Advisory Committee on Evidence Rules

Minutes of the Meeting of October 25, 1999

Washington, D.C.

The Advisory Committee on the Federal Rules of Evidence met on October 25th, 1999 at the Thurgood Marshall Federal Building in Washington, D.C..

The following members of the Committee were present:

Hon. Milton I. Shadur, Chair
Hon. Jerry E. Smith
Hon. David C. Norton
Hon. Jeffrey Amestoy
Laird Kirkpatrick, Esq.
Frederic F. Kay, Esq.
John M. Kobayashi, Esq.
David S. Maring, Esq.
Professor Daniel J. Capra, Reporter

Also present were:

Hon. Anthony J. Scirica, Chair of the Standing Committee on Rules of Practice and Procedure
Hon. Richard Kyle, Liaison to the Civil Rules Committee
Hon. David D. Dowd, Liaison to the Criminal Rules Committee
Hon. Fern M. Smith, Director of the Federal Judicial Center and former Chair of the Evidence Rules Committee
Professor Kenneth Broun, former Member of the Evidence Rules Committee and Consultant to the Subcommittee on Privileges
Professor Leo Whinery, Reporter, Uniform Rules of Evidence Drafting Committee
Roger Pauley, Esq., Justice Department
Peter G. McCabe, Esq. Secretary, Standing Committee on Rules of Practice and Procedure
John K. Rabiej, Esq., Chief, Rules Committee Support Office
Mark Shapiro, Esq. Rules Committee Support Office
Joe Cecil, Esq., Federal Judicial Center
Jennifer Evans Marsh, Esq. Federal Judicial Center
Joseph Spaniol, Consultant to the Standing Committee on Rules of Practice and Procedure

Opening Business

Judge Shadur opened the meeting by conveying his sense of honor at being appointed the new Chair of the Committee. He noted that the terms of three members had expired--Greg Joseph, Ken Broun, and Judge James Turner. He expressed the Committee's gratitude for the excellent contributions and dedicated service of these three members. He also expressed his thanks, on behalf of the Committee, to Judge Fern Smith, the Committee's previous Chair, who provided remarkable leadership in obtaining approval by the Standing Committee and the Judicial Conference of the recent package of proposed amendments to the Evidence Rules.

Judge Shadur noted that the three vacant Committee positions had not been filled. He expressed the hope that these positions might be filled in the near future, and stated the Committee's interest in selecting outstanding female candidates for membership.

Judge Shadur asked for approval of the minutes of the April, 1999 meeting. Three stylistic changes were made to the draft, and then these minutes were unanimously approved.

Judge Shadur then brought the Committee up to date on the status of the proposed amendments to Evidence Rules 103, 404(a), 701, 702, 703, 803(6) and 902. The proposals were approved by the Standing Committee and the Judicial Conference and will soon be forwarded to the Supreme Court. Unless the Supreme Court or Congress disapproves of the proposals, they will become effective on December 1, 2000. Judge Shadur observed that the Reporter had prepared a short summary of the proposed amendments, and that this summary will be forwarded to the Supreme Court along with the package of proposed amendments.

Report on Case Law Divergence From the Rules

At the April, 1999 meeting the Committee agreed to consider whether it would be useful to prepare a report highlighting the Evidence Rules in which the case law diverges from the text of the Rule. For the October meeting the Reporter prepared a memorandum highlighting the Rules that might be treated in such a report. The problems of case law divergence arise in two situations: 1) Some case law is simply inconsistent with the text of the Rule; and 2) some case law concerns matters on which the Rule is silent.

Judge Shadur observed that any project to highlight case law divergence from the Rules would not result in the promulgation of new Committee Notes, nor would it result in formal amendment or revision of old Committee Notes. Judge Shadur noted that the relevant statute, 28 U.S.C. § 2073, contemplates that Committee Notes cannot be promulgated independently of a rule change. Instead, the goal of a report would be to have it published wherever the Rules themselves are published, as an entry after the Committee Note to each treated Rule. The

Reporter noted that West Group has already agreed in principle to the publication of such a Report prepared by the Advisory Committee. Also, the publisher of Weinstein's treatise on Evidence included the previous report on misleading Advisory Committee notes at appropriate places in the treatise, and would likely do the same with a report on case law divergence.

A discussion then ensued on whether the project should be continued. It was asked whether the Evidence Rules are going to be restylized in the near future--if so, any case law divergences might be taken care of simply by amending the affected Rule. The Committee was informed, however, that there are no current plans to restylize the Evidence Rules.

One member's comment indicated that he favored the project but was concerned that pointing up situations where the case law was different from the Rule amounted to a criticism that the courts had misconstrued the Rule. This was recognized as a legitimate concern. It was agreed that the project to highlight case law divergences would be reportorial only. The introduction to the report would emphasize that no inference should be drawn as to the merits of the case law divergence. It was remarked that many of the divergences in fact seem to reach a fair result in the face of rigid statutory language.

Another member expressed his strong support for preparing a report on case law divergence from the text of the Rules and Committee Notes. He noted that many Magistrate Judges have relied on the original Committee Notes concerning confrontation, even though the current law on confrontation is far different from that stated in the Note. He observed that the project might be a useful way of determining which Rules should be amended in light of their divergence from the current case law.

Judge Scirica noted that the Standing Committee is understandably reluctant to approve amendments to Committee Notes without an accompanying rule change. But he stated that a pilot project to prepare a report on case law divergence from the Rules and Notes could provide an important service to the bench and bar.

After this discussion, there was general agreement that the Committee should proceed with the project to prepare a report on case law divergence from the Rules. The Reporter was instructed to prepare the following for the next meeting: 1) An introduction to the report, which would indicate the goals of the report and provide a caveat that the report does not draw conclusions on the merits of the case law and is designed only to assist the bench and bar by highlighting the situations in which the case law diverges from the Rule; 2) a full write-up of case law divergence from Evidence Rules 803(8), 804(b)(1), and Rule 1101.

Privileges

Judge Shadur expressed his gratitude that Judge Jerry Smith has agreed to chair the Subcommittee on privileges. He also noted that Professor Ken Broun had been appointed as a

consultant to the Subcommittee. Judge Smith reported on the meeting of the Subcommittee that took place the day before the full Committee meeting. The Subcommittee was unanimously of the view that any proposed codification of the privileges would be a very long-term project. At this stage, no final decision has been or need be made on whether amendments would actually be proposed. The Subcommittee believes that drafting privilege rules that would codify existing Federal common law would be a useful project even if amendments are never proposed. For example, the Committee might, independently of any rule change, find it useful to prepare a report for the bench and bar setting forth the current state of privilege law.

Judge Smith indicated that the Subcommittee agreed that its first step was to prepare, in draft form, four rules on privilege: 1) an initial Rule, such as the originally proposed Rule 501, which would state that privileged information is excluded unless otherwise provided; 2) a codification of the attorney-client privilege; 3) a waiver rule; and 4) a catch-all provision, similar to current Rule 501, which would provide for "reason and experience" development of privileges not covered by other specific privilege rules. The goal is to circulate a draft of these provisions within the Subcommittee, and to report on developments to the full Committee at the next meeting.

Subcommittee members emphasized that the goal of the privilege project is to fashion rules that would codify existing privilege law. The goal is not to make law or to decide policy questions.

A Committee member noted that conflict of laws issues often arise with privileges, and expressed the hope that the Subcommittee would deal with that problem. The Subcommittee was of the view, however, that the Evidence Rules are not the place to set forth conflict of laws principles.

Attorney Conduct Rules

Judge Scirica reported on the work of the Standing Committee Subcommittee on Attorney Conduct Rules. He noted that the Subcommittee's work stemmed from the local rules project, which uncovered a plethora of local rules governing attorney conduct. A good number of these local rules appear to conflict with the pertinent state rule of professional conduct. Judge Scirica noted that the Subcommittee had considered several alternatives: 1) do nothing; 2) provide a single federal rule of dynamic conformity (i.e., the applicable rule is that which governs in the state in which the district court sits); 3) promulgate a number of "core" federal rules; and 4) promulgate an entire federal code of attorney conduct. After extensive discussion, the Subcommittee reduced the alternatives to two: 1) do nothing; 2) promulgate a rule of dynamic conformity, while recognizing that federal courts have the power to control their own procedure, even if inconsistent with a state disciplinary rule.

Judge Scirica emphasized that no final decision had been made to opt for a "dynamic conformity subject to federal procedure" rule. The draft that had been circulated to the Advisory Committees was for discussion purposes only. The Advisory Committees were being asked, at this point, to express their views on whether the attorney conduct rules project should continue or be abandoned. He stated that the Subcommittee on Attorney Conduct Rules will meet early in 2000 to survey whether a problem really exists that needs to be addressed. While it is clear that there are local rules in conflict with state disciplinary rules, this might not really be a problem if 1) the federal courts are not enforcing their rules in cases of real conflict, and 2) the state disciplinary authorities are being sensitive to federal interests. Judge Scirica noted that the Subcommittee plans to hear from people in the field, including state disciplinary counsel, in order to assess whether a substantial problem exists.

The Justice Department representative observed that the real problem occurs with the state variations in Rule 4.2 (the no contact rule). Some states construe their version of Rule 4.2 to prohibit investigative contacts by prosecutors, including federal prosecutors. This creates a risk that federal prosecutors will be disciplined for conduct in one state that is permissible in another. The concern over discipline has been heightened by the McDade amendment, which provides that federal prosecutors are governed by the relevant state ethics rules.

Judge Scirica noted that the Rule 4.2 problem is a serious one, but that it is possible that the problem might be addressed outside the Rules process. For example, the ABA 2000 project might propose a Rule 4.2 that could accommodate DOJ interests; or Congress might intervene. The Council of State Chief Justices might be another avenue of resolution.

Judge Shadur and other Committee members expressed reservations about any rule that would attempt to preempt state regulation of attorney conduct--an area that traditionally has been left to the states. They also noted that the distinction in the draft rule between matters of professional responsibility and matters of procedure was vague and problematic. Some concluded that it was likely that the proposed rule would do no good, because local district courts could simply reconstitute all of their local rules on "professional responsibility" as local rules of "procedure." While many Committee members maintained serious reservations about the proposal, it was generally agreed that the project should continue, in order to allow the Subcommittee to determine: 1) whether serious problems of state-federal conflict really exist, and 2) whether the draft rule (or something like it) could do anything to solve such problems without treading inappropriately on important state interests.

Rules That Warrant Further Study

The Committee engaged in a general discussion to determine whether there are any rules that are so problematic in operation as to warrant further study, and possible amendment in the long-term. Some rules were considered and determined by the Committee to be not proper

subjects for further study at this point. Other rules were considered to be possibly problematic, so that further study was warranted.

1. Rule 1101--The argument was made that Rule 1101 should be amended to codify the case law holding that certain proceedings are not subject to the Evidence Rules (e.g. juvenile transfer proceedings, suppression hearings), even though they are not specifically exempt under the terms of Rule 1101. The Committee determined, however, that the courts have not had a problem in determining which proceedings are covered by the Rules and which are not. The danger is that by specifying some specific proceedings as exempt, other proceedings might be deemed inadvertently covered by the Rules. The Committee resolved not to proceed with any amendment to Rule 1101. It was determined that the best course is to mention Rule 1101 as one of the Rules in the proposed report concerning case law divergence from the Rules.

2. Technological Advances in the Presentation of Evidence: The Committee reconsidered whether the Evidence Rules should be amended to accommodate changes in technology that impact the presentation of evidence. The Reporter referred the Committee to his previous memorandum on the subject. If the goal is to modify all references to "paper evidence" in the Rules, this would require either 1) the amendment of more than 25 rules; or 2) the amendment of Article 10 to apply the definition in the Best Evidence Rule to all the Rules. It was determined that either change would be costly and potentially confusing, and that change was unwarranted given the fact that courts and litigants have had no problem in handling technological advances under the current Evidence Rules.

3. Rule 801(d)(1)(B): The Committee considered a proposal that Rule 801(d)(1)(B) be amended to provide that a prior consistent statement is admissible for its truth whenever it is admissible to support the witness' credibility. After discussion, it was determined that this proposal might have some merit as a narrow and technical amendment to an Evidence Rule, but that the problems currently arising under the Rule are not so serious as to require proposing an amendment at this time. Consideration was deferred, with the understanding that the proposal might be considered more fully should other proposed amendments to the Rules be necessary at some time in the future.

4. Rule 706: The Committee noted that there is uncertainty of definition among the roles of special master, court-appointed expert witness and technical adviser. Most of the questions of definition, however, arise over the role of the special master. The Committee was informed that the Civil Rules Committee has a Subcommittee considering the role of the special master and the possibility of amending Civil Rule 53. It was determined that an amendment to Evidence Rule 706 was not necessary at this time. Instead, the Committee would keep apprised of any developments with respect to Civil Rule 53.

5. Rule 608(b): A Committee member observed that as written, Rule 608(b) precludes extrinsic evidence when offered to prove a witness' "credibility." The Rule is intended, however, to limit extrinsic proof only when it is offered to attack the witness' character for veracity--so the

Supreme Court held in *United States v. Abel*. The Committee member suggested that the Rule might be amended to change the word "credibility" to "character." He stated that despite the Court's ruling in *Abel*, many lower courts have construed Rule 608(b) to preclude extrinsic proof when offered for such not-for-character purposes as bias and contradiction. Some reservations were expressed about a possible amendment, however. Specifically, to change the text to preclude extrinsic evidence only when offered to prove a witness' character would constitute a value judgment that this form of impeachment, and no other, should be subject to the exclusion. It is unclear why this should be so. Thus, any amendment would require more than a simple substitution of one word for another. It would require a merits analysis as to why extrinsic evidence cannot be offered for character impeachment but can be offered for other forms of impeachment. The Committee instructed the Reporter to prepare a report assessing whether there are a large number of courts that are misconstruing Rule 608(b) despite the Supreme Court's ruling in *Abel*. The Reporter stated that he would submit the report for the next Committee meeting.

6. Rule 804(b)(3): A Committee member observed that the Rule requires criminal defendants to proffer corroborating circumstances clearly indicating trustworthiness for statements against penal interest made by a declarant that exculpate the accused. In contrast the rule does not by its terms require a similar showing by the government when a declaration against penal interest is offered to inculpate the accused. Given this seeming unfairness, many courts have required the government to provide corroborating circumstances even though that is not required by the text of the Rule. Others have not. Also, courts appear to be in disarray over the degree and nature of the corroborating circumstances that must be provided under the Rule. Given the degree of discord in the courts, as well as the potential unfairness of the Rule as written, the Committee agreed to consider, at least on a preliminary basis, whether Rule 804(b)(3) should be amended. No timetable was set for any proposed amendment and no agreement was reached on whether the rule should in fact be amended. The Reporter was instructed to provide a background report for the Committee in time for the next Committee meeting.

7. Rule 902: The Justice Department representative pointed out a problem in applying Rule 902 when used to authenticate state official records. Rule 902 provides for authentication through the use of a seal. Yet many states no longer use a seal for authenticating their public documents. Other Committee members noted that the very concept of a seal may be outmoded, at least insofar as it might be considered an important or exclusive means of self-authentication of official records. The Committee resolved to consider, at least on a preliminary basis, whether Rule 902 should be amended to modify the reference to a government seal. No timetable was set for any proposed amendment and no agreement was reached on whether the rule should in fact be amended. The Reporter was instructed to provide a background report for the Committee in time for the next Committee meeting.

Technology

The Chair noted that Judge Turner, who was the Evidence Rules Committee's representative on the Technology Subcommittee of the Standing Committee, how now gone off the Evidence Rules Committee. The Chair appointed Judge Norton as Judge Turner's replacement. Judge Scirica informed the Committee that the Technology Subcommittee has done important work in the area of electronic filing, and would consider other matters, such as privacy concerns, in the near future.

Uniform Rules

Professor Whinery, the Reporter for the Uniform Rules of Evidence Drafting Committee, reported on developments in the Uniform Rules project. The Drafting Committee's proposals have been accepted by the Conference and will be referred to the States. The Uniform Rules Committee has generally followed the Federal Rules of Evidence, but Professor Whinery noted that there are some marked differences. For example, Proposed Uniform Rule 702 establishes a presumption of admissibility for expert testimony that passes the *Frye* test, and a presumption of inadmissibility for expert testimony that does not. Then the Rule provides a number of factors that would be relevant to overcoming the presumption one way or another. Also, the Uniform Rules have been amended throughout to update language that might not accommodate the presentation of evidence in electronic form.

Next Meeting

The next meeting of the Evidence Rules Committee is scheduled for April 17th in Chicago.

The meeting was adjourned at 12:20 p.m., Monday, October 25th

Respectfully submitted,

Daniel J. Capra
Reed Professor of Law