ADVISORY COMMITTEE ON EVIDENCE RULES

Minutes of the Meeting of May 4 and 5, 1995

New York, New York

The Advisory Committee on the Federal Rules of Evidence met on May 4 and 5, 1995 at the federal courthouse in Foley Square in the Southern District of New York.

The following members of the Committee were present:

Circuit Judge Ralph K. Winter, Jr., Chair

Circuit Judge Jerry E. Smith

District Judge Fern M. Smith

Federal Claims Judge James T. Turner

Dean James K. Robinson

Professor Kenneth S. Broun

Gregory P. Joseph, Esq.

Fredric F. Kay, Esq.

John M. Kobayashi, Esq.

Mary F. Harkenrider, Esq., and Roger Pauley, Esq.,

Department of Justice

Professor Margaret A. Berger, Reporter

Chief Judge Covington and Judge Shadur were unable to attend.

Also present were:

Honorable Alicemarie H. Stotler, Chair, Committee

on Rules of Practice and Procedure

Professor Daniel R. Coquillette, Reporter, Committee on Rules of Practice and Procedure

District Judge David S. Doty, Liaison to the Civil Rules Committee

Circuit Judge C. Arlen Beam

Peter G. McCabe, Esq., Secretary, Committee on Rules of Practice and Procedure

John K. Rabiej, Esq., Administrative Office

Paul Zingg, Esq., Administrative Office

Judge Winter called the meeting to order at 8:30 a.m. He reported to the Committee on a number of developments.

The Standing Committee. Judge Winter informed the Committee that the Standing Committee had voted to send out the amendments to Rules 103 and 407 for public comment. He also reported that some members of the Standing Committee feared that the amendment to Rule 103 might prove a trap for lawyers, and had expressed a preference for a default rule that would relieve the losing attorney from having to renew the motion at trial. A motion to revise the amendment accordingly was defeated, but it was agreed that the Committee Note to Rule 103 would indicate that such an alternate version had been considered and rejected.

Congress. Judge Winter reported that he met with a number of persons on the Hill with regard to Rules 413-415. Staff counsel to Senator Biden indicated that the Democrats would have no objection to the Evidence Committee redraft. Judge Winter also met with four Republican staffers and suggested to them that admissibility should be limited to conduct resulting in a conviction. He reported that the House side had been surprisingly receptive. The Senate staffers acknowledged that the Evidence Committee draft might well be an improvement on the congressional version but that a revision of Rules 413-415 could not be accomplished through the Crime Bill. If at all, the Committee's draft would have to be presented as a technical amendment at the request of Congress; it might possibly pass "on consent." The House might perhaps hold hearings. Although Judge Winter was somewhat encouraged by the meetings, he thought that at this time there was less than a 50% chance that Congress would take any action to modify Rules 413-415.

At these meetings, Judge Winter also discussed the congressional initiative to amend Rule 702. He reported that he had advised the participants that the Committee viewed Daubert as a good decision with great potential and that an attempt to codify the opinion at this point would create problems. The Committee agreed that it would be unwise to react to each congressional proposal to amend a rule of evidence by submitting its own preferred redraft. The Committee decided to take no action on Rule 702 at this time.

The Committee then returned to its consideration of the hearsay rule.

Rule 803(4). The Committee agreed to recommend not amending Rule 803(4).

Rule 801(d)(2). At the previous meeting, the Committee had directed the Reporter to prepare a draft of Rule 801(d)(2)(E) that would deal with issues raised by the Supreme Court's decision in Bourjaily v. United States, and to also consider the effect of Bourjaily on Rules 801(d)(2)(C) and (D). The Reporter presented a number of alternate proposals for either amending each of the subdivisions separately or for language that would apply to all three.

The Committee then engaged in an extensive discussion. Professor Saltzburg, who had not been at the previous meeting, urged the Committee to codify pre-Bourjaily practice as the better rule. Professor Broun also expressed reservations about codifying any part of Bourjaily and extending its doctrine to civil cases. Dean Robinson suggested a corroboration requirement, such as appears in Rule 804(b)(3) instead of an independent evidence requirement. Mr. Kobayashi was in favor of a requirement that would explicitly require the trial judge to examine the evidence offered pursuant to Rule 104(a) to establish the requisite preliminary facts and to make a finding as to whether the conditions for the exception are satisfied.

The Committee voted on three alternative approaches to Rule 801(d)(2)(E):

1. To not amend the rule - 3 votes

2. To add an independent evidence requirement - 7 votes

3. To codify the common law rule requiring that the statement must be set aside in making the preliminary determination - 2 votes.

The Committee decided not to draft the amendment in terms of corroboration but rather to specifically state that the statement could be considered but would not suffice in the absence of some independent evidence. The Committee then voted to extend this approach to subdivisions (C) and (D). It also agreed that it would review and vote on the text of the proposed amendment as well as the accompanying Committee Note at the next day's meeting.

The Committee also discussed whether a personal knowledge requirement should be added to either Rule 801(d)(2)(C) or Rule 801(d)(2)(D). The Committee declined to do so. Members of the Committee suggested that it was not unfair to shift to the opponent the burden of explaining to jurors how probative value was affected by the absence of personal knowledge, and that in some cases in which the declarant clearly lacked personal knowledge Rule 403 might be used to exclude the evidence.

Rule 803(3). The Committee had asked the Reporter to prepare a memorandum on the Hillmon doctrine, directed to the question of whether the Rule ought to be amended to prohibit evidence of declarant's intent to commit a future act when the act could not be performed without the participation of the party against whom the evidence is offered. The prime example that has disturbed some commentators is the homicide victim's statement that he or she is intending to meet the defendant. After discussion, the Committee decided not to amend the rule.

Rule 803(8). The Committee first discussed whether to amend the rule to state explicitly that evidence which would be barred by subdivisions (B) and (C) when offered against an accused may be admissible pursuant to another hearsay exception, or whether to adopt the reasoning of a Second Circuit opinion, United States v. Oates, 560 F.2d 45 (2d Cir. 1977), that barred such evidence absolutely. The Committee discussed the Reporter's memorandum about how the Circuits are handling this issue. It appears that routine evidence of governmental activity, such as recording license plate numbers, that falls literally within the prohibitions of subdivisions (B) and (C) is admitted by most circuits pursuant to Rule 803(5). Furthermore, the circuits also admit some evidence barred by Rule 803(8) pursuant to Rule 803(6) when

the declarant is available to testify. These cases do not suggest that the courts are permitting the government to put in crucial aspects of its case through hearsay testimony. The Committee concluded that there was no need to amend the rule.

The Committee then discussed whether Rule 803(8)(B) should be amended to permit a criminal defendant to offer against the government evidence which falls within the scope of the exception. Rule 803(8)(C) specifically provides that the evidence made admissible by that provision is admissible "against the Government in criminal cases." The omission in Rule 803(8)(B) may have occurred as a drafting error when Congress revised the rule. The few cases that have considered the issue have allowed the defendant to introduce evidence that otherwise satisfies subdivision (B). Consequently, the Committee saw no need to amend the provision.

Waiver by misconduct. The Committee next considered whether it should codify the generally recognized principle, that hearsay statements become admissible on a waiver by misconduct notion when the defendant deliberately causes the declarant's unavailability. The Committee debated a number of issues: the degree to which defendant must have participated in procuring the declarant's unavailability; the burden of proof that the government must meet in proving the defendant's misconduct; the consequences of a waiver finding; and the appropriate rule of evidence in which to place such a provision. The Committee agreed that codifying the waiver doctrine was desirable as a matter of policy in light of the large number of witnesses who are intimidated or incapacitated so that they do not testify. Consequently, the Committee chose a version of the rule that would not require having to show that the defendant actively participated in procuring the declarant's unavailability. Acquiescence will suffice. In addition, the Committee rejected imposing a "clear and convincing" burden of proof on the prosecution, as is required in the Fifth Circuit, in favor of the usual preponderance of the evidence standard used in connection with preliminary questions under Rule 104(a) even when a constitutional rule is at issue. The federal circuits other than the Fifth, currently use a preponderance standard with regard to finding waiver by misconduct.

The Committee agreed that the consequence of a finding of waiver is that the declarant's hearsay statement becomes admissible to the extent that it would have been admissible had the declarant testified at trial. For example, hearsay contained in the hearsay statement is not admissible unless it satisfies some other hearsay exception, the declarant must have had personal knowledge, and the evidence may be subject to exclusion under Rule 403.

The Committee debated at length where to place this new exception. Some members of the Committee argued in favor of Rule 801 because subdivision (d) of that rule contains a number of provisions that are distinct from the traditional class exceptions dealt with in Rules 803 and 804. Furthermore, statements admissible on a waiver theory resemble admissions in being admissible only against the defendant and not against the world. On the other hand, other members were concerned that placement in the rule containing admissions would suggest that a personal knowledge requirement does not apply. In addition, the unavailable declarant is the subject of Rule 804.

In the course of discussing appropriate placement of the waiver principle, some members also expressed concern that adding the provision to Rule 804 would upset that rule's numbering scheme. The new provision clearly would have to appear before the residual exception in subdivision (b)(5) which is entitled, "Other exceptions." On the other hand, numbering the new provision "(b)(5)" would require

renumbering the residual exception as "(b)(6)." This possibility disturbed some members of the Committee who felt that this would cause problems with computerized searches. Furthermore, the Committee realized that this renumbering problem would arise whenever a new exception was added to either Rule 803 or 804. Judge Winter suggested that the two residual exceptions should be combined and moved into a new Rule 807. No change in meaning would be intended by this transfer; it would be done solely to leave room for new exceptions and to minimize the impact on computer research when a new exception is added. The Committee adopted this suggestion.

Mr. McCabe then informed the Committee that when a provision is moved out of a Federal Rule its number is not reassigned to new material that is added to the rule from which it was removed. The Committee agreed that (b)(5) should remain blank in Rule 804 and that the waiver provision would be numbered Rule 804(b)(6).

Rule 804(b)(1). The Reporter had been asked to advise the Committee about judicial interpretations of the "predecessor in interest" provision. The Reporter informed the Committee of a number of cases, particularly in the Sixth Circuit, that hold that the provision is satisfied when the party against whom the evidence was offered at the first proceeding had a similar motive and opportunity to cross-examine as the party against whom the evidence is now being offered. Such an interpretation essentially renders superfluous the "predecessor in interest" provision. This approach has, however, been utilized almost exclusively in asbestos cases to admit deposition testimony given by the medical director of one manufacturer against a different manufacturer. It appears likely that the evidence could have been admitted instead pursuant to the residual hearsay exception.

A second possible issue that arises with regard to the "predecessor in interest" requirement is whether it applies in a criminal case. Dictum in one circuit suggests that under specialized circumstances such evidence might be admitted against a criminal defendant, and there is some uncertainty expressed in the cases as to whether evidence may be offered against the government as a "predecessor in interest." There is no indication, however, that these cases are causing problems for the courts or litigants.

The Committee agreed not to amend Rule 804(b)(1).

Rule 804(b)(3). The Reporter had been asked to look at cases construing the corroboration requirement for exculpatory declarations against interest. The Committee was particularly interested in determining if the requirement was being interpreted too rigidly, and if a similar provision ought to be added for inculpatory statements. The Reporter distributed a number of recent cases to the Committee, and the Committee concluded that the corroboration requirement did not seem to be causing difficulties. Furthermore, in light of the Supreme Court's recent opinion in Williamson v. United States, 114 S.Ct. 2431 (1994), which restricted the use of inculpatory declarations against interest, the Committee saw no need to extend the corroboration requirement to inculpatory declarations at this time.

Articles 9 and 10. The Committee had asked the Reporter to consider a number of issues with regard to these two articles. The Committee agreed that the definition of "writings and recordings" that appears in Rule 1001(1) does not have to be added to Article 9. Rule 901(b) which specifically states that it is illustrating and not limiting methods of authentication is sufficiently flexible to deal with all of the items covered by the Rule 1001 definition.

The Committee also agreed that the certification requirement provided for foreign business records in 18 U.S.C. §3502(a) ought not to be extended to domestic records. In the case of domestic records, litigants will invariably handle authentication issues by stipulation except in instances in which a problem exists. When there is a problem and the witnesses are available in the United States they ought to be produced; allowing authentication by certification would be inappropriate.

Two issues were presented with regard to Rule 1006. 1) whether the rule should be clarified to state that summaries satisfying the rule will ordinarily be sent to the jury room, and 2) whether the text should be amended to explain that Rule 1006 does not apply to summaries that recapitulate evidence that has otherwise been admitted. The Committee decided not to propose an amendment to Rule 1006.

Rule 104. The Committee had determined not to consider possible amendments to Rule 104 until it was finished with its survey of the articles of the Federal Rules of Evidence other than Article 5. Now that the Committee had completed that agenda, it agreed that no amendment to Rule 104 was required.

Rape counselor privilege. The Crime Bill required the Judicial Conference to report to the Attorney General on the advisability of enacting a rape counselor privilege for the federal courts. The Committee agreed, however, to await the Attorney General's study as suggested by Ms. Harkenrider at the October 1994 meeting. A subcommittee consisting of Judge Fern Smith, Professor Broun, Ms. Harkenrider, Mr. Joseph and the Reporter analyzed rape counselor provisions that are presently in effect in twenty-four states. After a conference call among members of the subcommittee, Mr. Joseph drafted a qualified privilege that contained those features that the subcommittee considered least objectionable.[(1)] No one on the subcommittee, however, was in favor of recommending that a rape counselor privilege ought to be enacted for the federal courts. The Committee agreed with the subcommittee. In particular, members thought it would be inappropriate to have a rape counselor privilege as the only specifically codified privilege. especially in light of the case load of the federal courts which rarely includes rape cases. Consequently, no recommendation to enact a rape counselor privilege will be made.

Review of proposed amendments and notes. Before the Committee adjourned, the amendments and proposed Committee Note to Rule 801(d)(2) and 804(b)(6) were distributed. The Committee unanimously voted to send them to the Standing Committee. The Committee also approved combining and transferring the text of the residual exceptions in Rule 803(24) and 804(b)(5), and directed the Reporter to add a Committee Note stating that no change in meaning was intended.

Respectfully submitted,

Margaret A. Berger

Professor of Law

Reporter

1. It provided:

(a) Sexual assault counselors may not be compelled to testify about any opinion or information received from or about the victim without the consent of the victim. However, a counselor may be compelled to identify or disclose information if the court determines that the public interest and the need for the information substantially outweigh any adverse effect on the victim, the treatment relationship, and the treatment services if disclosure occurs.

(b) "Sexual assault counselor" for the purpose of this rule means a licensed medical professional, a licensed psychotherapist, or a person who has undergone at least [20 - 40] hours of counseling training and works under the direction of a supervisor in an organization or institution, or a division of an organization or institution, whose primary purpose is to render advice, counseling, or assistance to victims of sexual assault.

An alternate version of subdivision (a) was also suggested:

A victim has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made to a sexual assault counselor unless the court determines that the public interest and the need for the information substantially outweigh any adverse effect on the victim, the treatment relationship, and the treatment services if disclosure occurs.