Advisory Committee on Evidence Rules

Minutes of the Meeting of April 19, 2001

Washington, D.C.

The Advisory Committee on the Federal Rules of Evidence met on April 19th at the Thurgood Marshall Federal Judiciary Building in Washington, D.C.

The following members of the Committee were present:

Hon. Milton I. Shadur, Chair
Hon. Ronald L. Buckwalter
Hon. David C. Norton
Hon. Jeffrey L. Amestoy
Thomas W. Hillier, Esq.
David S. Maring, Esq.
Roger Pauley, Esq.
Patricia Lee Refo, Esq.

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. Richard H. Kyle, Liaison to the Civil Rules Committee
Hon. David G. Trager, Liaison to the Criminal Rules Committee
Peter G. McCabe, Esq., Secretary, Standing Committee on Rules of Practice and Procedure
John K. Rabiej, Esq., Chief, Rules Committee Support Office
Elizabeth Marsh, Esq., Federal Judicial Center
Daniel J. Capra, Reporter to the Evidence Rules Committee
Hon. Jerry E. Smith, Former Committee Member
John M. Kobayashi, Esq., Former Committee Member
Christopher F. Jennings, Esq., Law Clerk to Hon. Anthony J. Scirica
Professor Leo Whinery, Reporter, Uniform Rules of Evidence Drafting Committee

Opening Business

Judge Shadur opened the meeting by welcoming Judge Ronald Buckwalter, Thomas Hillier and Patricia Refo as new members of the Committee. On behalf of the Committee, Judge Shadur expressed his deep gratitude for the dedicated service of Judge Jerry Smith and John Kobayashi, whose terms have expired.

Judge Shadur asked for approval of the minutes of the April, 2000 Evidence Rules Committee meeting. The minutes were unanimously approved.

Judge Shadur provided a brief historical background of the Committee's history and previous work for the benefit of the new committee members. Judge Shadur observed that the Committee had not met in October 2000, because there was no pressing need to consider any amendments to the Evidence Rules at that time. He noted that the Committee has taken a cautious approach to amending the Evidence Rules. Unlike some of the other Federal Rules, the Evidence Rules must often be invoked and applied instantaneously in the course of a trial. As a result, the Evidence Rules must be predictable; changing the Rules can upset settled expectations and require substantial reorientation of judges and practicing lawyers. There is also a risk that a rule change may be misinterpreted as meaning more or less than it actually says. Judge Shadur noted that the Standing Committee views this cautious approach as a sound and justified way of treating the Evidence Rules. Therefore any shift to a more activist approach would require discussion with and approval of the Standing Committee. Judge Shadur noted that some commentators and judges have suggested that the Evidence Rules Committee take a more activist approach to amending the Evidence Rules. Members resolved to continue to monitor these calls for broader change to the Evidence Rules, but agreed that the Committee should adhere to the cautious approach that it has traditionally employed.

Consideration of Evidence Rules

At the April 2000 meeting the Evidence Rules Committee tentatively agreed to propose amendments to Evidence Rules 608(b) and 804(b)(3). The Committee also agreed to consider a possible amendment to Rule 1101. A discussion of Committee action on each of these proposals follows.

1. Rule 608(b)

Rule 608(b) by its terms excludes extrinsic evidence when offered to impeach a witness' "credibility." Read literally, the Rule would mean that extrinsic evidence could never be offered

to prove any aspect of a witness' credibility. But the Supreme Court has made clear in *United States v. Abel* that the term "credibility" really means "character for truthfulness." So if the proponent is using the extrinsic evidence for impeachment on any ground other than an attack on character (e.g., to show bias, prior inconsistent statement, contradiction or lack of capacity), the extrinsic evidence limitation of Rule 608(b) is not applicable. At its April 2000 meeting the Evidence Rules Committee tentatively approved an amendment to Rule 608(b) that would substitute the term "character for truthfulness" for the term "credibility" in accordance with the decision in *Abel*. The Committee also tentatively agreed to a change that would specify that the extrinsic evidence limitation prohibits not only the introduction of extrinsic evidence but also any reference to such evidence. This change was designed to prohibit a cross-examiner from referring to the consequences suffered by a witness as a result of alleged witness' misconduct, such as suspension from a job. When the cross-examiner asks the witness not only whether the misconduct occurred but also whether the witness suffered consequences from it, the cross-examiner is violating both the hearsay rule and the spirit of the extrinsic evidence limitation of Rule 608(b).

The Committee considered the draft amendment and draft Committee Note as prepared by the Reporter. One Committee member suggested that the proposal's reference to "character for truthfulness" was inconsistent with later references in the Rule to "character for truthfulness or untruthfulness." But the Committee determined that the difference in terminology made sense in light of the different context in which "character for truthfulness" was used in the amendment. The clause in which the amendment is made refers to the "purpose of attacking or supporting" the witness' character. Since the clause is cast in terms of "attack or support," the reference to character for truthfulness is quite accurate. The next sentence of the Rule states that specific bad acts may be inquired into on cross-examination "if probative of truthfulness or untruthfulness." Given the generic reference to probative value (as opposed to "attack *or* support") the reference to truthfulness or untruthfulness makes sense. Therefore, it was resolved not to change the proposed addition of the term "character for truthfulness."

The Reporter expressed concern that the language prohibiting "reference to or introduction of" extrinsic evidence was overbroad. Such language could prohibit the cross-examiner from referring even to a document prepared by the witness. The Reporter noted that it would be extremely difficult to craft language that would cover only the perceived problem of referring to the consequences suffered by the witness from his or her alleged misconduct; it would be likely that any amendment would prohibit more than would be intended. Moreover, it is probably not necessary to amend the Rule to prevent the practice of referring to the consequences of alleged misconduct, because a cross-examiner who does so is independently violating the hearsay rule (by referring to assertions by out-of-court declarants about the witness' misconduct, and offering those assertions as true). Because the hearsay rule prohibits the practice already, it seems unnecessary to add language covering the problem to Rule 608(b)–especially if that language could create problems of construction and application for lawyers and judges. The Committee resolved to delete the proposed language prohibiting "reference to or introduction of" extrinsic evidence. The Committee agreed that it would be sufficient to refer to the problem in

the Committee Note.

A Committee member suggested that the Committee Note refer to *United States v. Abel*, the Supreme Court case that established that Rule 608(b) does not apply to non-character forms of impeachment. The Committee agreed with this suggestion, and *Abel* was added to the opening paragraph of the Committee Note.

A Committee member suggested that the Committee Note should refer to the fact that a number of courts have misread the current Rule to prohibit extrinsic evidence even when offered for a purpose other than attacking a witness' character (e.g., contradiction or bias). Committee members in discussion on this point recognized that judicial misapplication of the current Rule is a major reason for proposing an amendment. It was, however, considered counterproductive to point up in the Committee Note that specific courts had erroneously applied the Rule. The Committee approved language to the Note stating that the current Rule "has been read to bar extrinsic evidence for bias, competency and contradiction impeachment", without referring to the specific case law.

A motion was made and seconded to recommend to the Standing Committee that the proposed amendment to Evidence Rule 608(b) and the accompanying Committee Note, both as revised in light of discussion, be issued for public comment. The motion passed unanimously. A copy of the proposed amendment to Rule 608(b) together with the proposed Committee Note is attached to these minutes.

2. Rule 804b3

Rule 804(b)(3) provides a hearsay exception for declarations against penal interest. In criminal cases, the Rule as written states that an accused must provide corroborating circumstances clearly indicating the trustworthiness of the statement before a statement exculpating the accused can be admitted as a statement against the declarant's penal interest. This requirement does not, by the terms of the Rule, apply to government-proffered (inculpatory) declarations against penal interest. Nor does the corroborating circumstances requirement apply on its face in civil cases. At its April 2000 meeting, the Evidence Rules Committee tentatively agreed to propose an amendment to Rule 804(b)(3) that would extend the corroborating circumstances requirement to every hearsay statement offered as a declaration against penal interest.

The Committee reviewed the draft amendment and Committee Note prepared by the Reporter. Committee members noted that the one-way corroboration requirement in the current Rule resulted from misconceptions in Congress about the scope of Rule 804(b)(3). Members of Congress apparently believed that inculpatory declarations against penal interest could not be

admitted against criminal defendants due to the rule of *Bruton v. United States*. Therefore the corroboration requirement was written to apply only to accused-proffered hearsay. But it is clear that government-proffered declarations against penal interest can be and are often admitted against criminal defendants.

Committee members recognized that most courts in fact apply the corroborating circumstances requirement to government-proffered declarations against penal interest (despite the absence of such a provision in the text of the Rule). But some do not, and it is possible that criminal defense counsel do not demand corroboration of government-proffered statements because a look at the text of the Rule indicates that the requirement is inapplicable.

The Department of Justice representative on the Committee expressed the Department's opposition to the proposed amendment. He contended that the legislative history showed that Congress was simply unconcerned about the asymmetrical corroborating circumstances requirement. He argued that there is a reason to distinguish between inculpatory and exculpatory declarations against penal interest insofar as the corroborating circumstances requirement is concerned, because exculpatory statements are often made under suspect motivation. He also stressed that a corroborating circumstances requirement for inculpatory statements is unnecessary in light of the Supreme Court's decision in *Williamson v. United States.* The Court in *Williamson* strictly construed the "against interest" requirement of Rule 804(b)(3), requiring that each statement in a broader narrative must be truly self-inculpatory of the declarant's penal interest to meet the Rule's "against interest" requirement. Moreover, statements made by the declarant while in custody are not "against interest" under *Williamson* to the extent that they directly implicate the accused in criminal conduct. The Department of Justice representative concluded that this strict construction of the "against interest" requirement would probably render a corroborating circumstances requirement superfluous. Alternatively, if a corroborating circumstances requirement were to have independent meaning beyond the *Williamson* "against interest" requirement, it might mean that the admissibility requirements would be so strict that no inculpatory statement would qualify.

The DOJ representative argued further that the Supreme Court's decision in *Lilly v. Virginia* counseled against an amendment to Rule 804(b)(3). In *Lilly* a plurality of the Court stated that the hearsay exception for declarations against penal interest is not "firmly rooted" under the Court's Confrontation Clause jurisprudence. Under the plurality's view, an inculpatory against-penal-interest statement would have to carry independent guaranties of trustworthiness to be admissible under the Confrontation Clause. The DOJ representative argued that the corroborating circumstances requirement of an amended Rule 804(b)(3) might be different from the "guaranties of trustworthiness" requirement of the Confrontation Clause, and this might create confusion in the courts. Finally, the DOJ representative saw no reason to extend the corroborating circumstances requirement to civil cases.

Several Committee members spoke in opposition to the comments of the DOJ representative. One member pointed out that *Lilly* was a constitutional law case that says nothing

about the Federal Rules of Evidence. He concluded that *Lilly*, if anything, supports the proposed amendment. The Court in *Lilly* expressed concern that an against-penal-interest exception might be applied too broadly against the accused; the proposed amendment addresses that concern by imposing an extra admissibility requirement on prosecution-offered statements.

Other Committee members stated that the proposed amendment was a necessary change that leveled the playing field in criminal cases. They also noted that the proposed change was consistent with most of the case law, including the cases construing Rule 804(b)(3) decided after *Williamson.* Other members noted that it was important to extend the corroborating circumstances requirement to civil cases. The stakes are often as high in civil as in criminal cases, and therefore the risks of admitting unreliable hearsay are just as profound. Those members also saw a positive benefit to a unitary treatment of against-penal interest statements in all cases.

Committee discussion then turned to the draft Committee Note. Committee members expressed the opinion that it would be helpful to set forth in the Note some guidelines on how the courts have applied the corroborating circumstances requirement. Practitioners on the Committee noted that Committee Notes can and should provide helpful guidance to practicing lawyers about the meaning of a Rule. It was generally agreed that the Note should be simply descriptive of the case law, rather than an expression of the Committee's opinion on how the corroborating circumstances requirement should be applied. Members also agreed that the Note should make clear that a court applying Rule 804(b)(3) must find that the statement is "against interest" before it considers whether corroborating circumstances exist. Moreover, the factors supporting corroborating circumstances must be independent of the fact that the statement is against the declarant's penal interest, i.e., the against-interest factor is not to be double-counted as a corroborating circumstance indicating the trustworthiness of the statement. The Committee proceeded to suggest and agree upon language to revise the Reporter's draft of the Note to accord with the discussion.

One Committee member suggested that the Committee Note refer to the Supreme Court's decision in *Lilly v. Virginia*. But this suggestion was rejected on the ground that *Lilly* is a constitutional decision and that the Note should avoid any notion that the Rule is intended to codify a constitutional principle.

A motion was made and seconded to recommend to the Standing Committee that the proposed amendment to Evidence Rule 804(b)(3) and the accompanying Committee Note (as that Note was revised in light of Committee discussion) be issued for public comment. The motion passed with one dissent. A copy of the proposed amendment to Rule 804(b)(3) together with the proposed Committee Note is attached to these minutes.

3. Rule 1101

Evidence Rule 1101(d) provides that the Federal Rules of Evidence (with the exception of privilege rules) are not applicable to certain proceedings, e.g., grand jury proceedings, proceedings for extradition, sentencing proceedings, etc. Subdivision (e) of the Rule provides a laundry list of proceedings governed by listed statutes, in which the Evidence Rules are applicable only to the extent that "matters of evidence are not provided for" in the specified statutes.

Courts have found that several proceedings not listed as exempt by Rule 1101(d) are in fact exempt from the Evidence Rules. Examples include suppression hearings, proceedings for the revocation or modification of supervised release and psychiatric release and commitment proceedings. In 1998 the Evidence Rules Committee decided not to proceed with an amendment to Rule 1101 that would codify this case law. The Committee at that time concluded that the courts were having no trouble deciding that the Evidence Rules should not apply to any proceeding that was similar to those specified in Rule 1101(d), specifically those proceedings in which the judge is the factfinder and in which procedures are by necessity more flexible and less informal than those governing a trial.

The Department of Justice representative asked the Committee to revisit the question of amending Rule 1101. In discussing this proposal, all Committee members agreed that if the Rule were to be amended, Subdivision (e) of that Rule should be deleted. Subdivision (e) provides a laundry list of statutes that are not exhaustive, inaccurately cited in some respects, and outmoded or abrogated in others. Moreover, Rule 1101(e) is unnecessary because the Evidence Rules are by definition applicable only to the extent that proceedings are not governed by some other statutory rule of evidence. Committee members were generally in agreement, however, that the minor anomaly created by Rule 1101(e) is not a sufficient reason in itself to justify the costs of an amendment. If Subdivision (e) alone were amended, an unwarranted inference might be created, i.e., that the Committee had approved in principle the unamended text of Subdivision (d).

After extensive discussion, the Committee resolved not to propose an amendment to Rule 1101(d). The Committee determined that it is difficult, if not impossible, to mention specifically all the proceedings in which the Evidence Rules are not or should not be applicable. Listing some of the more common proceedings might create an inference that the Evidence Rules do apply to those proceedings not specifically mentioned. For example, a statement that the Evidence Rules do not apply to "proceedings for psychiatric commitment or release" may well not cover all the proceedings that are prescribed in the relevant statutes, 18 U.S.C. §§ 4241-4247. While a specific reference to the statutes would likely be more all-encompassing, that solution creates its own problems–a statute may be renumbered or abrogated at some point, meaning that the Rule would become outmoded and in need of amendment again. There is also a risk of failing to include some of the statutory proceedings that should be included as exempt from the Rules.

Most Committee members agreed that the risk of underinclusiveness might be tolerable if

an amendment were truly necessary to provide guidance to the courts about the reach of the Evidence Rules. But in fact the courts are having no problem in applying Rule 1101(d) as it is currently–and underinclusively–written. If a proceeding requires flexibility and if the judge is the factfinder, courts have uniformly held that the Evidence Rules are inapplicable even if the proceeding is not specifically listed in Rule 1101(d). The Judges at the Committee meeting each expressed an opinion that they have never had a problem in determining whether a particular proceeding is governed by the Evidence Rules. Their conclusion was that the cost of any amendment to Rule 1101 would outweigh the benefit.

A vote was taken on whether to proceed with an amendment to Rule 1101. Six members of the Committee voted against any amendment. One member voted in favor. The Committee resolved to continue to monitor Rule 1101, and to reconsider a possible amendment if it appeared that the courts were having problems in applying that Rule.

Privileges

Judge Shadur announced that Judge Buckwalter has been appointed Chair of the Subcommittee on Privileges. The Subcommittee is engaged in a long-term project to provide a draft of privilege rules that would codify the federal common law as developed under Evidence Rule 501. The Subcommittee has prepared a preliminary draft of five privilege rules: 1) a catchall provision, providing that the state law of privilege applies in diversity cases and containing a provision to govern application of privileges not specifically established in the Rules; 2) a rule covering the attorney-client privilege; 3) a rule providing a privilege to a witness to refuse to give adverse testimony against a spouse in a criminal case; 4) a rule providing a privilege for interspousal confidential communications; and 5) a rule governing waiver. The Subcommittee on privileges had reviewed these drafts in a conference call a month before the Committee meeting, and significant changes to the drafts were made in light of that discussion.

Judge Shadur observed that the overriding question is whether the Committee will decide to propose a codification of the privileges. He noted that Congress rejected the original Advisory Committee's privilege proposals, and that the Enabling Act (28 U.S.C. § 2074(b)) requires that privilege rules must be affirmatively enacted by Congress. One question that must be addressed by the Committee is whether the considerations leading to congressional rejection of the privilege proposals the first time around remain relevant today. Committee members observed that the predominant reason for rejection of the Advisory Committee's proposals was that the then-proposed federal rules of privilege would apply even in diversity cases. This raised *Erie*-like concerns of federalism. Judge Shadur stated that if this *Erie* concern can be overcome, the Committee might resolve the fundamental question as to whether privilege rules are acceptable at all, and then could look at the merits of each privilege. Committee members in discussion expressed the view in undertaking the privilege project, the Committee is not necessarily bound

or required to propose a codification of the privileges. Others opined that the Committee would perform a valuable service in preparing a "best principles" version of the privilege, even if such a version is never proposed or enacted. Others noted that privilege questions are the ones that arise most often in practice and that it is most important to have a clear and consistent law of privileges, making it all the more important for the Advisory Committee to attempt to codify the case law.

The Committee found it unwise to abandon the privileges project at the outset simply because Congress had objected to the proposals of the original Advisory Committee long ago. Congress' *Erie*-based objection is not pertinent to the current Subcommittee draft, which proposes, as does current Rule 501, that the state law of privilege governs when state law provides the rule of decision.

The Committee agreed that if it ever decides to propose amendments to codify the privileges, those amendments should be proposed as a single package, rather than privilege by privilege. Thus, any proposal to amend the Evidence Rules with respect to privileges will await the Committee's approval of an entire set of privileges.

The Subcommittee then sought specific commentary from the full Committee on three of the draft rules–the general catchall provision, the attorney-client privilege and the spousal privilege against giving adverse testimony. Because the project is at a very preliminary stage, no final decisions were made on any of the drafts. What follows is a summary of the discussion on the three drafts that were reviewed by the Committee:

1. Catchall privilege: In a previous review of this provision, Committee members had expressed concern about draft language that referred to the "state" law of privilege. The question raised was whether this language was sufficient to cover the privilege law of the District of Columbia, Commonwealth of Puerto Rico and the Territories. One question previously raised was whether those jurisdictions should be treated the same as States for purposes of privilege rules. The Reporter researched the pertinent cases and determined that all of the decided cases have held that where the law of the District, Commonwealth, or Territory provided the rule of decision, the local law of privilege was to be applied in federal court. Thus, the District, Commonwealth and Territories have been treated the same as the States under current Rule 501. The Reporter noted that the courts in those cases have not actually analyzed the possibility that the relationship between the District, Commonwealth and Territories and the federal government might be different from the relationship between the States and the federal government–and that this difference might support a different result with respect to privilege applicability.

After discussion at the meeting, it was determined that the reason that the District, Commonwealth and Territories should be treated on a par with the States is that Congress has provided for diversity jurisdiction for cases between citizens of different States, and the term "States" includes "the Territories, the District of Columbia, and the Commonwealth of Puerto Rico." See 28 U.S.C. § 1332(d). Because Congress has decided to treat those jurisdictions on a

par with the States for purposes of diversity, it follows that the same considerations supporting the application of the State law of privilege in a diversity case apply to the District of Columbia, the Commonwealth of Puerto Rico and the Territories. Those considerations are grounded in the policy judgment of current Rule 501 that the choice of privilege law should be tied to the applicable substantive law. The Committee therefore agreed that the catchall provision should include language defining a "State" as any jurisdiction whose residents can qualify for diversity jurisdiction under 28 U.S.C. § 1332(d).

The Committee then considered how and whether the draft rule should treat "mixed" claims: specifically, which privilege law should apply in a case in which federal and state claims are joined? The Subcommittee's current draft provides that if there is a federal claim in the case, then federal privilege law applies to *all* of the claims. The Reporter stated that the circuit court cases considering this matter have held that federal privilege law applies to all claims in a mixed claims case. Those cases have found it untenable to apply different privilege laws to the different claims, because it would be impossible to regulate the evidence and properly instruct the jury. The question is therefore whether federal or state law should apply to all the claims. The circuit courts have reasoned that the need for uniformity and consistency in federal privilege law requires that federal law of privilege must apply in mixed claims cases. However, the Reporter noted that a few cases can be found applying the state law of privilege to all claims in mixed cases. One Committee member argued that applying federal law of privilege to state claims in mixed cases undermines the *Erie* concerns that are embodied in the current Rule 501. Another member stated that the crucial question is whether the courts have been consistent in applying federal privilege law in mixed claims cases. If some courts would apply the state law of privilege in mixed claims cases, then Congress might be legitimately concerned about an amendment that would limit the application of state privileges more than is the case under current law.

After further discussion, the Committee directed the Reporter to do further research on the case law concerning privilege applicability in mixed claims cases. If there is a fair body of case law on either side of the matter, then the draft rule should simply leave the treatment of mixed claims cases to a discussion of that case law in the Committee Note. However, if the vast body of authority mandates the application of the federal law of privilege in mixed claims cases, then the draft should codify this case law.

The Committee next considered language in the draft which would retain privileges recognized by "existing federal common law." The intent of the language is to retain those common law privileges that Congress does not specifically abrogate if it ever codifies the privileges. Committee members suggested that if and when a Committee Note to the proposal is prepared, that Note should clarify that the term "existing" common law privileges refers to privileges existing on the date of enactment of the rule. This would avoid any misconception that a court could adopt a new common law privilege without regard to the Evidence Rules.

The Committee next considered the provision in the draft that is intended to govern the promulgation of new privileges. The draft provided that new privileges could be recognized if the

court finds in the light of reason and experience that "the benefits of the privilege substantially outweigh the loss of probative evidence that the privilege would entail." After discussion, the Committee resolved to change the language to provide that new privileges can be recognized if the court finds "that the benefits of the privilege outweigh the loss of probative evidence that would result from application of the privilege."

A tentative vote was taken on whether the draft catch-all provision was taking the right approach, with the caveat that the question of choice of privilege law in mixed claims cases must still be resolved. Six members voted in favor of the approach taken by the draft. One member dissented.

2. Lawyer-client privilege: The draft of the lawyer-client privilege was prepared by Professor Broun and reviewed by the Subcommittee on Privileges. The latest draft responded to questions and suggestions made by the Committee when it reviewed an earlier draft at its April 2000 meeting. The draft is derived from a number of sources, including the Restatement of the Law Governing Lawyers, the original proposal of the Advisory Committee and the latest version of the Uniform Rules of Evidence.

Professor Broun led a discussion of matters previously raised by the Committee, and explained how those matters were treated in the current draft. Professor Broun informed the Committee that the Subcommittee had chosen the term "lawyer-client" privilege rather than "attorney-client" privilege, because "lawyer-client" was chosen both by the original Advisory Committee and by the drafters of the new Uniform Rules. Committee members generally agreed, however, that the draft should be changed to refer to an "attorney-client privilege." This is how the privilege is referred to in the case law, and it is the term used by most judges and practicing lawyers. The Subcommittee agreed to make this change in a new draft.

At the previous Committee meeting, questions had been raised about the definition of "lawyer" (now "attorney") in the draft, specifically whether it was broad enough to cover non-lawyers in foreign countries who perform legal services, such as notaries. Professor Broun noted that the definition is not broad enough to cover non-lawyers, even if they have a "quasi-lawyer" status under foreign law. He stated that the Subcommittee had considered whether to cover non-lawyers and resolved that the draft language should not be changed. The privilege, as drafted and as generally applied in both the state and federal courts, covers only lawyers. Where the case law has recognized the privilege as covering non-lawyers who are covered by a comparable privilege in other countries, the issue is a choice of law problem. The court does not decide that there would be privilege for such a communication under the appropriate law of the United States, but rather that, under choice of law principles, the foreign privilege should be recognized. The Committee agreed that the draft should not cover non-lawyers and should not deal with

complex choice of law questions.

Another question raised by the Committee was whether the term "attorney" was broad enough to cover patent agents. Professor Broun noted that a number of cases have held that communications between a U.S. patent agent and a client may be privileged where the patent proceeding is before the patent office and the agent is registered with that office. The Subcommittee resolved that if such communications should be privileged, such a privilege should be drafted as separate from the attorney-client privilege, even though it is based on some of the same policy considerations. If included within the attorney-client privilege, the definitions of "communication," "attorney" and "in confidence" would all have to be adjusted in order to take this special circumstance into account. Another possibility is to discuss the matter of patent agents in a Committee Note to the rule on attorney-client privilege. The Committee agreed that any patent agent privilege should not be added to the text of a rule on attorney-client privilege.

Professor Broun next addressed a comment on the prior draft's treatment of the "common interest" doctrine. That doctrine provides a privilege for communications among multiple clients and lawyers when the clients are pursuing a common interest. The previous draft of the attorney-client privilege appeared to permit communications between clients to be protected even if no lawyer was present. Professor Broun noted that at least one case denied the privilege for a client-to-client communication, but that the case could be analyzed as one in which the communications between the clients were not even pertinent to legal representation. Professor Broun stated that as a policy matter it might be appropriate to protect communications between clients when those communications in fact dealt with the legal representation on which they shared a common interest. Discussion among Committee members indicated a strong preference for a more bright-line rule–that a communication between clients is not privileged unless a lawyer is present. The Committee believed a privilege for some client-to-client communications without a lawyer present would be difficult to regulate and administer. For example, it would be difficult to determine whether the clients were really communicating about the matter on which they were represented, and it would be difficult to determine whether they were communicating in a common interest. The Committee unanimously approved a change to the draft that would limit common interest protection to communications made while a lawyer is present.

Professor Broun next addressed the question whether the exception to the privilege for communications made for purposes of crime or fraud should be extended to communications made in furtherance of an intentional tort. He noted that there is a division in the cases on this subject. Probably more cases, especially federal cases, that have looked at the issue have expanded the exception to include intentional torts. Virtually all the cases are district court opinions. Professor Broun noted that the Restatement limits the exception to crimes and frauds, reasoning that "it would be difficult to formulate a broader exception that is not objectionably vague." In discussion, the sense of the Committee was that an exception for intentional torts would be too broad an incursion on the privilege. It would mean, for example, that a communication from a client to an attorney on whether the client should interfere with another's

contractual relations might be excepted from the privilege. Committee members observed that clients would ordinarily expect that such statements would be protected by the privilege–unlike statements that are obviously intended to further a crime or fraud. The Committee unanimously agreed that the exception set forth in the draft should remain limited to statements made for purposes of furthering a crime or fraud, and should not be expanded to cover statements made for purposes of furthering an intentional tort.

Professor Broun then addressed the next question raised at the previous Committee meeting: whether the draft adequately covers the situation where an in-house lawyer is fired for whistleblowing and sues for retaliatory discharge. Professor Broun observed that the current draft is ambiguous on whether the lawyer can disclose privileged communications as part of his case. It states that an exception to the privilege arises where it is necessary for the lawyer to reveal the information "in a proceeding to resolve a dispute with a client." Committee members expressed concern that this language might be too broad an exception to the privilege. It might, for example, allow a lawyer to reveal privileged communications in a business dispute with the client. The Committee directed the Subcommittee to consider the matter further and to determine whether the exception might be limited in some clear way. The Committee also asked the Subcommittee to consider whether to include language covering the privileged or unprivileged status of fees and fee payments.

The Committee next considered whether the draft of the attorney-client privilege accurately captured the exception for statements that a lawyer needs to reveal in order to defend against an allegation of negligent or wrongful conduct. The Committee agreed that the exception should permit disclosure in response to charges of either wrongful or negligent conduct. The sentiment was expressed that a Committee Note might specify that the term "wrongful" does not necessarily mean "immoral" but rather could refer to any charge of unprofessional conduct within the meaning of applicable rules on lawyer's ethics.

The Committee then considered whether the attorney-client privilege draft adequately set out the *Garner v. Wolfinbarger* exception. *Garner* has received a broad reading in most federal courts. It has come to stand for the proposition that a fiduciary may not invoke the attorney-client privilege as to communications made to an attorney in the course of working for a beneficiary. The Committee agreed that the draft accurately captures the exception, and that the *Garner* exception should not be limited to shareholder suits.

Finally, the language of Subdivision (c) of the draft was revised by general agreement to clarify that a client "may, implicitly or explicitly, authorize a lawyer, agent of the lawyer, or an agent of a client to invoke the privilege on behalf of the client."

3. Adverse Testimonial Privilege for Spouses: The Subcommittee prepared a draft of an a privilege for a witness to refuse to give adverse testimony against a spouse in a criminal case. The Reporter raised the policy question whether such a privilege should even be proposed. The

Supreme Court limited the privilege in *Trammel v. United States*, and the federal courts since *Trammel* have often imposed significant limitations on its invocation. Committee members observed that the privilege rarely arises in practice. The probability is that a witness who knows about a spouse's criminal conduct will either want to testify or will be given a deal to testify, and thereby voluntarily waive the privilege (as did the witness-spouse in *Trammel*). Thus, instead of protecting the marriage as it was intended to do, the adverse testimonial privilege has become little more than a bargaining chip for a spouse when the government wants to call that spouse as a witness. The Committee unanimously resolved not to proceed at this time with an adverse testimonial privilege.

Long Range Planning

At Judge Shadur's suggestion, the Committee resolved to continue its practice of monitoring the cases and the legal scholarship for suggestions and guidance as to necessary amendments to the Evidence Rules. The Reporter was directed to prepare a report for the Committee at the next meeting; this report will analyze the recent scholarship that advocates some amendment to the Evidence Rules. Judge Shadur also invited Committee members to review the American University Evidence Project, as well as any other project for reforming the Rules, to determine whether there are any long-term issues that the Committee should address. The Committee was strongly of the view that amendments should not be proffered simply for the sake of change. On the other hand, valid arguments for necessary amendments must be seriously considered.

One suggestion for change was offered by Professor Broun. He urged the Committee to consider a possible amendment to Evidence Rule 803(4). Currently, Rule 803(4) excludes statements from the hearsay rule when they are made to medical personnel for purposes of "medical treatment or diagnosis." The Advisory Committee Note to the Rule states that the exception covers statements to a doctor consulted only for the purpose of enabling him to testify. Professor Broun suggested that the Committee consider whether the Rule should be amended to preclude statements made solely for purposes of litigation. He noted that the original rationale for admitting statements to litigation doctors was that such statements would ordinarily be disclosed to the jury at any rate as part of the basis for the doctor's expert opinion. Professor Broun observed that this rationale is now in question in light of the recent amendment to Evidence Rule 703, which generally prohibits disclosure to the jury of otherwise inadmissible hearsay when offered as the basis of an expert's opinion. The Committee directed Professor Broun and the Reporter to prepare a memorandum for the next meeting on the possibility of a proposed amendment to Rule 803(4).

Conclusion

The meeting was adjourned at 3:30 p.m., Thursday, April 19th.

The next meeting of the Evidence Rules Committee is scheduled for October 15, 2001.

Respectfully submitted,

Daniel J. Capra
Reed Professor of Law

Attachments:

Proposed amendments to Evidence Rules 608(b) and 804(b)(3), with the recommendation that each proposal be released for public comment.

Rule 608. Evidence of Character and Conduct of Witness*

(a) Opinion and reputation evidence of character. — The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) Specific instances of conduct. — Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' ~~credibility~~ character for truthfulness, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another

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

witness as to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness' privilege against self-incrimination when examined with respect to matters which relate only to credibility

* * *

COMMITTEE NOTE

The Rule has been amended to clarify that the absolute prohibition on extrinsic evidence applies only when the sole reason for proffering that evidence is to attack or support the witness' character for truthfulness. *See United States v. Abel*, 469 U.S. 45 (1984); *United States v. Fusco*, 748 F.2d 996 (5th Cir. 1984) (Rule 608(b) limits the use of evidence "designed to show that the witness has done things, unrelated to the suit being tried, that make him more or less believable per se"); Ohio R.Evid. 608(b). On occasion the Rule's use of the overbroad term "credibility" has been read "to bar extrinsic evidence for bias, competency and contradiction impeachment since they too deal with credibility." American Bar Association Section of Litigation, *Emerging Problems Under the Federal Rules of Evidence* at 161 (3d ed. 1998). The amendment restores the Rule to its original intent, which was to impose an absolute bar on extrinsic evidence only if it was offered to prove the witness' character for veracity. *See* Advisory Committee Note to Rule 608(b) (stating that the Rule is "[i]n conformity with Rule 405, which forecloses use of evidence of specific incidents as proof in chief of character unless character is in issue in the case . . .").

By limiting the application of the Rule to proof of a witness' character for truthfulness, the amendment leaves the admissibility of

extrinsic evidence offered for other grounds of impeachment (such as contradiction, prior inconsistent statement, bias and mental capacity) to Rules 402 and 403. *See, e.g., United States v. Winchenbach,* 197 F.3d 548 (1st Cir. 1999) (admissibility of a prior inconsistent statement offered for impeachment is governed by Rules 402 and 403, not Rule 608(b)); *United States v. Tarantino,* 846 F.2d 1384 (D.C.Cir. 1988) (admissibility of extrinsic evidence offered to contradict a witness is governed by Rules 402 and 403); *United States v. Lindemann,* 85 F.3d 1232 (7th Cir. 1996) (admissibility of extrinsic evidence of bias is governed by Rules 402 and 403). Rules 402 and 403 displace the common-law rules prohibiting impeachment on "collateral" matters. *See* 4 Weinstein's Evidence, § 607.06[3][b][ii] (2d ed. 2000) (advocating that courts substitute "the discretion approach of Rule 403 for the collateral test advocated by case law").

It should be noted that the extrinsic evidence prohibition of Rule 608(b) bars any reference to the consequences that a witness might have suffered as a result of an alleged bad act. For example, Rule 608(b) prohibits counsel from mentioning that a witness was suspended or disciplined for the conduct that is the subject of impeachment, when that conduct is offered only to prove the character of the witness. *See United States v. Davis,* 183 F.3d 231, 257, n. 12 (3d Cir. 1999) (emphasizing that in attacking the defendant's character for truthfulness "the government cannot make reference to Davis's forty-four day suspension or that Internal Affairs found that he lied about" an incident because "[s]uch evidence would not only be hearsay to the extent it contains assertion of fact, it would be inadmissible extrinsic evidence under Rule 608(b)"). *See also* Stephen A. Saltzburg, *Impeaching the Witness: Prior Bad Acts and Extrinsic Evidence,* 7 Crim. Just. 28, 31 (Winter 1993) ("counsel should not be permitted to circumvent the no-extrinsic-evidence provision by tucking a third person's opinion about prior acts into a question asked of the witness who has denied the act.").

Rule 804. Hearsay Exceptions; Declarant Unavailable[**]

* * *

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

* * *

(3) Statement against interest. – A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability ~~and offered to exculpate the accused~~ is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

* * *

COMMITTEE NOTE

[**] Matter to be omitted is lined through.

Advisory Committee on Evidence Rules
Proposed Amendment: Rule 804

The second sentence of Rule 804(b)(3) has been amended to provide that the corroborating circumstances requirement applies to all declarations against penal interest, whether proffered in civil or criminal cases. See Ky.R.Evid. 804(b)(3); Tex. R.Evid. 804(b)(3). Most courts have applied the corroborating circumstances requirement to declarations against penal interest offered by the prosecution, even though the text of the Rule did not so provide. *See, e.g., United States v. Alvarez,* 584 F.2d 694, 701 (5thCir. 1978) ("by transplanting the language governing exculpatory statements onto the analysis for admitting inculpatory hearsay, a unitary standard is derived which offers the most workable basis for applying Rule 804(b)(3)"); *United States v. Garcia,* 897 F.2d 1413 (7th Cir. 1990) (requiring corroborating circumstances for against-penal-interest statements offered by the government). The corroborating circumstances requirement has also been applied to declarations against penal interest offered in a civil case. *See, e.g., American Automotive Accessories, Inc. v. Fishman,* 175 F.3d 534, 541 (7th Cir. 1999) (noting the advantage of a "unitary standard" for admissibility of declarations against penal interest). This unitary approach to declarations against penal interest assures all litigants that only reliable hearsay statements will be admitted under the exception.

The Committee notes that there has been some confusion over the meaning of the "corroborating circumstances" requirement. *See United States v. Garcia,* 897 F.2d 1413, 1420 (7th Cir. 1990) ("the precise meaning of the corroboration requirement in rule 804(b)(3) is uncertain"). For example, some courts have held that in assessing corroborating circumstances, the court must consider whether the witness who heard the statement is a credible person. *See United States v. Rasmussen,* 790 F.2d 55 (8th Cir. 1986) (requiring an assessment of the "probable veracity of the in-court witness"). Other courts prohibit such an inquiry on the ground that it would usurp the role of the jury in assessing witness credibility. *United States v. Katsougrakis,* 715 F.2d 769 (2d Cir. 1985). Some courts look to whether independent evidence supports or contradicts the declarant's statement. *See, e.g., United State v. Mines,* 894 F.2d 403 (4th Cir. 1990) (corroborating circumstances requirement not met because other evidence contradicts the declarant's account). Other courts hold that independent evidence is irrelevant and the court must focus only on the circumstances under which the statement was made. *See, e.g.,*

United States v. Barone, 114 F.3d 1284, 1300 (1st Cir. 1997) ("The corroboration that is required by Rule 804(b)(3) is not independent evidence supporting the truth of the matters asserted by the hearsay statements, but evidence that clearly indicates that the statements are worthy of belief, based upon the circumstances in which the statements were made.").

The case law identifies some factors that may be useful to consider in determining whether corroborating circumstances clearly indicate the trustworthiness of the statement. Those factors include (*see, e.g.*, *United States v. Bumpass*, 60 F.3d 1099, 1102 (4th Cir. 1995)):

> (1) the timing and circumstances under which the statement was made;
>
> (2) the declarant's motive in making the statement and whether there was a reason for the declarant to lie;
>
> (3) whether the declarant repeated the statement and did so consistently, even under different circumstances;
>
> (4) the party or parties to whom the statement was made;
>
> (5) the relationship between the declarant and the opponent of the evidence; and
>
> (6) the nature and strength of independent evidence relevant to the conduct in question.

Other factors may be pertinent under the circumstances. The credibility of the witness who relates the statement in court is not, however, a proper factor for the court to consider in assessing corroborating circumstances. To base admission or exclusion of a hearsay statement on the credibility of the witness would usurp the jury's role in assessing the credibility of testifying witnesses. *United States v. Katsougrakis*, 715 F.2d 769 (2d Cir. 1985).

The corroborating circumstances requirement assumes that the court has already found that the hearsay statement is genuinely

disserving of the declarant's penal interest. *See Williamson v. United States*, 512 U.S. 594, 603 (1994) (statement must be "squarely self-inculpatory" to be admissible under Rule 804(b)(3)). "Corroborating circumstances" therefore must be independent from the fact that the statement tends to subject the declarant to criminal liability. The "against penal interest" factor should not be double-counted as a corroborating circumstance.