COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

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EVIDENCE RULES

MEMORANDUM

TO: **Honorable Mark R. Kravitz, Chair**
Standing Committee on Rules of Practice and Procedure

FROM: **Honorable Sidney A. Fitzwater, Chair**
Advisory Committee on Evidence Rules

DATE: **November 28, 2011**

RE: **Report of the Advisory Committee on Evidence Rules**

I. Introduction

The Advisory Committee on Evidence Rules (the "Committee") met on October 28, 2011 in Williamsburg, Virginia at the William and Mary Marshall-Wythe College of Law. The meeting was preceded by a Symposium on the Restyled Rules of Evidence that William and Mary hosted at the Committee's request. The Committee is not proposing any action items for the Standing Committee at its January 2012 meeting. It continues to monitor the need for rule changes necessitated by the Supreme Court's decision in *Crawford v. Washington* and its progeny. The Committee's work also includes considering whether Rule 801(d)(1)(B) should be amended, a privileges project (which is the subject of a separate memorandum to the Standing Committee), and a continuous study of the Evidence Rules.

II. Action Items

No action items.

III. Information Items

A. Symposium on the Restyled Rules of Evidence

Prior to commencement of the fall meeting, at the request of the Committee, the William and Mary Marshall-Wythe College of Law hosted a Symposium on the Restyled Rules of Evidence. The Committee was particularly pleased that members of the Standing Committee were able to attend.

The Symposium consisted primarily of presentations made by two panels that included key participants in the restyling project. One panel—moderated by Committee Reporter Professor Daniel J. Capra (Fordham Law School)—examined the restyled rules retrospectively, sharing critical insights into how this complicated project was completed. The other panel—moderated by Committee Consultant Professor Kenneth S. Broun (University of North Carolina School of Law)—considered the future of the Federal Rules of Evidence, including the restyled rules, examining issues that remain for further consideration.

The members of the "Looking Back" panel were Judge Robert L. Hinkle (Northern District of Florida), the immediate past chair of the Committee; Judge Joan N. Ericksen (District of Minnesota), a Committee member; Judge Marilyn L. Huff (Southern District of California), the Standing Committee liaison to the Committee and a member of the Standing Committee Style Subcommittee; Judge Reena A. Raggi (Second Circuit), a member of the Standing Committee Style Subcommittee; Judge Geraldine Soat Brown (Northern District of Illinois), representing the Federal Magistrate Judges Association; Professor Joseph Kimble (Thomas Cooley Law School), Style Consultant to the Restyling Project; Professor Edward H. Cooper (University of Michigan Law School), Reporter to the Advisory Committee on Civil Rules; and Professor Stephen A. Saltzburg (George Washington University Law School), ABA Consultant to the Restyling Project (who submitted a written statement).

The "Looking Forward" panelists were Judge Harris L. Hartz (Tenth Circuit), a member of the Standing Committee during the Restyling Project; Justice Andrew D. Hurwitz (Arizona Supreme Court), former Committee member; Professor Roger C. Park (University of California Hastings College of the Law); Professor Deborah J. Merritt (Ohio State University Michael E. Moritz College of Law); Professor Kathryn Traylor Schaffzin (University of Memphis Cecil C. Humphreys School of Law); Professor Jeremy Counsellor (Baylor Law School); and attorney Paul Hannaford-Agor, Director, Center for Jury Studies, National Center for State Courts (Williamsburg, Virginia).

The Symposium proceedings will be published in the *William and Mary Law Review* on an expedited schedule, with publication expected in late March 2012.

B. Proposed Amendment to Rule 803(10)

The amendment to Rule 803(10) that the Standing Committee approved for release for public comment at its June 2011 meeting is out for public comment.

Rule 803(10) currently allows the government to prove in a criminal case, through the introduction of a certificate, that a public record does not exist. Under *Melendez-Diaz v. Massachusetts* such a certificate would be "testimonial" within the meaning of the Confrontation Clause, as construed by *Crawford v. Washington*. Therefore, the admission of such certificates (in lieu of testimony) violates the accused's right to confrontation. The proposed amendment to Rule 803(10) addresses the confrontation clause problem in the current rule by adding a "notice-and-demand" procedure. This procedure requires that the government produce the person who prepared the certificate only if, after receiving notice from the government of its intent to introduce a certificate, the defendant makes a timely pretrial demand for production of the witness. In *Melendez-Diaz* the Court stated that the use of a notice-and-demand procedure (and the defendant's failure to demand production under that procedure) would cure an otherwise unconstitutional use of testimonial certificates

As of the Committee's fall meeting, no comments had been received. Hearings on the proposed rule are currently scheduled for January 7, 2012 in Phoenix, Arizona and January 17, 2012 in Washington, D.C. The Committee will consider at its spring 2012 meeting any comments received.

C. Possible Amendment to Rule 801(d)(1)(B)

As it did at its spring 2011 meeting, the Committee considered at its fall 2011 meeting a proposal to amend Rule 801(d)(1)(B), the hearsay exemption for certain prior consistent statements. Although not listed as an action item, the Committee intends at the January 2012 meeting of the Standing Committee to seek its guidance regarding whether the proposal should be considered further. Subject to that guidance, the Committee intends to take up this proposal again at its spring 2012 meeting.

Under the proposal, Rule 801(d)(1)(B) would be amended to provide that prior consistent statements are admissible under the hearsay exemption whenever they would otherwise be admissible to rehabilitate the witness' credibility. The justification for the amendment is that there is no meaningful distinction between substantive and rehabilitative use of prior consistent statements. Under the current rule, some prior consistent statements offered to rehabilitate a witness' credibility—specifically, those that rebut a charge of recent fabrication or improper influence or motive—are also admissible substantively under the hearsay exemption. In contrast, other rehabilitative statements—such as those that explain a prior inconsistency or rebut a charge of faulty recollection—are admissible only for rehabilitation but not substantively.

Proponents of a rule change maintain that there are two basic problems under the present rule. First, the necessary jury instruction is almost impossible for jurors to follow. The prior consistent statement is of little or no use for credibility unless the jury believes it to be true. Second, and for similar reasons, the distinction between substantive and impeachment use of prior consistent statements has little, if any, practical effect. The proponent has already presented the witness' trial testimony, so the prior consistent statement adds no real substantive effect to the proponent's case.

Concerns, however, have been expressed about this proposal. One concern is that any expansion of the hearsay exemption to cover all prior consistent statements admissible for rehabilitation might be viewed as a signal that the Rules are taking a more liberal attitude toward admitting prior consistent statements generally. Under an amended version of Rule 801(d)(1)(B), parties might seek to use the exemption as a means to bolster the credibility of their witnesses, and courts might admit more prior consistent statements, leading to impermissible bolstering.

Prior its spring meeting, the Committee, with the assistance of the Federal Judicial Center, intends to survey all district judges to obtain their views on whether the proposal is needed and has merit. The Committee will also solicit the views of the American Bar Association, the American College of Trial Lawyers, the National Association of Criminal Defense Lawyers, and other interested groups.

D. Privileges Project

Several years ago, the Committee undertook a project to publish a pamphlet describing the federal common law on evidentiary privileges. The Committee determined that, although it would be inappropriate to propose to Congress a codification of the evidentiary privileges, it would be valuable to the Bench and Bar to set out in text and commentary the federal common law privileges. The Consultant to the Committee has prepared drafts of several privileges.

Although not listed as an action item, as explained more fully in a separate memorandum, the Committee is requesting the guidance of the Standing Committee regarding whether and how this project should proceed.

E. "Continuous Study" of the Evidence Rules

The Committee is responsible for engaging in a "continuous study" of the need for any amendment to the Federal Rules of Evidence. The grounds for a possible amendment include (1) a split in authority about the meaning of a rule; (2) a disparity between the text of a rule and the way that the Rule is actually being applied in courts; and (3) difficulties in applying a rule, as experienced by courts, practitioners, and academic commentators.

Under this standard, the Reporter has raised the following possible amendments for the Committee's consideration: (1) amending Rule 106 to provide that statements may be used for completion even if they are hearsay; (2) clarifying that Rule 607 does not permit a party to impeach its own witness if the only reason for calling the witness is to present otherwise inadmissible evidence to the jury; (3) clarifying that Rule 803(5) can be used to admit statements made by one person and recorded by another; (4) clarifying the business duty requirement in Rule 803(6); and (5) resolving a dispute in the courts over whether prior testimony in a civil case may be admitted against one who was not a party at the time the testimony was given.

The Committee will consider at its spring 2012 meeting the possible amendments that the Reporter has identified.

F. *Crawford v. Washington* and the Hearsay Exceptions in the Evidence Rules

As previous reports have noted, the Committee continues to monitor case law developments after the Supreme Court's decision in *Crawford v. Washington*, in which the Court held that the admission of "testimonial" hearsay violates the accused's right to confrontation unless the accused has an opportunity to confront and cross-examine the declarant.

The Reporter regularly provides the Committee a case digest of all federal circuit cases discussing *Crawford* and its progeny. The goal of the digest is to enable the Committee to keep current on developments in the law of confrontation as they might affect the constitutionality of the Federal Rules hearsay exceptions.

With the exception of Rule 803(10), nothing in the developing case law appears to mandate an amendment to the Evidence Rules at this time. The Supreme Court is currently considering the case of *Williams v. Illinois*, in which it will address whether an expert witness can testify to the results of a laboratory test where the certificate of the test is not itself admitted at trial. The Court's decision in *Williams* may have an effect on the application of Rule 703. The Committee will monitor developments on the relationship between the Federal Rules of Evidence and the accused's right to confrontation.

IV. Minutes of the Fall 2011 Meeting

The Reporter's draft of the minutes of the Committee's October 2011 meeting is attached to this report. These minutes have not yet been approved by the Committee.

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MEMORANDUM

TO: **Honorable Mark R. Kravitz, Chair, and the Members of the Standing Committee on Rules of Practice and Procedure**

FROM: **Honorable Sidney A. Fitzwater, Chair Advisory Committee on Evidence Rules**

DATE: **November 28, 2011**

RE: **Request of the Advisory Committee on Evidence Rules for Guidance Concerning its Privileges Project**

I Background

Congress has excluded rules governing privilege from the Rules Enabling Act process. Any new rule concerning privilege must be directly enacted by Congress. *See* 28 U.S.C. § 2074(b). Accordingly, with one exception, the Advisory Committee on Evidence Rules ("Committee") has not dealt with the possibility of new rules governing privilege. The exception is Rule 502, which governs inadvertent waiver and scope of waiver. But even that Rule, although initially drafted by the Committee, went through the usual legislative process.

Ten years ago, the Committee decided that, in lieu of rules governing privilege, it would attempt to survey the federal law of privilege. Professor Kenneth S. Broun of the University of North Carolina School of Law was hired as a consultant to work with the Committee Reporter, Professor Dan Capra, in a project to draft survey rules governing the most important privileges. It was intended that the survey rules be published either in a monograph or in a legal journal. The Committee has sponsored two other projects that were not intended to result in rule amendments. The first was an article discussing original Advisory Committee Notes that were superseded in whole or part by Congressional changes to the Committee draft. The second was an article about case law that diverged from the explicit text of an applicable Federal Rule of Evidence. Both articles were published under the name of the Reporter, who wrote them. In the text of the articles, the

Reporter referred to the Committee's interest in and review of the project, but made clear that the Committee was not proposing any change to any existing Rules of Evidence. Similarly, Professor Broun's work under the auspices of the privileges project is not intended to have any binding effect; instead, it would constitute a guide for the courts, in much the same way as does a Restatement. The Committee does not intend through this project to make new law or to change existing case law. Points of uncertainty or conflict would be noted but not resolved.

Professor Broun initially prepared two survey rules: psychotherapist-patient privilege and attorney-client privilege. As the Committee had directed, the survey rules attempted only to restate federal case law. Where there was no federal case law directly on point, the survey rules borrowed from the prevailing state law or sources such as the Uniform Rules of Evidence or the Restatement of the Law Governing Lawyers. There was considerable discussion of both survey rules in a subcommittee appointed to review the Rules and in the Committee itself. Amendments and additional research were prepared in response to the comments made in those discussions.

The project was placed on an undeclared hold from 2006-2010. During this period, the Committee was occupied primarily with Rule 502 or with the extensive work of restyling. Professor Broun's time was spent assisting with these projects.

At its fall 2010 meeting, the Committee asked Professor Broun to renew his work. He updated his drafts of the psychotherapist-patient and attorney-client privileges and prepared a new survey rule dealing with the marital communications privilege. These survey rules were presented to the Committee, first at its spring 2011 meeting and again at its fall 2011 meeting.

At the fall 2011 meeting, a few Committee members raised questions about the project. Some concern was expressed that a survey rule published under the auspices of the Committee would be given weight similar to the Rules of Evidence promulgated through the Rules Enabling Act process. Concern was also expressed that law might be created where, in the absence of federal case law, a survey rule borrowed from state law or other sources. The Committee decided that the working name of the project would be changed from "survey rules" to "compendium of the federal law on privileges" to avoid any inference that the Committee was trying to establish new rules of evidence.

II. Request for Guidance

The Committee has concluded that it is prudent to seek the Standing Committee's guidance on this project. Guidance regarding the following questions would be helpful.

- Should the Committee continue the project as it is now intended, i.e., review by the Committee of a compendium of privileges law drafted by Professor Broun in consultation with the Committee Reporter?

- If the project continues in its present form, should the Committee review any of the work on privileges with the same rigor as it would review a rule that was going through the Rules Enabling Act process?

- If the privileges project continues in its present form, should it exclude rules or aspects of rules as to which there is no federal case law or where the federal case law

is in conflict?

- Assuming that Professor Broun and the Reporter publish their work, should the publication indicate that the work was done at the request, or under the auspices, of the Committee, or should it disclaim Committee approval and/or involvement?

The Committee is grateful for any guidance the Standing Committee deems it appropriate to provide.

Advisory Committee on Evidence Rules

Minutes of the Meeting of October 28, 2011

Williamsburg, Virginia

The Judicial Conference Advisory Committee on the Federal Rules of Evidence (the "Advisory Committee") met on October 28, 2011 in Williamsburg, Virginia.

The following members of the Committee were present:

Hon. Sidney A. Fitzwater, Chair
Hon. Brent R. Appel
Hon. Anita B. Brody
Hon. John A. Woodcock, Jr.
Hon. William K. Sessions III
William T. Hangley, Esq.
Marjorie A. Meyers, Esq.
Paul Shechtman, Esq.
Elizabeth J. Shapiro, Esq., Department of Justice

Also present were:

Hon. Marilyn L. Huff, Liaison from the Committee on Rules of Practice and Procedure and member of the Standing Committee's Style Subcommittee
Hon. Wallace Jefferson, member of the Standing Committee
Hon. Joan N. Ericksen., former member of the Evidence Rules Committee
Hon. Judith H. Wizmur, Liaison from the Bankruptcy Rules Committee
Hon. Andrew Hurwitz, former member of the Evidence Rules Committee
Jonathan Rose, Chief, Rules Committee Support Office
Benjamin Robinson, 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
Professor Laird Kirkpatrick, George Washington University Law School
Professor Frederic Lederer, William and Mary Law School
Professor Roger Park, Hastings Law School
Professor Katherine Schaffzin, University of Memphis School of Law

I. Opening Business

Introductory Matters

Judge Fitzwater, the Chair of the Committee, welcomed the members, liaisons, other members of the Standing Committee, and members of the public. The minutes of the Spring 2011 Committee meeting were approved.

Judge Fitzwater noted that the Restyled Rules of Evidence will go into effect on December 1, 2011. The Restyled Rules have won two important awards for excellence in legal writing — the Burton Award and the Clearmark Award. In honor of the Restyled Rules going into effect, the Advisory Committee sponsored a Symposium on the Restyled Rules of Evidence, which took place on the morning of the Advisory Committee meeting. Judge Fitzwater stated that the Symposium was a great success. He observed that the ideas exchanged by the panel members will provide an important historical record on the meaning of the Restyled Rules, and will also assist the Advisory Committee going forward. Judge Fitzwater thanked the Reporter for putting together the Symposium; William and Mary Law School for hosting the event; Professor Frederic Lederer for all his help in hosting the Symposium; the William and Mary Law Review for publishing the proceedings; and all the panelists and moderators who made such outstanding presentations.

Judge Fitzwater then welcomed and introduced the two new members of the Advisory Committee, Judge Sessions and Judge Woodcock.

Judge Fitzwater and the Reporter then provided heartfelt thanks to two former members — Justice Hurwitz and Judge Ericksen — who both provided excellent service to the Committee. Each has been and will be sorely missed.

II. Proposed Amendment to Rule 803(10)

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 certificates (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 Advisory Committee at its Spring 2011 meeting proposed an amendment to Rule 803(10), which currently allows the government to introduce a certificate to prove that a public record does not exist. A certificate of the absence of public record is ordinarily prepared for use in a criminal case, and so under *Melendez-Diaz*, such a certificate would be testimonial. The proposed amendment to Rule 803(10) adds a "notice-and-demand" procedure to the Rule: requiring production of the person who prepared the certificate only if after receiving notice from the

government of intent to introduce a certificate, the defendant makes a timely pretrial demand for production of the witness. In *Melendez-Diaz* the Court declared that the use of a notice-and-demand procedure (and the defendant's failure to demand production under that procedure) would cure an otherwise unconstitutional use of testimonial certificates. The Advisory Committee's proposed amendment was approved for release for public comment.

The Reporter reported to the Advisory Committee that no public comments had yet been received on the proposed amendment to Rule 803(10). Any comments that are received will, of course, be reviewed by the Committee at its Spring 2012 meeting.

III. Possible Amendment to Rule 801(d)(1)(B)

At the Spring 2011 meeting the Committee considered a proposal to amend Evidence Rule 801(d)(1)(B), the hearsay exemption for certain prior consistent statements. Under the proposal, Rule 801(d)(1)(B) would be amended to provide that prior consistent statements are admissible under the hearsay exemption whenever they would otherwise be admissible to rehabilitate the witness's credibility. The justification for the amendment is that there is no meaningful distinction between substantive and rehabilitative use of prior consistent statements.

Under the current rule, some prior consistent statements offered to rehabilitate a witness's credibility — specifically those that rebut a charge of recent fabrication or improper motive — are also admissible substantively under the hearsay exemption. In contrast, other rehabilitative statements — such as those which explain a prior inconsistency or rebut a charge of faulty recollection — are not admissible under the hearsay exception but only for rehabilitation. There are two basic practical problems in the distinction between substantive and credibility use as applied to prior consistent statements. First, the necessary jury instruction is almost impossible for jurors to follow. The prior consistent statement is of little or no use for credibility unless the jury believes it to be true. Second, and for similar reasons, the distinction between substantive and impeachment use of prior consistent statements has little, if any, practical effect. The proponent has already presented the witness's trial testimony, so the prior consistent statement adds no real substantive effect to the proponent's case.

At the Spring 2011 meeting the Committee unanimously agreed that the current distinction between substantive and impeachment use of prior consistent statements is impossible for jurors to follow. But some members were concerned that any expansion of the hearsay exemption to cover all prior consistent statements admissible for rehabilitation might be taken as a signal that the Rules were taking a more liberal attitude toward admitting prior consistent statements generally. Parties might seek to use the exemption as a means to bolster the credibility of their witnesses. The Committee at the Spring meeting resolved to consider the amendment further, and also to seek the input of public defenders, the Department of Justice, and state court judges on the merits of amending Rule 801(d)(1)(B). Before the Fall meeting, the Department of Justice submitted a letter in favor of the amendment and the Public Defender submitted a letter opposed to the amendment. Justice Appel contacted courts in three states and reported that there was recognition that the current

distinction between rehabilitation and substantive use was confusing and not meaningful — but that there was no sense of urgency to amend the rule in those three states.

At the Fall meeting, the Public Defender expressed concern that courts would end up admitting more prior consistent statements under the amendment, leading to impermissible bolstering of witnesses. The Reporter responded that the amendment by its terms would admit no statements that are not already admitted for rehabilitation — and any possible risk of abuse would be tempered by the court's judicious use of Rule 403, as emphasized in the proposed Advisory Committee Note. The Reporter also noted that in Minnesota, where the Rule is similar to the proposed amendment, there does not appear to be any indication in the case law that prior consistent statements had been more liberally admitted.

The Public Defender also expressed concern that if a witness had made both consistent and inconsistent statements, all of them admissible for impeachment or rehabilitation, then under the amendment all of the consistent statements would be admissible for their truth while the prior inconsistent statements — if not made under oath — would be admissible only for impeachment and not for their truth. The Public Defender argued that in this situation the judge would completely confuse the jury by giving different instructions for consistent and inconsistent statements. (But in fact the judge in such a situation would not give any instruction about the consistent statements because, under the amendment, the consistent statements would be admissible for both rehabilitation and substantive use — this means that under the amendment there will be fewer, not more, instructions).

A member of the Committee noted that the rule as it exists is logically inconsistent and intellectually dishonest; as such the Committee should approve the amendment to further its goal of providing consistent and logical rules. Another member observed that prior consistent statements often had value as corroboration. He also noted that the clearer the judge can be to the jury, the better for the system — and the instruction required as to certain prior consistent statements under current law is incomprehensible to jurors and accordingly brings disrespect to the system. The Reporter and the Chair noted that the proposed amendment had been greeted with enthusiasm by some of the district court judges on the Standing Committee when it was raised as an information item at the Spring 2011 meeting. Those judges remarked that in their experience, an instruction that a prior consistent statement was admissible for rehabilitation and not for its truth is one that jurors find impossible to follow.

One Committee member suggested that the instruction currently given for consistent statements admissible only for rehabilitation might in fact have some value for counsel in argument to the jury.

Other members of the Committee were undecided about the amendment and suggested the Committee seek more input from judges and interested groups to determine whether it would be worthwhile to proceed with an amendment.

The Committee ultimately voted to table the proposal and conduct further research so that

it could be considered on the merits at the Spring 2012 meeting. The Reporter stated that he would work with Dr. Reagan, the FJC representative, to send out a survey to district judges to seek their views on the need for and merits of the proposed amendment. The Reporter stated that he would also send the proposal to the ABA, the American College of Trial Lawyers, the NACDL, and other interested groups for their views on the proposal. The Chair also stated that he would raise the proposal as an information item at the next Standing Committee, in order to seek guidance on whether the amendment was worth pursuing.

The working language for the proposed amendment, to be considered at the next meeting, is as follows:

> **(d) Statements That Are Not Hearsay.** A statement that meets the following conditions is not hearsay:
>
> > **(1)** ***A Declarant-Witness's Prior Statement.*** The declarant testifies and is subject to cross-examination about a prior statement, and the statement:
> >
> > * * *
> >
> > **(B)** is consistent with the declarant's testimony and ~~is offered to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying~~ rehabilitates [is otherwise admissible to rehabilitate] [supports] the declarant's credibility as a witness;

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 the Reporter noted that — with the exception of Rule 803(10), the proposed amendment currently out for public comment — nothing in the developing case law mandated an amendment to the Evidence Rules at this time. The Reporter observed that the Supreme Court is currently considering the case of *Williams v. Illinois*, in which it will address whether an expert witness can testify to the results of a lab test where the certificate of the test is not itself admitted at trial. The Court's decision in *Williams* may have an effect on the application of Rule 703. The Committee resolved to continue monitoring developments on the relationship between the Federal Rules of Evidence and the accused's right to confrontation.

V. 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 advisable to propose an actual codification of all the evidentiary privileges to Congress, or even to opine on what model rules of privilege would look like. 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 Rule 502 and the restyling project.

At the Fall meeting, Professor Broun submitted materials on the attorney-client privilege and the marital privileges. Committee members stated for the record that the project was intended only as a description of the federal common law of privilege, and would result in a published product that would assist the bench and bar. Members emphasized that the Committee has no intent to propose codification of privileges or to intrude on Congress's role in enacting privilege rules.

But some members expressed concern that the project might be read as the Committee's statement about what privileges *ought* to look like or which side of a dispute about the meaning or extent of a privilege should be adopted. There was also a concern that by even stating what the law was, the Committee might put its imprimatur on bad or disputed law. Other members suggested that calling the project a "survey" or a "restatement" might be misinterpreted as the Committee's attempt to establish the law of privileges.

Professor Broun and the Reporter emphasized that the project was not intended to provide the Committee's imprimatur on any question of privilege law. Committee members suggested that the title of the project should be changed to indicate the limited intent. After discussion, the working title of the project was changed from "privilege survey" to "compendium" on the federal common law of privilege.

The Committee also determined that the ultimate work product should not be published under the name of the Committee. The Reporter noted that he had, at the Committee's direction, written two articles about the Federal Rules. Those articles were reviewed and approved by the Committee, but they were published under the Reporter's name in pamphlets published by the Federal Judicial Center. Those pamphlets thus were not sent out under the Advisory Committee's auspices, and accordingly their publication was outside the rules process. They were not sent out for a period of public comment and they were not approved by a vote of the Standing Committee. Committee members generally agreed that the same or a similar process should be employed if and when the work on privileges is ready for publication.

Judge Fitzwater stated that he would raise the privilege project at the next Standing Committee meeting and seek advice on how and whether the project should be published. Professor Broun and the Reporter stated that they would prepare a memorandum for the Committee's next

meeting on the process questions involved in preparing and publishing a work on privileges.

VI. "Continuous Study" of the Evidence Rules

The Procedures for the Standing Committee require the Evidence Rules Committee to engage in a "continuous study" of the need for any amendment to the Rules. At the Chair's request, the Reporter prepared a memorandum setting forth the history of the studies that have already been undertaken by the Advisory Committee, and providing some suggestions of possible amendments for consideration by the Committee. The grounds for a possible amendment included: 1) a split in authority about the meaning of an Evidence Rule; 2) a disparity between the text of a rule and the way that the rule is actually being applied in courts; 3) difficulties in applying a rule, as experienced by courts, practitioners, and academic commentators.

Possible amendments raised by the Reporter included: 1) amending Rule 106 to provide that statements may be used for completion even if they are hearsay; 2) clarifying that Rule 607 does not permit a party to impeach its own witness if the only reason for calling the witness is to present otherwise inadmissible evidence to the jury; 3) clarifying that Rule 803(5) can be used to admit statements made by one person and recorded by another; 4) clarifying the business duty requirement in Rule 803(6); and 5) resolving the dispute in the courts over whether prior testimony in a civil case may be admitted against one who was not a party at the time the testimony was given.

At the meeting, after a brief discussion, Judge Fitzwater noted that the Committee was just coming off a number of difficult and time-consuming projects and could use more time to consider the possible amendments set out by the Reporter. Accordingly, the Committee resolved to place the Reporter's memorandum on the Spring agenda. One member stated for the record that he was in favor of the proposal to amend Rule 607 to prevent parties from abusing the rule by calling a witness solely to introduce otherwise inadmissible evidence.

VII. Next Meeting

The Spring 2012 meeting of the Committee is scheduled for Tuesday April 3 in Dallas.

Respectfully submitted,

Daniel J. Capra
Reporter