

Advisory Committee on Evidence Rules

Minutes of the Meeting of October 20-21, 1997

Charleston, S.C.

The Advisory Committee on the Federal Rules of Evidence met on October 20th and 21st at the Charleston Place Hotel in Charleston, South Carolina.

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. Alicemarie H. Stotler, 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

Gene W. Lafitte, Esq., Chair of the Standing Committee's
Subcommittee on Technology

Roger Pauley, Esq., Justice Department

Joe Cecil, Esq., Federal Judicial Center

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

David Pimentel, Esq., Administrative Office

Mark Syska, Esq., Administrative Office

Al Cortese, Esq., Lawyers for Civil Justice

Karen Molzen, Law Clerk, District Court for the District of
New Mexico

Opening Business

The Chair opened the meeting by asking for approval of the minutes of the April, 1997 meeting. These minutes were unanimously approved. The Chair expressed the pleasure of the Committee in the reappointment of Judge

Jerry Smith and John Kobayashi to new terms. The Chair also welcomed Judge Bullock as the new liaison from the Standing Committee.

The Chair then reported on actions taken by the Standing Committee at its June, 1997 meeting. The Standing Committee remanded the Evidence Rules Committee's proposed amendment to Rule 103 for reconsideration. The Standing Committee accepted the Evidence Rules Committee's proposed amendment to Rule 615 in principle, but changed the proposed language of the amendment to provide that a person whose "presence is authorized by statute" cannot be excluded from trial. The Standing Committee's amendatory language has been approved by the Judicial Conference and is currently before the Supreme Court.

Rule 103

The Committee began a discussion on how to revise the proposed amendment to Evidence Rule 103 in light of the Standing Committee's comments. The major question to be decided is whether the proposal should include treatment of the issues presented in *Luce v. United States*--should the rule provide that when the effect of a ruling is triggered by a trial event, a party cannot appeal unless that event actually occurs? Comment was made that the courts (both state and federal) are generally uniform as to the implications of *Luce*, with the exception of the situation in which a party introduces the offending evidence to remove the sting of anticipated prejudice. In that situation, some courts have found a waiver of a claim of error and others have not. Yet the Committee's proposal to deal with *Luce* does not deal with this problem. Thus, one point of view expressed was that it was not necessary to codify *Luce* and its progeny, as the proposal to the Standing Committee had attempted to do.

A countervailing concern was then expressed: that the failure to mention *Luce* might lead one reading the rule to assume that there was an intent to reject *Luce*. Several members expressed the further view that *Luce* is an important decision, based on sound policy considerations, that had to be recognized in the rule.

Another question addressed was whether the proposed amendment should be placed in a new subdivision (e), or instead added as a freestanding paragraph to subdivision (a). It was noted that the amendment will deal with all advance rulings, both pre-trial and at-trial. From this it was concluded that the amendment would be most properly placed in subdivision (a), which deals specifically with all evidentiary rulings.

There was general agreement that the heart of the Advisory Committee proposal previously sent to the Standing Committee was correct, i.e., that if the advance ruling is "definitive" a party need not renew an objection or offer of proof in order to preserve a claim of error.

A vote was taken on a motion to include the amendatory language concerning renewal of objections and offers of proof in subdivision (a) of Rule 103. All were in favor. The Committee unanimously agreed that the language should be set forth as a freestanding paragraph at the end of Rule 103(a). Because of the way the rule is structured, the amendatory language could not be added as a new subdivision (a)(3); and restructuring the existing subparagraphs of the rule would lead to a renumbering that would be confusing, especially given the many cases that have already been decided under the subdivision structure that currently exists.

A motion was made to add language codifying *Luce* and its progeny to the new freestanding paragraph in Rule 103(a). This motion was unanimously approved.

The Committee unanimously agreed to submit the proposed amendment to Rule 103(a) to the Standing Committee, with the recommendation that the Rule be published for public comment. The Committee also approved a proposed Advisory Committee Note to accompany the proposed amendment. The approved draft and the Advisory Committee Note are attached to these minutes.

Rule 615

The Kennedy-Leahy bill on victim's rights, currently in the Senate, contains a provision that would directly amend Evidence Rule 615. The bill gives the Judicial Conference a time period after passage in which to provide comments and suggestions on the legislation. The Reporter prepared some suggested drafting changes to the Congressional proposal to amend Rule 615, so that the Committee can be prepared with comments should the legislation pass. After preliminary discussion, the Committee was informed by the Administrative Office that it was unlikely that the Bill would be passed in this Congressional session. Therefore, the Chair suggested that any discussion on this matter should be tabled until the next meeting. This suggestion was unanimously approved. Members were asked to give the Reporter any comments that they might have on the suggested drafting changes.

Rule 404

The Omnibus Crime Bill, currently before Congress, proposes two changes to Evidence Rule 404. The first change would provide that if the defendant attacks the character of the victim, this would open the door to an attack on a pertinent character trait of the defendant. The second change would add "disposition toward a particular individual" as one of the proper purposes for evidence of uncharged misconduct under Rule 404(b). The Advisory Committee considered the merits of these proposals.

The Committee was in agreement that the proposed amendment to Rule 404(b) was unnecessary and unwise. It is unnecessary because the list of proper purposes in Rule 404(b) is illustrative only. It is not intended to be exclusive. The Reporter could find no case in which evidence of disposition toward a particular individual was excluded on the ground that such a purpose was not listed in Rule 404(b). The change is also unwise because it could lead courts to the erroneous conclusion that a purpose must be on the list of not-for-character purposes in Rule 404(b) in order for evidence offered pursuant to that purpose to be admissible under the Rule. The Committee concluded that Rule 404(b) should not be amended along the lines proposed in the Omnibus Crime Bill.

A majority of the Committee agreed in principle that if a defendant attacks the victim's character, this should allow the prosecution some opportunity to attack the defendant's character. There was concern, however, over the breadth of the language in the Omnibus Crime Bill proposal. After substantial discussion, the Committee agreed upon language that would limit proof of the defendant's character to evidence of a character trait that corresponds to the trait of the victim's that the defendant has attacked. This language would prevent the prosecution from attacking the defendant's credibility simply because the defendant had proven a pertinent character trait of the victim.

After agreeing in principle upon language revising the Congressional proposal, the Committee discussed whether it should simply refer this language to Congress in the form of a suggested drafting change, or whether it should propose an amendment to Rule 404(a) by way of the rules process. After extensive discussion, the Committee

voted to submit a proposed amendment to Rule 404(a) to the Standing Committee, with the recommendation that the Rule be published for public comment. Two members dissented. The Committee also approved an Advisory Committee Note to accompany the proposed amendment. The approved draft and the Advisory Committee Note are attached to these minutes.

Rules 803(6), 902(11), and 902(12)

At its April, 1997 meeting, the Evidence Rules Committee approved in principle a proposal to amend Rule 803(6) to provide for a means of establishing the foundation requirements for business records other than through a live witness. This change would correct an anomaly created by 18 U.S.C. § 3505. Under that statute, foreign business records can be proved through certification in criminal cases. But under Evidence Rule 803(6), all other business records in all other cases must be proven through a foundation witness. The Committee agreed that if Rule 803(6) were amended to permit proof by certification, then conforming amendments to Rule 902 would be required to provide that such records can be self-authenticating.

At the April meeting, some concern was expressed about the difficulty that an opponent might have in attacking the trustworthiness of self-authenticating business records. A subcommittee was appointed to determine whether language could be added to the proposed amendments to Rule 902 that would require testimonial foundation if a genuine question were raised about the trustworthiness or authenticity of the proffered records. The subcommittee reported to the Committee that such additional language was not necessary, because the proposed amendments to Rule 902 already incorporated the trustworthiness proviso from Rule 803(6). Also, a studied effort had been made in the proposed amendments to track the provisions of 18 U.S.C. § 3505, in order to provide for consistent treatment of business records in all cases. Adding language to the proposed amendments to Rule 902, when such language is not included in the statute, would result in the disuniformity that the amendments are proposed to avoid.

After discussion, the Committee voted to submit proposed amendments to Rule 803(6) and 902 to the Standing Committee, with the recommendation that these Rules be published for public comment. The Committee also approved Advisory Committee Notes to accompany these proposed amendments. The approved draft and the Advisory Committee Notes are attached to these minutes.

At the end of the discussion on this matter, it was mentioned that Civil Rule 44 deals with the admissibility of public records, and might overlap with the Rules of Evidence, particularly Evidence Rules 803(8) and 902. It was suggested that the Advisory Committee on Civil Rules might consider whether Civil Rule 44 should be deleted.

Rules 702 and 703

At the April meeting, the Committee agreed to consider whether Rule 702 should be amended to account for

changes wrought by the Supreme Court's *Daubert* decision. In advance of the November meeting, the Reporter provided the Committee with background information as well as several possible working models that could be used for a possible amendment. The Chair, as well as several members, noted that there is a good deal of conflict in the cases over the meaning of the *Daubert* decision, and particularly over whether the *Daubert* standards are applicable to non-scientific expert testimony.

After a general discussion, the Committee agreed that some amendment to Rule 702 should be proposed, in light of the conflicts created by *Daubert*, and the importance of the issue to courts and litigants. An amendment through the rulemaking process was also considered important in light of the proposals in Congress to amend Evidence Rule 702. Members expressed the opinion that the Committee could perform a valuable service by setting forth some general standards that would guide a trial court in determining whether expert testimony is sufficiently reliable. Other members commented that an amendment to Rule 701 should be considered as well, to address the problem of lay witnesses who testify on technical subjects. The Committee also discussed the question of whether an amended Rule 702 should provide procedural standards to govern the timing of the hearing, notice requirements, etc. While no final decision was made on this point, several members expressed the concern that inclusion of procedural requirements in the rule might be unwise. For one thing, different procedures might have to apply to civil and criminal cases. For another, the addition of extensive and detailed procedural requirements might simply create another set of issues for appeal.

The Committee was in general agreement that any amendment to Rule 702 must cover all expert testimony, not just scientific testimony. Imposing more rigorous standards for scientific expert testimony only would create an incentive for litigants to argue that a proffered expert's methodology is completely unscientific, and therefore should be free from scrutiny. The Committee agreed that any amendment to Rule 702 must provide that all expert testimony is to be scrutinized for reliability. The Committee also agreed that any amendment to Rule 702 must concern itself not only with the theory employed by the expert, but also with the application of that theory to the specific facts of the case.

Consideration was given to the Seventh Circuit's conception of *Daubert*: that an expert should employ the same intellectual rigor in testifying that would be demanded from the expert in her professional life. Members expressed the view that language to this effect might have some utility in an amended Rule 702. It was observed, however, that the Seventh Circuit standard might be insufficient on its own to regulate expert testimony in a situation where there are no professional standards in the expert's particular field.

Finally, it was generally agreed that any amendment to Rule 702 should not be excessively long or detailed. No rule could attempt to include all the factors that should be considered in assessing the trustworthiness of all types of expert testimony. It was agreed that any details or elaborations on general principles should be left for the Advisory Committee Note.

The Chair appointed a subcommittee to prepare a working draft of Rule 702 for the next meeting, taking into account the foregoing Committee discussion and the general points of agreement that had been reached. Judge Shadur, Ken Broun, Greg Joseph, John Kobayashi, and the Reporter were named to the subcommittee, with Judge Shadur serving as the Chair of the subcommittee. The Chair of the Evidence Rules Committee will serve *ex officio*.

The Chair noted that the Committee had already worked on a proposed change to Rule 703, to deal with the problem of an expert who uses otherwise inadmissible information as the basis of an opinion. It was agreed that consideration of an amendment to Rule 703 must be deferred in order to be considered in tandem with the Rule 702 proposal. The Subcommittee was therefore directed to review the proposed amendment to Rule 703, and to

report to the Committee at the next meeting.

Uniform Rules

Professor Leo Whinery, Reporter to the Uniform Rules of Evidence Drafting Committee, reported on developments in the effort to amend those rules. The Drafting Committee has proposed the inclusion of extensive procedural requirements in Rule 404(b). It has also proposed an amendment to Rule 801(d)(1)(B) that would codify the Supreme Court's *Tome* decision. The Drafting Committee is working on an amendment to Rule 702 that would apply a presumption of admissibility to expert testimony based on a generally accepted methodology, and a contrary presumption of inadmissibility for testimony based on a methodology not generally accepted. The Uniform Rules Drafting Committee is also proposing a change to Rule 801(d)(2) that would track the recent amendment to the Federal Rule.

Electronic Filing

Karen Molzen, Law Clerk for Chief Judge Conway of the District Court of the District of New Mexico, gave a visual presentation of a pilot program providing for electronic filing of court papers. Under a system of electronic filing, parties can file pleadings, answers, and other motions (including motions to intervene) electronically. Filings can be retrieved through Netscape for litigants and members of the public to review. The documents cannot be altered electronically once filed. The docket sheet contains hyperlinks so that relevant documents can be called up by the user. The system provides for digital signatures that are equivalent to fingerprints. Sole practitioners seem to prefer the system of electronic filing, because it makes access to the courts easier. The system contains an electronic mailbox for lawyers and judges, allowing them to keep track of orders and opinions. A digital filing stamp is created when a document is filed with the court.

Automation

The Committee discussed whether the Evidence Rules must be amended to accommodate technological changes in the presentation of evidence. One possible solution discussed is to expand the applicability of the definition of "writings" and "recordings" in Rule 1001 to cover all of the Federal Rules. The Uniform Rules Drafting Committee is considering this solution. Research is required to determine whether any other particular rules must be amended, or whether extending the application of the Rule 1001 definition will adequately cover electronic evidence offered under other rules. The Reporter was directed to report at the next meeting on whether Rule 1001 could be amended to address computerized evidence, and whether conforming amendments to other rules might be necessary as well.

Misleading Advisory Committee Notes

At the April meeting, the Reporter was directed to prepare a list of Advisory Committee Notes that have become misleading because the Advisory Committee proposal on the particular Rule was either rejected or substantially changed by Congress. The Reporter prepared a list of such notes, together with suggested editorial comments that could be included in a published version of the Federal Rules, and that would alert the reader to the fact that the particular Advisory Committee comment is inconsistent or in conflict with the rule as promulgated. The Committee discussed how the Reporter's memorandum might be most usefully distributed. One possibility is to send a letter to all the publishers of the Federal Rules, suggesting that the editorial comments be incorporated. Another possibility is that the memorandum could be distributed in some form by the Federal Judicial Center. It was agreed that inquiries would be made to determine whether the FJC would be interested in distributing the memorandum. It was also agreed that the memorandum would not be distributed as the work product of the Advisory Committee. Rather, it would be distributed, if at all, as a memorandum prepared by the Reporter in his individual capacity.

New Business

The Chair received the text of an ABA resolution providing that the attorney-client privilege should be applied to the same extent for in-house counsel as for outside counsel. The proposal was referred to the Chair for informational purposes. After discussion, the Advisory Committee decided that it would not propose any amendment concerning privileges at this time.

Next Meeting

The Chair announced that the next meeting of the Evidence Rules Committee would take place on April 6th and 7th, 1998, in New York City.

The meeting was adourned at 9:40 am., Tuesday, October 21st.

Respectfully submitted,

Daniel J. Capra

Reed Professor of Law

Reporter