Advisory Committee on Evidence Rules

Minutes of the Meeting of October 12, 2010

San Diego, California

The Judicial Conference Advisory Committee on the Federal Rules of Evidence (the "Committee") met on October 12, 2010 in San Diego, California.

The following members of the Committee were present:

Hon. Sidney A. Fitzwater, Chair
Hon. Joseph F. Anderson, Jr.
Hon. Brent R. Appel
Hon. Anita B. Brody
Hon. Joan N. Ericksen.
Marjorie A. Meyers, Esq.
Paul Shechtman, Esq.
Elizabeth J. Shapiro, Esq., Department of Justice

Also present were:

Hon. Lee H. Rosenthal, Chair of the Committee on Rules of Practice and Procedure ("Standing Committee")
Hon. Marilyn L. Huff, Liaison from the Committee on Rules of Practice and Procedure and member of the Standing Committee's Style Subcommittee
Hon. Robert L. Hinkle, former Chair of the Evidence Rules Committee
Hon. Paul S. Diamond, Liaison from the Civil Rules Committee
Hon. Karen Caldwell, Liaison from the Bankruptcy Rules Committee
William W. Taylor, III, Esq., former member of the Evidence Rules Committee
John K. Rabiej, Esq., Rules Committee Support Office
James N. Ishida, Esq., Rules Committee Support Office
Peter McCabe, Esq., Secretary to the Standing Committee
Professor Daniel J. Capra, Reporter to the Evidence Rules Committee
Professor Kenneth S. Broun, Consultant to the Evidence Rules Committee
Timothy Reagan, Esq., Federal Judicial Center
Jeffrey Barr, Esq., Rules Committee Support Office

I. Opening Business

Judge Fitzwater, the new chair of the Committee, welcomed the members and stated that he was honored to return to service on the Rules Committees.

The minutes of the Spring 2010 meeting were approved with two revisions.

Judge Fitzwater asked Judge Hinkle to speak about the departing members of the Committee. Judge Hinkle noted that Bill Taylor had provided stellar service to the Committee, most importantly from his perspective as a practitioner in high-level litigation. Bill Taylor then expressed his gratitude to the Committee members and praised the Committee's work. Judge Hinkle noted that Justice Hurwitz could not attend the meeting due to an accident. Committee members expressed their best wishes for Justice Hurwitz's quick recovery and noted that his brilliant contributions to the work of the Committee — especially in the effort to enact Rule 502 — would be sorely missed.

The Reporter then requested the opportunity to provide a tribute to Judge Hinkle. The Reporter noted that the recently completed restyling project could not have been accomplished without Judge Hinkle's brilliant efforts. Committee members lauded Judge Hinkle's wise counsel, his integrity, and his inspirational leadership.

The Chair then welcomed and introduced the new members of the Committee — Justice Brent Appel of the Iowa Supreme Court, and Paul Shechtman, a practicing lawyer and adjunct Evidence professor at Columbia Law School. The Chair also welcomed Judge Diamond as the new liaison from the Civil Rules Committee, and Judge Caldwell, who was substituting for Judge Wiznur, the Bankruptcy Rules Committee liaison.

At the Chair's request, Judge Hinkle reported on the June meeting of the Standing Committee. The Standing Committee unanimously approved the restyled Evidence Rules. That approval was the result of the hard work and cooperative efforts of the Style Subcommittee of the Standing Committee, the Evidence Committee, and Professor Kimble, the style consultant. The product was substantially improved by careful readings by three members of the Standing Committee before its June meeting — Judge Raggi, Judge Hartz, and Dean Levi. Judge Hinkle and the Reporter expressed their gratitude to Judges Raggi and Hartz and to Dean Levi for their time and outstanding effort.

Judge Rosenthal then reported on legislative developments. She noted that the Rules Committee had already contacted staff members of the House Judiciary Committee to provide background on the restyling project, and that staffers had responded affirmatively. The Rules Committee is continuing to monitor two pieces of proposed legislation: 1) a proposal to alter the *Twombley/Iqbal* construction of Civil Rule 8; and 2) the proposed Sunshine in Litigation Act, which if enacted would have an impact on orders issued under Evidence Rule 502. At this point, neither bill is near enactment, but the Rules Committee will continue to monitor developments.

II. Restyling Project

The Restyled Rules of Evidence have been approved by the Standing Committee and the Judicial Conference. After the Evidence Rules Committee completed its work on the project, some changes were made in response to comments and suggestions from Standing Committee members in advance of the Standing Committee's meeting. Those changes were approved by Judge Hinkle, the Reporter, Professor Kimble, and the members of the Style Subcommittee of the Standing Committee. At the Fall Committee meeting, the Reporter presented those changes for the Committee's information and review.

Examples of changes reviewed at the meeting included:

1) reinserting "wrongs" into Rule 404(b) to assure that all evidence currently covered by the Rule will remain so — the concern being that evidence of "crimes or other acts" as restyled might not cover a wrongful failure to act;

2) making a slight change to Restyled Rule 602 to clarify that when a witness testifies to both expert and lay matters, the witness must have personal knowledge as a foundation for the lay testimony;

3) reinserting the last sentence of Rule 704(b), to emphasize that the criminal defendant's mental state is a jury question; and

4) changing Rule 901(a) to clarify that authentication is a requirement for proffered evidence.

III. Possible Amendments to Federal Rules in Light of *Melendez-Diaz v. Massachusetts*

In *Melendez-Diaz v. Massachusetts*, the Supreme Court held that certificates reporting the results of forensic tests conducted by analysts were "testimonial" and therefore the admission of such a certificate (in lieu of testimony) violated the accused's right to confrontation. The Court reasoned that the certificates were prepared exclusively for use in a criminal trial, as substitutes for trial testimony, and so were testimonial within the meaning of the Confrontation Clause as construed by *Crawford v. Washington.*

The Reporter prepared a memorandum for the Committee on the effect of *Melendez-Diaz* on the constitutionality, as applied, of the hearsay exceptions that cover records in the Federal Rules of Evidence. The memorandum made the following tentative conclusions:

1) Records fitting within the business records exception are unlikely to be testimonial, and addressing any uncertainty about the constitutional admissibility of business records in

certain unusual cases should await more case law development.

2) Records admissible under the public records exception are unlikely to be testimonial, because to be admissible under that exception the record cannot be prepared with the primary motivation of use in a criminal prosecution.

3) Authenticating business and public records by certificate under various provisions in Rule 902 is unlikely to raise constitutional concerns, because the Court in *Melendez-Diaz* found an exception to testimoniality for certificates that did nothing but authenticate a document. Addressing any uncertainty about the constitutionality of the Rule 902 provisions in criminal cases should await more case law development.

4) *Melendez-Diaz* appears to bar the admission of certificates offered to prove the absence of a public record under Rule 803(10). Like the certificates at issue in *Melendez-Diaz,* a certificate proving up the absence of a public record is prepared with the sole motivation that it will be used at trial — as a substitute for live testimony. Lower courts after *Melendez-Diaz* have recognized that admitting a certificate of absence of public record under Rule 803(10) violates the accused's right to confrontation after *Melendez-Diaz.*

In light of the above, the Committee discussed the possibility of an amendment to Rule 803(10) that would correct the constitutional problem raised by *Melendez-Diaz.* It was suggested that the problem arises mostly in cases involving a) illegal reentry, in which the government must prove that the defendant did not have permission to re-enter, and b) firearms prosecutions, in which the government has to prove that a firearm was not properly licensed.

The possible fix suggested in the Reporter's memo was to add a "notice-and-demand" procedure to the Rule: requiring production of the person who prepared the certificate only if the defendant made a pretrial demand for that production. The Court in *Melendez-Diaz* specifically approved a state version of a notice-and-demand procedure, and the Reporter's draft added the language from that state version to the existing Rule 803(10).

Committee members were divided on whether to propose an amendment to Rule 803(10) that would add the basic notice-and-demand procedure used as an example in *Melendez-Diaz.* The public defender argued that *Melendez-Diaz* did not raise any substantial practical problems of compliance, because the parties could stipulate to the absence of a record, or the case agent could check for the record and then simply testify to its absence as part of that agent's overview testimony. She noted however that she had contacted other public defenders on the subject and found no objection to the addition of a notice-and-demand procedure to Rule 803(10).

Another member questioned whether a notice-and-demand procedure would be very helpful in alleviating the burden of producing a government witness. The member predicted that defendants would enter such demands pro forma, and then would simply stipulate to the record once the government produced the witness. But others thought that a notice-and-demand procedure would be helpful for at least two reasons. First, not all defendants would engage in the gamesmanship of

making the demand solely to impose a burden on the government. Second and more important, a notice-and-demand procedure would at least provide predictability, because a prosecutor would know that the witness must be produced. The alternative — a proffered stipulation to which the defendant may or may not respond — does not provide the same predictability.

Another member noted that whatever the value of a notice-and-demand procedure, the fundamental problem of Rule 803(10) is that it is unconstitutional as applied. And one of the primary goals of the Committee has been to propose amendments necessary to cure any constitutional defect in the Evidence Rules. While a notice-and-demand procedure may not have a profound practical impact, the fact is that it would cure the constitutional infirmity in Rule 803(10) after *Melendez-Diaz.*

The DOJ representative presented preliminary statistics indicating that *Melendez-Diaz* has imposed burdens on the government in presenting evidence of the absence of a public record. She stated that the Department would welcome a notice-and-demand provision, but wished to review the notice-and-demand procedures that do exist to determine which version might be optimal. The Department does not intend to propose the so-called "subpoena procedure," which would impose the burden of producing the witness on the accused rather than the government. Committee members recognized that the constitutionality of a subpoena procedure was doubtful after *Melendez-Diaz*, where the Court declared that the right to confrontation could not be satisfied by providing a right of compulsory process.

At the end of the discussion, the Committee unanimously resolved to consider a proposed amendment to Rule 803(10) at its next meeting. The Reporter was directed to work with the Justice Department to review all the possible viable alternatives for a notice-and-demand procedure, including ones that add procedural details such as providing for continuances. The Reporter was also asked to consider an alternative draft that would prevent the use of Rule 803(10) when a record is offered by the government in a criminal case.

IV. *Crawford* Developments

The Reporter provided the Committee with a case digest of all federal circuit cases discussing *Crawford v. Washington* and its progeny. The digest was grouped by subject matter. The goal of the digest is to allow the Committee to keep apprised of developments in the law of confrontation as they might affect the constitutionality of the Federal Rules hearsay exceptions.

The Committee reviewed the memo and noted that — with the possible exception of Rule 803(10), discussed supra — nothing in the developing case law mandated an amendment to the Evidence Rules at this time. The Committee resolved to continue to monitor a number of important developments, including: 1) the Supreme Court's consideration of *Michigan v. Bryant*, which may have an effect on the admissibility of excited utterances under Rule 803(2); 2) the Supreme Court's consideration of *Bullcoming v. New Mexico,* which concerns whether certificates can be introduced by a witness other than the person who prepared it, and which may have an effect on the application

of Rule 703; and 3) the case law allowing testimonial statements to be admitted not for their truth but for "background" or "context."

V. Proposed Amendment to Rule 410

During the restyling process, the American College of Trial Lawyers provided a number of detailed and helpful comments for improvement of the Restyled Rules as they were issued for public comment. One set of the College's comments was addressed to Rule 410, but the College noted that those comments called for substantive changes to the Rule. Accordingly the Committee's consideration of the suggested changes to Rule 410 was deferred until the restyling project was completed.

At the Fall 2010 meeting, the Committee considered a memorandum from Professor Broun and the Reporter that evaluated the changes proposed by the College. Two basic changes were proposed: 1) clarify that the protections of Rule 410 apply only to a party in the case in which the evidence is offered, i.e., that a withdrawn guilty plea is admissible if the person who entered the plea is only a witness and not a party in the case; and 2) provide that the protection for "withdrawn" guilty pleas also extends to guilty pleas that are rejected or vacated by the court. The most important suggestion was the one concerning guilty pleas of testifying witnesses — the College had suggested that many defense counsel do not ask for such information from the government because they do not believe the withdrawn guilty plea of a cooperating witness would be admissible under Rule 410.

The memorandum noted that there is some ambiguity in the text of Rule 410 as to whether it protects against admission of withdrawn guilty pleas of witnesses, as opposed to the defendant in the case. But the memorandum also noted that the case law, while sparse, has held uniformly that Rule 410 does not apply to withdrawn guilty pleas of testifying witnesses. Likewise, all of the major treatises state that Rule 410 does not apply to the withdrawn guilty pleas of testifying witnesses. As to vacated and rejected guilty pleas, the case law again is sparse, but it uniformly holds that Rule 410 does preclude admission of a vacated or rejected guilty plea of the defendant in the case. The reasoning is that the policy of protecting plea discussions is as applicable when the plea is rejected or vacated as it is when the plea is withdrawn.

In discussion, both the DOJ representative and the public defender noted that they had surveyed others in their respective departments and found no reports of any problem in the operation of Rule 410 — either in general or with respect to the two suggestions made by the College. Given the uniformity of case law and the lack of any problem in operation of the Rule, the Committee unanimously resolved not to propose any amendment to Rule 410.

VI. Proposed Amendment to Rules 803(6)-(8)

The restyling project uncovered an ambiguity in Rules 803(6)-(8), the hearsay exceptions for business records, absence of business records, and public records. Those exceptions in current form set forth admissibility requirements and then provide that a record meeting those requirements is admissible despite the fact it is hearsay "unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness." The rules do not specifically state which party has the burden of showing trustworthiness or untrustworthiness.

The restyling sought to clarify the ambiguity by providing that a record fitting the other admissibility requirements would satisfy the exception if "the opponent does not show that" the source of information, etc., indicate a lack of trustworthiness. But the Committee did not submit this proposal as part of restyling because research into the case law indicated that the change would be substantive. While most courts impose the burden of proving untrustworthiness on the opponent, a few courts require the proponent to prove that the record is trustworthy. Thus the proposal would have changed the law in at least one court, and so was substantive under the restyling protocol.

When the Standing Committee approved the Restyled Rules, several members suggested that the Evidence Rules Committee consider making the minor substantive change that would clarify what is implicit in Rules 803(6)-(8) — that the opponent has the burden of showing untrustworthiness. Those members believed that allocating the burden to the opponent made sense for a number of reasons, including: 1) the Rules' reference to a "lack of trustworthiness" suggests strongly that the burden is on the opponent, as it is the opponent who would want to prove the lack of trustworthiness; 2) almost all the case law imposes the burden on the opponent; and 3) if the other admissibility requirements are met, the qualifying record is entitled to a presumption of trustworthiness, and adding an additional requirement of proving trustworthiness would unduly limit these records-based exceptions.

In discussion, some members suggested that it was better to leave the rule fuzzy on who has the burden as to untrustworthiness. They suggested that the determination of trustworthiness might be a process and a court may decide that a record is untrustworthy even if the opponent does not provide any evidence or argument on that subject. Others suggested that imposing the burden on the opponent might impose difficulties on opponents who may not have an opportunity to discover and present evidence of untrustworthiness — although whatever difficulty exists is in fact already imposed by the predominant case law. Another member noted that there has to be a burden allocation; that allocation is only relevant when the evidence is in equipoise; and therefore that a clarification allocating the burden to the opponent in a narrow band of cases is well-justified. The DOJ representative noted that the Department was in favor of the change as a helpful clarification.

After discussion, the Committee directed the Reporter to check with representatives of the ABA Litigation Section, the American College of Trial Lawyers, and other interested parties to determine whether it would be helpful to propose an amendment that would clarify that the burden of showing untrustworthiness is on the opponent. The Committee determined that it would revisit the question of a possible amendment at the next meeting. The Committee also determined that if an amendment were to be proposed to allocate the burden to the opponent, a statement should be included in the Committee note that the opponent, in meeting that burden, is not necessarily

required to introduce affirmative evidence of untrustworthiness.

VII. Proposal to Amend Rule 801(d) "Not Hearsay" Designation

The Committee considered a public comment from Professor Sam Stonefield, suggesting a change to the designation of hearsay statements admissible under Rule 801(d) as "not hearsay." The problem is that the statements that fall under Rule 801(d) — prior statements of testifying witnesses and statements of party-opponents — do in fact fit the definition of hearsay and yet the Rule says that they are "not hearsay." Analytically, it would be better to call these provisions "hearsay exceptions" because that is what they are. (The categories were designated "not hearsay" because admissibility was not grounded on the kinds of circumstantial guarantees of reliability that supported the traditional hearsay exceptions. But this attempt to alleviate confusion has in fact caused confusion because something that is hearsay is called "not hearsay.").

The Reporter prepared a memo on the public comment, and set out the various drafting alternatives, from minimal to more radical reorganization of all the hearsay exceptions. In discussion, Committee members were unconvinced of the need for an amendment. They noted that there is no practical difference between a statement that is "not hearsay" under Rule 801(d) and one that is "hearsay but subject to an exception" under Rules 803, 804 and 807. When covered by any of these Rules, the statement is admissible for its truth despite the fact it is hearsay. Thus, the change would be a technical one. Committee members concluded that courts and litigants have become comfortable with referring to, e.g., statements of party-opponents as not hearsay, and therefore any marginal benefit in the proposed amendment would be outweighed by the disruption that such an amendment — that any amendment — would cause. The Committee determined unanimously that it would not propose an amendment to change the designation of Rule 801(d) statements.

VIII. Circuit Conflict on Rule 804(b)(1)

The Reporter provided a memo on a circuit split that has developed in the application of the hearsay exception for prior testimony, Rule 804(b)(1). That Rule provides a hearsay exception for testimony offered against a party who, at the time it was made, had a motive and opportunity to develop it that was "similar" to the motive and opportunity it would have if the declarant could be produced for trial. The split is over the admissibility of grand jury testimony that is favorable to the accused. Some circuits have held that such favorable testimony is generally inadmissible against the government at trial, because the prosecutor's motive to develop such testimony is ordinarily not similar to what it would be at trial, given the differing operative standards of proof at grand jury and trial. Other circuits have held that such testimony is admissible, noting that the respective motives need only be "similar" and not identical or equally intense.

The Committee determined that any attempt to amend the Rule would probably cause more problems than it would solve. The conflict in the cases concerns an important question, but it is a narrow one in the context of Rule 804(b)(1). Any attempt to amend the Rule would also have to take

into account the consequences for admissibility of preliminary hearing testimony against the accused. And most importantly, resolving the question of admissibility one way or the other would surely be controversial. For example, the DOJ would certainly oppose any rule that made exculpatory grand jury testimony automatically admissible against the government, as such a rule would of necessity change grand jury practice by turning the questioning of every grand jury witness into a trial-like event. And the defense bar would correspondingly oppose any rule change that would bar the admission of exculpatory grand jury testimony in the circuits where that is the law. Finally, drafting a solution that would cover all the nuances of when exculpatory testimony might fairly be admissible against the government under a "similar motive" test would be extremely difficult.

Committee members also noted that the Supreme Court has previously shown an interest in interpreting Rule 804(b)(1) as it applies to grand jury testimony, so it is at least possible that the current circuit conflict will be resolved by the Court.

After discussion, the Committee resolved that it would continue to monitor the circuit split, but that it would not propose an amendment to Rule 804(b)(1) at this time.

IX. Privilege Project

Several years ago the Committee voted to undertake a project to publish a pamphlet that would describe the federal common law on evidentiary privileges. The Committee determined that it would not be appropriate to propose an actual codification of all the evidentiary privileges to Congress. But it concluded that it could perform a valuable service to the Bench and Bar by setting forth in text and commentary the privileges that exist under federal common law. Professor Broun had prepared drafts of a number of privileges, but the project was put on hold given the time and resources required for the restyling project.

At the meeting, Professor Broun reported on the status of the project and the Committee resolved that he should again take up the project and report back to the Committee with drafts and commentary in Spring 2011.

X. Next Meeting

The Spring 2011 meeting of the Committee is tentatively scheduled for April 1 in Philadelphia.

Respectfully submitted,

Daniel J. Capra
Reporter