapplicable, even though the actions are not specifically excluded under Rule 1101. For example, the Evidence Rules are not applicable in suppression hearings, even though Rule 1101 does not specifically exempt them.

After considering the Reporter's memorandum, the Committee concluded that while Rule 1101 is not comprehensive, there is no need to amend it; the courts have had no problem in exempting certain actions from the Evidence Rules where the nature of the action warrants it. The Committee also concluded that it would not be appropriate to amend the Rule to apply the Evidence Rules to any actions that are currently exempted by Rule 1101. For example, it makes no sense to extend the Evidence Rules to grand jury proceedings, which are *ex parte* and necessarily less rigid than a trial court proceeding.

Privileges

The Committee once again discussed whether it should attempt to propose a codification of the privileges. The issue was considered again in light of Congressional activity. Congress recently passed a tax preparer privilege, and there are bills pending in Congress that would establish a parent-child privilege, a secret service privilege, and others.

Some Committee members expressed concern that recommending a set of privilege rules to Congress

might spur even further piecemeal Congressional activity. Unlike other Evidence Rules, rules of privilege are not self-executing; they have to be passed by Congress. Other Committee members thought that the Committee might do a useful service in attempting to set forth rules embracing the current common law of privilege, even if those rules are never even submitted to Congress.

The Chair designated Greg Joseph and the Reporter to consider whether a proposed codification of the privileges would be a worthwhile project. They will report back to the Committee at the April 1999 meeting.

Rule 902(6)

Evidence Rule 902(6) provides that "[p]rinted materials purporting to be newspapers or periodicals" are self-authenticating. A Committee member pointed out that the Rule may not cover news wire reports that do not subsequently appear in print articles, such as electronic stock market reports. After discussion, the Committee resolved to consider this matter in the future, should another package of amendments to the Evidence Rules be deemed necessary.

Attorney Conduct Rules

Professor Coquillette informed the Committee that an ad hoc committee will soon meet to consider the draft of the attorney conduct rules. The ad hoc committee is composed of members of each of the Advisory Committees, two members of the Standing Committee, Professor Coquillette, and liaisons from the Committees on Federal/State Jurisdiction and Court Administration and Case Management. The ad hoc committee will proceed slowly so as not to get ahead of several developments that will affect the viability of any proposed attorney conduct rules for the federal courts. Among these developments are: the legislation recently passed in Congress that requires federal prosecutors to abide by state ethics rules; the ABA Ethics 2000 project; and the negotiations between the Justice Department and the Conference of Chief Justices concerning the proposed Rule 4.2.

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 occurred 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.

Professor Whinery noted that the working relationship that has been established between the Uniform Rules Drafting Committee and the Evidence Rules Committee has been most salutary and will continue in the future.

Next Meeting

The next meeting of the Evidence Rules Committee is scheduled for April 12th and 13th, 1999, in New York City.

The meeting was adjourned at 5 p.m., Thursday, October 22nd.

Respectfully submitted,

Daniel J. Capra

Reed Professor of Law