Advisory Committee on Evidence Rules

Minutes of the Meeting of May 1-2, 2008

Boston, MA

The Advisory Committee on the Federal Rules of Evidence (the "Committee") met on May 1st and 2nd 2008 in Boston.

The following members of the Committee were present:

Hon. Robert L. Hinkle, Chair
Hon. Joseph F. Anderson, Jr.
Hon. Anita B. Brody
Hon. Joan N. Ericksen.
Hon. Andrew D. Hurwitz
William T. Hangley, Esq.
Marjorie A. Meyers, Esq.,
William W. Taylor, III, Esq.
Ronald J. Tenpas, Esq., Department of Justice

Also present were:

Hon. Marilyn L. Huff, Liaison from the Committee on Rules of Practice and Procedure
Hon. Michael M. Baylson, Liaison from the Civil Rules Committee
Hon. John F. Keenan, Liaison from the Criminal Rules Committee
Elizabeth Shapiro, Esq., Department of Justice
Professor Daniel Coquillette, Reporter to the Committee on Rules of Practice and Procedure
John K. Rabiej, Esq., Chief, Rules Committee Support Office
James Ishida, Esq., Rules Committee Support Office
Peter McCabe, Esq., Secretary to the Standing Committee on Rules of Practice and Procedure.
Professor Daniel J. Capra, Reporter to the Evidence Rules Committee
Professor Kenneth S. Broun, Consultant to the Evidence Rules Committee
Professor R. Joseph Kimble, Consultant to the Style Subcommittee of the Committee on Rules of Practice and Procedure
Timothy Reagan, Esq., Federal Judicial Center
Jeffrey Barr, Esq., Rules Committee Support Office

Opening Business

Judge Hinkle welcomed the Committee's new member, Judge Anita Brody, to her first Committee meeting. Judge Hinkle asked for and received approval of the minutes of the Fall 2007 Committee meeting.

Judge Hinkle then asked Professor Coquillette for a report on the status of proposed Evidence Rule 502, which would provide protections against waiver of privilege and work product. Professor Coquillette noted that Rule 502 was passed unanimously in the Senate in February, but that its prospects of passage in the House are dependent on convincing some staffers and members of Congress that the Rule is well-drafted and that it does not conflict with other pending legislation on protective orders. Recent statements from staffers and House members appear to be positive, and there is a fair possibility that the House will pass the legislation before the end of the year.

I. Restyling Project

At the Spring 2007 meeting, the Committee voted unanimously to begin a project to restyle the Evidence Rules. At the Fall 2007 meeting, the Committee agreed upon a protocol and a timetable for the restyling project. At the Spring 2008 meeting the Committee reviewed a draft of the first third of the Evidence Rules (Rules 101-415). The draft had been reviewed by the Reporter, who provided suggestions, and it was approved by the Style Subcommittee of the Standing Committee.

At the meeting, the Committee reviewed each rule to determine whether any change was one of substance rather than style (with "substance" defined as changing an evidentiary result or changing language that is so heavily engrained in the practice as to constitute a "sacred phrase"). Under the protocol for the restyling project, if a significant minority of Evidence Rules Committee members agree that the proposed change is substantive, then that change is not implemented.

The Committee also reviewed each rule to determine whether to recommend that a change, even though one of style, might be reconsidered by the Style Subcommittee of the Standing Committee. After considering possible changes of both substance and style, the Committee unanimously voted to refer the restyled rules to the Standing Committee, with the recommendation that they be released for public comment. If the Standing Committee accepts the Evidence Rules Committee's recommendations, then all of the proposed restyled rules would be released for public comment as one complete package, in approximately two years.

What follows is a description of the Committee's determinations, rule by rule. **The final version of each rule to be submitted to the Standing Committee is attached (along with the existing rule in a side-by-side presentation) to these Minutes.**

Rule 101

Rule 101 provides an introductory statement about the applicability of the Evidence Rules — the details of Evidence Rule-applicability are found in Rule 1101. The Style Subcommittee draft of Rule 101 referred in some detail to the specific courts to which the Evidence Rules are applicable, including courts of appeals, district courts, and the District Courts of Guam, the Virgin Islands, and the Northern Marianas Islands.

Committee members raised a number of issues, including: 1) does it make sense to state that the Evidence Rules are applicable to the courts of appeals?; 2) should the proposal be amended to apply the Evidence Rules to the Supreme Court?; and 3) why should district courts in general be distinguished from the District Courts of Guam, the Virgin Islands, and the Northern Mariana Islands?

On these questions, the Committee determined that 1) Evidence Rules can and do apply to the courts of appeals, for example the rules on judicial notice and preservation of the right to appeal; 2) the Evidence Rules do not apply to the Supreme Court, as the Enabling Act does not authorize the rulemaking process to establish rules that would bind the Supreme Court; and 3) research is needed to determine whether a textual distinction was required to differentiate the District Courts of Guam, the Virgin Islands, and the Northern Mariana Islands from other district courts.

The Committee voted unanimously to defer the difficult drafting questions of rule-applicability until it reached Rule 1101. For now, the Committee adopted a simple and general statement of rule-applicability in Rule 101:

> **These rules apply to proceedings before United States courts. The specific courts and proceedings to which the rules apply, along with exceptions, are set out in Rule 1101.**

Rule 102

Rule 102 provides as follows:

> These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

The restyled version presented to the Committee changed the heading of Rule 102 from "Purpose and Construction" to "Purpose". Committee members noted that the change was problematic because the rule deals mostly with how a court is to construe the Evidence Rules. The Committee asked the Style Subcommittee to consider whether to retain the existing heading, or in the alternative to change it to "Construction" rather than "Purpose."

The Style Subcommittee changed “shall” to “should”. After discussion, the Committee agreed with this change. One of the goals of the style project is to take out all the “shalls” from the Rules; the reasoning is that “shall” is a vague term that might mean “must”, “may” or “should” among other possibilities. The style change to “should” in Rule 102 was approved because the Rule is hortatory — it does not require a court to apply specific guidelines for construing the rules.

The style draft changed the existing language “proceedings justly determined” to “achieve a just result.” The Committee voted unanimously against this change on substantive grounds. Committee members concluded that a focus on a justly determined proceeding could be construed to mandate an accurate result in every circumstance — a mandate that would be in conflict with the goal of evidence rules and burdens of proof in criminal cases. For the same substantive reason, the Committee unanimously rejected the proposed change from “to the end that the truth be ascertained” to “determine the truth.”

The Committee also unanimously determined that the Style Subcommitee’s deletion of the term “to the end that” would be substantive because it changes the goal of the rule. The existing rule divides the rules of construction and the ultimate goals of construction. The restyled rule simply lumps all the factors together without differentiating rules of construction from goals of construction. So the Committee voted to restore the language “to the end that”.

The Committee corrected the substantive changes and unanimously approved the following restyled version of Rule 102:

> These rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end that the truth may be ascertained and proceedings justly determined.

Rule 103

Rule 103 sets forth various rules on objections, offers of proof, preserving claims of error, and related questions. The Evidence Rules Committee unanimously approved the draft prepared by the Style Subcommittee. The Evidence Rules Committee made one suggestion — to take out the word “also” from subdivision (c). Committee members also raised questions about whether the restyled subdivision (d) was correct in mandating that the court conduct proceedings so that inadmissible evidence is not suggested to the jury, to the extent practicable. But the Committee ultimately concluded that the restyled language tracked the existing case law.

Rule 104

Rule 104 covers preliminary questions, including admissibility determinations and conditional relevance. Rule 104(a) provides that in making an admissibility determination, a trial court “is not bound by the rules of evidence except those with respect to privileges.” The Style

Subcommittee considered whether there might be rules outside the Evidence Rules that could affect the trial court's determination of admissibility, and if those rules should also be inapplicable to admissibility determinations. The Subcommittee proposed the term "any evidence rules"; but the Evidence Rules Committee determined that a reference to "any" evidence rules could raise a host of unforeseen issues about the applicability of rules outside the Evidence Rules to preliminary determinations. The Committee decided, as a substantive matter, that the proper reference should be to "evidence rules."

The Committee next considered the draft's use of the term "criminal defendant." All members of the Committee agreed that the term "criminal defendant" was presumptive and pejorative. Six members of the Committee believed that the term "criminal defendant" effectuated a substantive change — much like the difference between "victim" and "alleged victim." The Committee then discussed what term should be used. It rejected the term "accused" because that term had been used in other rules and courts sometimes misconstrued it to apply to civil defendants accused of misconduct. The Committee tentatively agreed on the term "defendant in a criminal case." Professor Kimble, the style consultant, agreed to try to implement that term throughout the restyled rules. The Committee agreed that whatever term is used, it must be used consistently throughout the rules.

The Committee next turned to Rule 104(b), which currently provides that when relevance is conditioned on the existence of a fact, "the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding." The restyled version changes "shall" to "may". The DOJ representative suggested that this might be a substantive change because it would give courts more discretion to exclude conditionally relevant evidence than is currently provided. He suggested that the correct word is "should." But the rest of the Committee disagreed. It determined that the word "may" properly gives the trial court discretion — which exists under the current rule — to rule on conditional relevance immediately or to admit the evidence subject to a connection and rule at a later point.

The Committee voted unanimously to approve the restyled version of Rule 104, with the deletion of "any" before evidence rules and the change of "criminal defendant" to "defendant in a criminal case."

Rule 105

Rule 105 provides as follows:

Rule 105. Limited Admissibility

When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

The Style Subcommittee Draft changed the heading to "Limiting Evidence That Is Not Admissible Against All Parties or for All Purposes." Committee members suggested that the heading was inaccurate because there is no way to determine all the purposes for which evidence might be admissible, at least outside the context of a case. The Committee recognized that the heading did not effectuate a substantive change, but nonetheless suggested that the heading be reconsidered. After discussion, the Committee and Professor Kimble agreed on the following heading:

"Limiting Evidence That Is Not Admissible Against Other Parties or for Other Purposes."

But the Committee also voted that the best solution was to retain the existing heading: "Limited Admissibility." The Committee determined that the existing heading accurately and succinctly captures the subject matter of the rule. Finally, the Committee voted 6 to 2 to recommend publication of restyled Rule 105.

Rule 106

Rule 106 provides as follows:

> When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

The Style Subcommittee draft deleted "may require the introduction" and substituted "may introduce." The Committee determined, unanimously, that this change was substantive, because it failed to cover all the situations in which Rule 106 currently applies. If the conditions of the existing Rule 106 are met, a party can force an adverse party to introduce completing evidence during its case. Changing the rule to "may introduce" does not cover the situation in which a party can require another party to introduce the completing evidence.

The Committee therefore determined that the term "require the introduction" must be retained. As so retained, the Committee unanimously approved the restyled version of Rule 106.

Rule 201

Rule 201 is the rule on judicial notice. The Committee unanimously approved the Style Committee draft of Rule 201. The Committee, however, discussed a substantive anomaly in the existing rule that is carried over to the restyled rule: the text of the Rule permits an appellate court to judicially notice a fact, but in criminal cases the Constitution prohibits an appellate court from noticing a fact against the defendant if that fact was not noticed below. (This is because of the accused's constitutional right to jury trial). The Committee asked Professor Broun, consultant to the

Committee, to prepare a memorandum on a possible substantive amendment to Rule 201 that would track the constitutional prohibition on judicial notice on appeal of a criminal case.

Rule 301

Rule 301 governs presumptions. The Subcommittee's restyling draft made a number of changes but kept the basic framework of the rule, i.e., that a presumption imposes the burden of going forward with evidence to rebut, but does not shift the burden of proof, "in the sense of the risk of nonpersuasion." The Committee unanimously approved the Style Subcommittee's draft.

Rule 302

Rule 302 provides as follows:

> In civil actions and proceedings, the effect of a presumption respecting a fact which is an element of a claim or defense as to which State law supplies the rule of decision is determined in accordance with State law.

The Style Subcommittee draft, among other things, changes "civil actions and proceedings" to "a civil case." The Committee discussed whether this is a substantive change. Some Committee members suggested that the term "proceeding" was broader than "case" but that if there was such a distinction, it would not make a difference for Rule 302. The Committee determined that the proper iteration of "civil case", "civil action" and "civil proceeding" was a global question that might be best treated by a specification in Rule 1101 that the terms would be used interchangeably throughout the Evidence Rules. For now, the Committee resolved to keep track of usages of terms such as "civil action", "civil case" and "civil proceeding" and to work on a global solution as the restyling project goes forward. The Committee unanimously agreed to recommend that the restyled version of Rule 302 be released for public comment.

Rule 401

Rule 401 provides as follows:

> ''Relevant evidence'' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

The Style Subcommittee draft retained the reference to "the action." Committee members noted that this reference was different from Rule 302, which currently refers to "actions and proceedings," and the restyled version of Rule 302, which refers to a "case". Again, this is a global issue that might possibly be resolved by language added to Rule 1101 that would allow those different references to be used interchangeably. The Committee approved for now the reference to "the action."

Committee members objected, however, to a change from "fact that is of consequence" to "fact that is consequential." Committee members unanimously agreed that this change could be read to provide a stricter standard for relevance than under the current, permissive rule. In essence, the change could be read to require that the evidence be more important to the action than is required under existing law. Raising even an argument of a substantive change was considered especially problematic given the importance of Rule 401 in the structure of the Evidence Rules. Committee members voted unanimously to restore the current reference to a "fact that is of consequence in determining the action." With that change, the Committee voted unanimously to approve the Style Committee draft of Rule 401.

Rule 402

Rule 402 provides as follows:

> All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

The draft of the Style Subcommittee breaks out the sources of exclusion into bullet points and provides other style improvements. One Committee member suggested that the restyled Rule 401 created a disconnect with Rule 402 because Rule 401 no longer uses the term "relevant evidence" but instead refers to evidence that is relevant. But Committee members, after discussion, determined that no change of substance had been made and that restyled Rules 401 and 402 have the same connection as the existing versions. The Committee voted unanimously to approve the Style Subcommittee draft of Rule 402.

Rule 403

Rule 403 provides as follows:

> **Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time**

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Among other things, the Style Subcommittee draft changed the heading of Rule 403 to "Exclusion of Relevant Evidence for Specific Reasons." The Committee unanimously objected to this heading, on the ground that the reference to "specific reasons" was vague and could be read to limit judicial discretion. Professor Kimble suggested that the existing heading was inaccurate because it referred to three reasons for excluding evidence when the rule mentions six. After discussion, the Committee unanimously suggested that the Style Committee consider and adopt the following heading to the restyled Rule 403:

"Exclusion of Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons"

After referring this style suggestion to the Style Subcommittee, the Committee unanimously approved the restyled Rule 403.

Rule 404

Rule 404 generally prohibits the circumstantial use of character evidence; sets forth a number of situations in which character evidence is admissible; and provides that specific acts are excluded if offered to prove character but are not barred by the rule if offered for some not-for-character purpose. The Committee determined that the restyled Rule 404 contained a number of substantive changes from the existing rule. Those substantive changes are as follows:

1. *Character/trait of character:* The existing rule sometimes refers to "character" and other times to "trait of character." The Style Subcommittee draft generally tried to refer to "character trait" or "trait" and deleted most of the broader references to "character". The Evidence Rules Committee found these changes to be substantive, because there is a reasoned difference between character and a character trait. In some cases, a party will be arguing that the adversary is making an undifferentiated attack — a character smear. Rule 404 provides protections against these attacks. In other situations, a party may be attempting to introduce a particular aspect of a person's character, such as honesty or peaceableness. Rule 404 provides other rules to govern this situation. The Committee carefully reviewed the existing Rule and determined that the various uses of "character" and "trait of character" were well considered, and that any change of those usages would be substantive. So the existing references were restored to the restyled draft.

2. *Reference to Rule 607:* Rule 404(a) provides that the bar on character evidence does not apply to evidence of the character of a witness, "as provided in Rules 607, 608, and 609." The Style Subcommittee asked the Evidence Rules to consider whether the reference to Rule 607 should be

deleted as inaccurate, because Rule 607 is not a rule that directly provides for admission of character evidence. The Committee considered this request and decided that deletion of the reference to Rule 607 would be a substantive change. While Rule 607 does not directly govern character evidence, it does allow character evidence (or for that matter impeachment evidence generally) to be introduced in situations that were not permitted before the federal rules were enacted. If the reference to Rule 607 were deleted, it could create the unintended consequence of an argument, or even a holding, that a witness's character could not be attacked on direct examination.

3. "Another purpose": Rule 404(b) currently provides that bad act evidence, while inadmissible to prove character, "may, however, be admissible" for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident." The restyled version states that such evidence "may be admitted for another purpose, such as proving motive, opportunity, intent, plan, preparation, knowledge, identity, absence of mistake, or lack of accident." This change raised a number of questions with Committee members, especially given the heavy use of Rule 404(b) in the courts. One problem raised by the Reporter is that the change from "other purposes" to "another purpose" could lead to an unintended substantive change. Under current law, the government often offers bad act evidence for multiple purposes, and then the evidence is assessed under Rule 403 for its probative value as to all such not-for-character purposes. Changing the language to "another purpose" could be read to permit the articulation of only *one* not-for-character purpose. Professor Kimble responded that the style convention is to use singular rather than plural, and that the use of the singular is not intended to be limiting. He also explained that applying the plural only in this rule could lead to unnecessary arguments about the use of the singular in other rules. After discussion, the Committee voted unanimously that the use of the singular rather than the plural did not create a substantive change. The Committee then voted on whether to recommend to the Style Subcommittee that the plural, "other purposes" be retained. That vote failed by a vote of 5 to 4.

In an email exchange of Committee members after the meeting, the Committee agreed to suggest to the Style Subcommittee that "another purpose" should be changed to "any other purpose." This change would then track a similar change made to Rules 413-415 (see below); it would not be in conflict with the style rule on singular and plural; and it would clearly allow the proponent to articulate multiple not-for-character purposes for evidence of uncharged misconduct.

4. "May be admitted" — The DOJ representative objected to the change from "may, however, be admissible" to "may be admitted" in Rule 404(b). He noted that hundreds of cases had established that Rule 404(b) is a rule of inclusion, not exclusion. He also noted that Congress explicitly changed the Advisory Committee draft of Rule 404(b) — which used more exclusionary language — to "may, however, be admissible." Under the Style protocol, language in a rule that is a "sacred phrase" is considered substantive and is not to be changed. The DOJ representative argued that the change to "may be admitted" was substantive because it was stricter in tone than "may, however, be admissible"; and that at any rate the Rule 404(b) language was a sacred phrase. A vote was taken on whether the change to "may be admitted" was substantive and a majority (five Committee members) agreed that it was substantive. Under the Style protocol, that means that the change cannot be made by the Style Subcommittee. So "may be admissible" was retained.

5. Plan/preparation: The Style Subcommittee switched "plan" and "preparation" in the list of permissible purposes set forth in Rule 404(b). The Reporter objected to this change as an unjustified tinkering with a Rule that has been applied in thousands of cases. The reasoning for the change is that a bad act is planned before it is prepared, and so the style change follows a more logical progression than the current rule. The Reporter's response was that the list of permissible purposes in Rule 404(b) does not, and is not intended to, follow a logical progression. The Committee voted on whether the list of purposes in Rule 404(b) constituted a "sacred phrase," changing which is considered substantive under the restyling protocol. The Committee voted 7 to 2 that the list of purposes was not a "sacred phrase" and therefore the flipping of "plan"and "preparation" was not substantive.

The Committee then voted unanimously to recommend to the Style Subcommittee that it retain the list of purposes as it is in the existing rule, i.e., to keep "preparation" before "plan" in the list.

Finally, a vote was taken to approve the restyled Rule 404, subject to undoing the substantive changes discussed above. The Committee unanimously approved the rule as so modified.

Rule 405

Rule 405 provides the rule on proof of character when such proof is permitted by Rule 404. The Committee reviewed the restyled version of Rule 405. After discussion, the Committee voted unanimously that the Rule must refer both to "character" and "character trait" in both subdivisions of the Rule. This was necessary to properly track the use of "character" and "character trait" in Rule 404. The Committee recognized that the Rule must cover proof of both specific character traits and more general references to character, e.g., "the defendant is a good person." Thus, the reference in the restyled version to character traits only operated as a substantive change.

After restoring references to character as well as character traits, the Committee unanimously approved the restyled version of Rule 405.

Rule 406

Rule 406 currently provides as follows:

> Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

Rule 406 is not strictly necessary, because even without the rule, habit evidence is clearly relevant to show conduct consistent with the habit under Rule 401. But the drafters of Rule 406 reasoned that a specific application of the relevance definition was necessary to abrogate some common law limitations on the use of habit evidence — specifically, the common law held that habit evidence was not relevant unless it was supported by corroborating evidence or eyewitness testimony. Rule

406 rejects those common law limitations.

The Style Subcommittee substituted "admissible" for "relevant": i.e., "habit is admissible" rather than "habit is relevant." After discussion, Committee members voted unanimously that the change from "relevant" to "admissible" was substantive. It essentially changed the rule from a particularized definition of relevance to a positive grant of admissibility. As such it went beyond the intent of the drafters of the original rule. The Committee then voted on the restyled version of Rule 406, with "relevant" replacing "admissible". The Committee unanimously approved the Rule as modified.

Rule 407

Rule 407 currently provides as follows:

> When, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

Among other changes, the restyled version of Rule 407 provides that evidence "may be admitted" if offered for one of the designated proper purposes in the rule. A number of Committee members argued that this was a change in the tone of the Rule. Current Rule 407 is a rule of exclusion; it becomes inapplicable if the proponent can articulate a purpose for the evidence that is not prohibited by the Rule. Rule 407 is not a rule that admits evidence. Committee members argued that by using the term "may be admitted" the tone of the rule was changed to one that provided a positive grant of admissibility. The Reporter noted that the language "does not require the exclusion of evidence" was carefully chosen by the original Advisory Committee, and carefully vetted by Congress, which changed similar language in Rule 404(b) to provide a broader rule of admissibility, but made no such change to Rule 407. Professor Kimble argued in response that the phraseology "may be admitted" was to be preferred because it means the same thing and is "tighter" than "need not be excluded."

The Committee voted on whether the change in approach from "does not require exclusion" to "may be admitted" was a substantive change under the style protocol. Eight members of the Committee were of the view that the change was not substantive; one Committee member dissented from that view.

The Committee then voted on whether to suggest to the Style Subcommittee to return to the original iteration of the rule or some variation, e.g., "the rule does not require exclusion" or "the evidence need not be excluded" — or simply "the rule does not apply." The Committee voted 6 to 2 in favor of this style recommendation. The Committee's second choice for a style change was to provide that "a court may admit" rather than "may be admitted." Committee members reasoned that

"a court may admit" seemed less compulsory (and more direct) than "the evidence may be admitted."

The Committee then voted on whether to approve the restyled Rule 407. It was approved by a vote of 8 to 1.

Rule 408

Like Rule 407, Rule 408 provides that certain evidence — in this instance evidence of compromise — is excluded if offered for certain specified purposes, but the rule "does not require exclusion" i.e., is not applicable, if the evidence is offered for a purpose not specifically barred by the rule. As with Rule 407, the Style Subcommittee changed Rule 408 to provide that evidence "may be admitted" if offered for some purpose not prohibited by the Rule. With respect to this change, Committee members came to the same resolution as was reached under Rule 407: all but one member agreed that the change was stylistic rather than substantive; but a strong majority voted to suggest to the Style Subcommittee that it return to the language of the original rule (which in this case was reaffirmed by an amendment in 2006): the evidence "does not require exclusion" if offered for a purpose not barred by the rule — or some variation of that language, such as "the rule does not apply." As a less preferred alternative, yet an improvement on the Style draft, the Committee suggested "the court may admit."

Committee members also suggested that the heading to subdivision (b) should be changed from "Exceptions" to "Permitted Uses." Professor Kimble agreed to take this suggestion under advisement.

Committee members unanimously approved the restyled version of Rule 408.

Rule 409

The Committee unanimously approved the restyled version of Rule 409.

Rule 410

Rule 410 provides that certain evidence related to plea negotiations is not admissible against the defendant involved in the negotiations. The Committee reviewed the restyled draft and noted that one change was substantive. One subdivision of Rule 412 currently protects "any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn." The restyled draft changed "attorney for the prosecuting authority" to "the prosecutor." Committee members unanimously saw this as a substantive change because Congress specifically chose this language to cover all attorneys acting under prosecutorial authority whether or not they were "prosecutors" in the strict sense. For example, in some jurisdictions private attorneys exercise prosecutorial authority for certain matters,

and a change to "prosecutor" may raise doubts about whether discussions with those attorneys are covered by Rule 410.

Committee members voted unanimously that the change from "attorney for the prosecuting authority" to "the prosecutor" was substantive and therefore the original language was to be retained. Committee members then voted unanimously to approve the restyled draft of Rule 410, subject to restoring the language "attorney for the prosecuting authority."

Rule 411

Rule 411 currently provides as follows:

> Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

As with Rules 407 and 408, the Style Committee draft changes Rule 411 from a rule that "does not require the exclusion of evidence" to a rule providing that evidence "may be admitted" if offered for a purpose not prohibited by the rule. The Committee voted on the restyled draft to Rule 411 in the same way as it did with respect to Rules 407 and 408: the change to "may be admitted" was not substantive, but the Committee suggested that the Style Subcommittee restore the language "does not require exclusion" or some variation such as "the rule does not apply." As a second alternative, the Committee suggested that the Style Subcommittee use "the court may admit."

Rule 412

Rule 412 provides that in cases involving sex offenses, evidence of the alleged victim's other sexual behavior or predisposition is to be admitted only under narrow circumstances. The existing rule provides that such evidence "is admissible, if otherwise admissible under these rules" under the narrow circumstances provided (in separate subdivisions for civil and criminal cases). Both Professor Kimble and the Reporter determined that the language "if otherwise admissible under these rules" should be deleted from the restyled draft because the general principle of all evidence rules is that admissibility under one rule does not guarantee admissibility under others. (For example, a statement that satisfies the hearsay rule may nonetheless be excluded under Rule 403). Moreover, the use of the term "if otherwise admissible under these rules" created an anomaly in criminal cases, where Rule 412 provides that evidence of the victim's sexual behavior must be admitted if its exclusion would violate the constitutional rights of the defendant. Retaining the language "if otherwise admissible under these rules" would condition a defendant's constitutional right on those other evidence rules, which is obviously incorrect.

Committee members agreed with the deletion of the two references to "if otherwise admissible under these rules." Members noted, however, that without this qualifying language, the

term “is admissible” sounded too positive, especially given the substantial limitations on the admissibility of evidence covered by Rule 412. As such the restyled version had made a substantive change. Committee members voted to change “is admissible” to “may be admitted” or “the court may admit”— with the determination of the exact language to be made by the Style Subcommittee.

Committee members and Professor Kimble also agreed to a style change to the notice provision to Rule 412: changing “14 days before the scheduled trial date” to “14 days before trial.”

With these changes, the Committee voted unanimously to approve the restyled draft of Rule 412.

Rule 413

Rule 413 provides in part as follows:

> (a) In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant’s commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant.
>
> (b) In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

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The restyled version changed “another offense or offenses” to “another offense.” This was in accord with style rules using the singular rather than the plural. But Committee members noted that this change would allow a defendant to argue that the prosecution could only admit one other sexual assault, even if the defendant had committed more than one. Members noted that such an argument was especially likely to be raised given the sensitive nature of the issues and the stakes involved in cases covered by Rule 413. After discussion, the Committee voted 5 to 4 to make a substantive change to the restyled draft: “another act” was changed to “any other act.”

The Reporter noted that the term “relevant matter” — as used in the restyled draft — was not a term that is recognized under the Evidence Rules. Professor Kimble agreed to return to the language of the existing rule — “on any matter to which it is relevant.”

The DOJ representative raised a possible substantive change in the restyled notice provision, which deleted the term “testimony that is expected to be offered” and replaced it with “summary of the testimony.” The DOJ representative noted that the government could not know with certainty in advance how a witness will testify on the stand. The term “summary of the testimony” could imply some standard of accuracy that the government would not be able to meet, especially compared with the language in the existing rule which refers to “testimony that is *expected* to be

offered." After discussion, the Committee voted unanimously that the deletion of the term "expected" was a substantive change. Accordingly the Committee voted to add the word "expected" before "testimony" in the restyled draft.

Finally, the Committee and Professor Kimble agreed to a change to the notice provision to provide consistent language with the modification made to the notice provision in Rule 412: "before the scheduled trial date" in the restyled draft was changed, by agreement, to "before trial."

With all the above changes, the Committee voted unanimously to approve the restyled draft of Rule 413.

Rules 414 and 415

Rules 414 and 415 provide the same treatment of evidence of sexual misconduct as Rule 413, but in different types of actions. These Rules present the same restyling issues presented by Rule 413, and the Committee resolved them in the same way: 1. Using "any other" rather than "another" to describe the acts subject to admission; 2. Using "on any matter to which it is relevant" rather than "any relevant matter"; 3. Adding "expected" before "testimony" in the notice provision; and 4. Changing "before the expected trial date" to "before trial" in the notice provision. Subject to these changes, the Committee unanimously approved the restyled draft of Rules 414 and 415.

II. Proposed Amendment to Rule 804(b)(3)

At its last meeting the Evidence Rules Committee voted to consider the possibility of an amendment to Evidence Rule 804(b)(3), the exception to the hearsay rule for declarations against interest. In its current form Rule 804(b)(3) requires an accused to provide corroborating circumstances clearly indicating the trustworthiness of a declaration against penal interest for the hearsay to be admissible; but by its terms the Rule imposes no similar requirement on the prosecution. The Committee expressed interest in at least considering an amendment that would extend the corroborating circumstances requirement to all proffered declarations against penal interest in criminal cases. The possible need for the amendment arose after the Supreme Court's decision in *Whorton v. Bockting*, which held that the Confrontation Clause provides no protection against unreliable hearsay if that hearsay is nontestimonial. If the prosecution has to show only that a declarant made a statement that tended to disserve his interest — i.e., all that is required under the terms of the existing rule — then it might well be that unreliable hearsay could be admitted against an accused.

At the Fall 2007 meeting, Committee members expressed interest in proceeding with an amendment to Rule 804(b)(3). Members stated that the rule would provide an important guarantee of reliability in criminal prosecutions, and could rectify confusion and dispute among the courts — because some courts currently apply a corroborating circumstances requirement to statements offered by the government and some do not. The Department of Justice representative asked the Committee to wait before proposing an amendment, until the Department had time to review the

proposal and prepare a position. At the Spring 2008 meeting, the DOJ representative stated that the Department supported publication of an amendment to Rule 804(b)(3) that would extend the corroborating circumstances requirement to declarations against penal interest offered by the government in criminal cases.

The Committee then discussed whether three issues that had been raised in the case law should be addressed in the text or note to a proposed amendment to Rule 804(b)(3). Those questions are as follows:

1. *Should the corroborating circumstances requirement be extended to civil cases?* Committee members noted that only one reported decision had extended the corroborating circumstances requirement to civil cases, and that there were no other significant reported cases on the subject. Given the dearth of authority, and the different policy questions that might be raised with respect to declarations against penal interest offered in civil cases, the Committee decided unanimously not to address the applicability of the corroborating circumstances requirement to civil cases.

2. *Should the amendment consider the applicability of the Supreme Court's decision in* Crawford v. Washington? Under *Crawford v. Washington*, a declaration against penal interest cannot be admitted against an accused if it is testimonial. Committee members considered whether to provide a textual limitation in Rule 804(b)(3), i.e., that "testimonial" declarations against penal interest are not admissible against the accused. The Committee determined that this language was unnecessary, because federal courts after *Crawford* have uniformly held that if a statement is testimonial, it by definition cannot satisfy the admissibility requirements of Rule 804(b)(3). A statement is "testimonial" when it is made to law enforcement officers with the primary motivation that it will be used in a criminal prosecution — but such a statement cannot be a declaration against penal interest because the Supreme Court held in *Williamson v. United States* that statements made to law enforcement officers cannot qualify under the exception as a matter of evidence law. Because of the fit between the hearsay exception and the right to confrontation, Committee members saw no need to refer to the *Crawford* standard in the text of the rule — especially since to do so could create a negative inference with respect to the hearsay exceptions that are not amended. The Committee agreed, however, to add language to the Committee Note to explain why the text of the Rule does not address *Crawford.*

3. Should the amendment resolve some disputes in the courts about the meaning of "corroborating circumstances"? Committee members noted that there are a few decisions that define "corroborating circumstances" as prohibiting any consideration of independent evidence that corroborates the assertions of the hearsay declarant. These courts appear to be relying on pre-*Crawford* Confrontation Clause jurisprudence that is no longer applicable. Members noted, however, that the disagreement in the courts about the meaning of "corroborating circumstances" did not run very deep, and that the few courts that are relying on outmoded constitutional law are likely to change their approach when the issue is directly addressed. Eight members of the Committee voted not to include any definition of corroborating circumstances in the text or Committee Note to the proposed amendment. One

member dissented.

After discussion, the Committee voted unanimously to refer the proposed amendment to Rule 804(b)(3), and the Committee Note, to the Standing Committee, with the recommendation that the amendment be released for public comment. Committee members noted that the Rule would have to be restyled as part of the restyling project, but resolved unanimously that the proposed substantive change should proceed on a separate track and timeline. Thus, Rule 804(b)(3), together with its substantive change if approved, will be restyled together with all the other hearsay exceptions in the third part of the restyling project.

What follows is the proposed amendment and Committee Note as unanimously approved by the Committee:

Rule 804. Hearsay Exceptions; Declarant Unavailable

* * *

(b) Hearsay exceptions. – The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

*** * ***

(3) Statement against interest. — A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered ~~to exculpate the accused~~ in a criminal case is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

Committee Note

The second sentence of Rule 804(b)(3) has been amended to provide that the corroborating circumstances requirement applies to all declarations against penal interest offered in criminal cases. A number of courts have applied the corroborating circumstances requirement to declarations against penal interest offered by the prosecution, even though the text of the Rule did not so provide. *See, e.g., United States v. Alvarez,* 584 F.2d 694, 701 (5thCir. 1978) ("by transplanting the language governing exculpatory statements onto the analysis for admitting inculpatory hearsay, a unitary standard is derived which offers the most workable basis for applying Rule 804(b)(3)");*United States v. Shukri,* 207 F.3d 412 (7th Cir. 2000) (requiring corroborating circumstances for against-penal-interest statements

offered by the government). A unitary approach to declarations against penal interest assures both the prosecution and the accused that the Rule will not be abused and that only reliable hearsay statements will be admitted under the exception.

The Committee found no need to address the relationship between Rule 804(b)(3) and the Confrontation Clause. The Supreme Court in *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004), held that the Confrontation Clause bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." Courts after *Crawford* have held that for a statement to be admissible under Rule 804(b)(3), it must be made in informal circumstances and not knowingly to a law enforcement officer — and those very requirements of admissibility assure that the statement is not testimonial under *Crawford*. *See, e.g., United States v. Johnson*, 495 F.3d 951 (8th Cir. 2007) (accomplice's statements implicating himself and the defendant in a crime were not testimonial as they were made under informal circumstances to another prisoner, with no involvement of law enforcement; for the same reasons, the statements were admissible under Rule 804(b)(3)); *United States v. Franklin*, 415 F.3d 537 (6th Cir. 2005) (admissions of crime made informally to a friend were not testimonial, and for the same reason they were admissible under Rule 804(b)(3)).

The amendment does not address the use of the corroborating circumstances for declarations against penal interest offered in civil cases.

The meeting was adjourned on May 2, 2008. The Fall 2008 Committee meeting is scheduled for October 23 and 24 in Santa Fe.

Respectfully submitted,

Daniel J. Capra
Reporter

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