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OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

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TO: Honorable Anthony J. Scirica, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Honorable Fern M. Smith, Chair
Advisory Committee on Evidence Rules

DATE: December 1, 1998

RE: Report of the Advisory Committee on Evidence Rules

I. Introduction

The Advisory Committee on Evidence Rules met on October 22nd in Washington, D.C. The Committee held a public hearing on the proposed amendments that are currently released for public comment--proposals to amend Evidence Rules 103, 404(a), 701, 702, 703, 803(6) and 902. After the public hearing, the Committee convened to consider the comments received at the hearing as well as other written comments submitted. The Committee reached tentative agreement on some minor revisions to the text and notes of some of the proposed amendments. The Committee also considered, and decided not to act on, some proposals to amend other Evidence Rules. The discussion of these and other matters is summarized in Part III of this Report, and is more fully set forth in the draft minutes of the October meeting, which are attached to this Report.

Given the fact that a package of proposed amendments to the Evidence Rules is currently in the public comment period, the Evidence Rules Committee will present no action items at the January, 1999 Standing Committee meeting.

II. Action Items

No Action Items

III. Information Items

A. Consideration of Possible Changes to Proposed Amendments Released for Public Comment.

1. Rule 103

The proposed amendment to Evidence Rule 103 provides: 1) that a party who loses an advance ruling on evidence need not renew an objection or offer of proof at trial, if the advance ruling is definitive; and 2) that if there is a condition precedent to the advance ruling, such as the pursuit of a certain claim or defense or the testimony of a certain witness, then an appeal cannot be taken on the ruling unless the condition precedent actually occurs at trial.

In light of the public comment received, the Committee tentatively agreed to change a citation in the Committee Note to one that more completely described the need to excuse a party from renewing objections to definitive rulings. The Committee also tentatively agreed with a public comment suggesting that the Committee Note should be amended to emphasize that an advance ruling cannot be relied on if the facts and assumptions underlying the trial court's advance ruling are materially changed at trial.

The second sentence in the proposed amendment, set forth above, would codify the Supreme Court's ruling in *Luce v. United States,* and the cases that have extended the logic of *Luce.* Academics have submitted comment that has been critical of *Luce*; they have suggested that the second sentence of the proposed amendment should be dropped, and the Committee Note changed to state that the Committee was taking no position on whether *Luce* should be applied or extended. After discussion, the Evidence Rules Committee remained in general agreement that the *Luce* principle should remain in the text of the Rule, though some members expressed concern that extending the *Luce* principle to all analogous situations might result in some unintended consequences. The Committee resolved to revisit the question of whether the *Luce* language should be retained at its April, 1999 meeting, after the end of the public comment period.

2. Rule 404(a)

The proposed amendment to Evidence Rule 404(a) provides that if an accused attacks the victim's character, this opens the door to an attack on a "pertinent" character trait of the accused. Public comment has raised the concern that the term "pertinent" may be too broad. In a multiple

count prosecution, the chosen language might permit the prosecution to attack a character trait of the defendant that is pertinent to a count different from the one on which the defendant attacked the character of the victim.

In light of the public comment, the Evidence Rules Committee has tentatively agreed that the word "pertinent" should be replaced with the word "same." Under this proposal, the prosecution could rebut an attack on the victim's character only with evidence of the same bad character trait of the defendant. The Committee has also tentatively agreed to add to the Committee Note a reference to the fact that an accused might introduce a negative character trait of the victim for a purpose other than to prove that the victim acted in accordance with the character trait; this would not open the door to a character attack on the accused.

3. Rule 701

The proposed amendment to Evidence Rule 701 would prohibit lay witness testimony where the witness is testifying on the basis of specialized knowledge. The goal of the amendment is to prohibit lay witnesses from testifying on matters that should be governed by the reliability requirements of Evidence Rule 702. While most public comment on the proposal has been favorable, some commentators have expressed concern that the amendment might prohibit testimony from lay witnesses who testify on the basis of ordinary experience, e.g., that a certain substance was cocaine. The Committee's position is that testimony based on particularized knowledge that any member of the public could obtain without training or expertise should be covered by Rule 701, while testimony based on specialized knowledge that is dependent on special skill or training should be covered by Rule 702. The Committee will consider whether a stylistic change to the proposal is necessary to clarify this distinction.

4. Rule 702

The proposed amendment to Evidence Rule 702 provides three reliability-based requirements that all expert testimony must meet: (1) the testimony must be sufficiently based upon reliable facts or data; (2) the testimony must be the product of reliable principles and methods; and (3) the principles and methods used by the witness must be applied reliably to the facts of the case. The public comment received so far is, not surprisingly, divided on the merits of the proposal to amend Rule 702, though most commentary has been quite favorable. A major intervening development is that the Supreme Court will hear argument on December 7 in *Kumho Tire v. Carmichael*, where the issue is whether the *Daubert* gatekeeping standards apply to the testimony of a tire failure expert who testified largely on the basis of experience. The Evidence Rules Committee will continue to monitor the *Kumho* case and its effect, if any, on the proposed amendment to Rule 702. The Committee has also tentatively agreed to make two minor changes to the Committee Note to Rule 702, in order to cite some recent case law and academic commentary.

5. Rule 703

The proposed amendment to Rule 703 would limit the disclosure to the jury of information relied on by an expert, where that information is otherwise inadmissible. The amendment provides that this information cannot be disclosed unless its probative value (in assisting the jury to weigh the expert's opinion) substantially outweighs the risk of prejudice (from the jury's misusing the evidence). The goal of the amendment is to prevent a party from evading exclusionary rules of evidence through the simple expedient of having an expert rely on the inadmissible information.

The public comments on Rule 703 have been almost uniformly positive. The Evidence Rules Committee has tentatively decided to reject suggestions that the text of the Rule be made more elaborate to specify the probative value and prejudicial effect that the trial judge must consider. The Evidence Rules generally refer to probative value and prejudicial effect without elaboration, leaving the balancing of these factors to the discretion of the trial court. Moreover, the Committee Note to the Rule makes clear what the probative value and prejudicial effect are when the expert relies on information not in evidence. The Committee has also decided to reject more radical proposals that would prohibit the expert from relying on information not in evidence, and that would add a new hearsay exception to permit reliable information used by an expert to be admitted for its truth.

The Committee considered and approved the changes to the text of Evidence Rule 703 suggested by the Style Subcommittee of the Standing Committee. These changes would make the language of the Rule more direct and concise. The Committee also tentatively agreed to a stylistic change that would clarify that the Rule presumptively prohibits disclosure of all information not in evidence that is relied upon by an expert. Finally, the Committee tentatively agreed to add language to the Committee Note that would indicate that the proponent of the expert might be permitted to disclose the information not in evidence relied on by the expert, if the opponent opens the door by attacking the expert's basis.

6. Rules 803(6) and 902

The proposed amendments to Rules 803(6) and 902 are interrelated. The amendment to Rule 803(6) would permit business records to satisfy the hearsay exception without the requirement of in-court testimony by a custodian or other qualified witness; such a person would be permitted to certify that the admissibility requirements of the exception are met. The amendment to Rule 902 would provide that a business record accompanied by such a certification can be self-authenticating. The goal of these amendments is to provide consistency in the proving up of business records. Current federal law permits proof of foreign business records in criminal cases by way of certification; but business records in civil cases and domestic business records in criminal cases must still be proven by the testimony of a qualified witness.

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

B. Other Matters Considered

1. Rule 609

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

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

2. Rule 1101

Evidence Rule 1101 sets forth the actions and proceedings to which the Federal Rules of Evidence are applicable, and also excludes certain proceedings from the applicability of those Rules. The Evidence Rules Committee considered whether Evidence Rule 1101 should be amended to either exclude certain actions from or include certain actions within the rubric of the Evidence Rules.

The Committee determined that there are several types of actions in which the courts have found the Evidence Rules inapplicable, even though the actions are not specifically excluded under Rule 1101. The Committee also considered whether some of the proceedings currently excluded from the Rules by Rule 1101 should remain so.

Ultimately, the Committee concluded that there is no critical need to amend Rule 1101 at this time. First, the courts have had no problem in exempting certain actions from the Evidence Rules where the nature of the action warrants it, even if there is no explicit exclusion in Rule 1101. Second, the Committee found that it would not be appropriate to apply the Evidence Rules to any proceedings that are currently exempted by Rule 1101.

3. Privileges

The Evidence Rules Committee once again discussed whether it should attempt to propose a codification of the privileges, in light of substantial recent Congressional activity in this area. Committee members are divided on whether the project would be productive. The Chair designated a subcommittee to consider whether a proposed codification of the privileges would be a worthwhile project. The subcommittee will report back to the Evidence Rules Committee at the April, 1999 meeting.

4. Rule 902(6)

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

C. Outmoded or Misleading Advisory Committee Notes

The Evidence Rules Committee has engaged in a two-year long project to identify those original Advisory Committee Notes that may be misleading because they comment on a version of the Rule that was either rejected or substantially changed by Congress. The culmination of the project was a report by the Committee's Reporter, setting forth the problematic Notes and providing editorial comment that can be used by publishers to alert the reader that the Note is commenting on a Rule different from that actually enacted.

The Reporter's report has been published as a pamphlet by the Federal Judicial Center. The pamphlet has been distributed to all Federal judges, all publishers of the Federal Rules of Evidence, and other interested parties. The report has also been published in the supplement to Wright and Miller's treatise on federal courts, and will soon be published in Federal Rules Decisions.

IV. Minutes of the October 1998 Meeting

The Reporter's draft of the minutes of the Evidence Rules Committee's October 1998 meeting are attached to this report. These minutes have not yet been approved by the Evidence Rules Committee.

Attachment:

Draft Minutes