File Copy

November 12, 1996

Evidence Rules Committee Meeting

Handouts
(No Agenda Book

San Francisco, CA

LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

JOHN K. RABIEJ
Chief
Rules Committee Support Office

WASHINGTON, D.C. 20544

October 31, 1996
Via Federal Express

MEMORANDUM TO ADVISORY COMMITTEE ON EVIDENCE RULES

SUBJECT: Agenda Materials for the November 12, 1996 Committee Meeting

I have attached the following agenda materials for the November 12, 1996 Committee Meeting:

1. Agenda for the November 12, 1996 committee meeting.

2. Minutes of the April 1996 Committee meeting.

3. Information on Judge Sam Pointer's proposed national use of a court appointed expert witness panel to facilitate breast implant silicone gel litigation.

4. Information on the Department of Justice proposals regarding forfeiture proceedings in criminal cases and in admiralty cases.

A memorandum on Agenda Item III from Professor Capra, dated October 22, 1996, was sent earlier to you. Item IV of the agenda will be spent on identifying potential rule amendments for future committee consideration. Judge Smith requests that you review the rules and be prepared to identify areas that warrant the committee's attention.

John K. Rabiej

Attachments

cc: Honorable Alicemarie H. Stotler
Professor Daniel R. Coquillette

AGENDA
Advisory Committee on Evidence Rules
November 12, 1996

I. Opening Remarks of the Chair (Oral report)

II. Approval of Minutes of April 1996 Meeting (Action)

III. Draft Report to Congress Regarding the Confidentiality of Communications Between Sexual Assault Victims and Their Counselors (Action)

- Memorandum from Professor Daniel J. Capra, reporter

IV. Identifying Potential Rule Amendments for Future Committee Consideration

- Reports from individual committee members (Oral reports)

V. Department of Justice Proposals Affecting Forfeiture Proceedings (Informational)

VI. Judge Sam Pointer's Proposal Facilitating Use of Expert Witness Panels in Breast Silicone Gel Implant Mass Tort Litigation (Informational)

VII. Reports of the Liaisons from the Civil and Criminal Rules Committee (Oral reports)

VIII. Report of the National Conference of Commissioners on Uniform State Laws (Oral report)

IX. Next Meeting

MEMO TO: **Members, Criminal Rules Advisory Committee**

FROM: **Professor Dave Schlueter, Reporter**

RE: **Rule 31(e), et al; Forfeiture Proceedings; DOJ Proposed Amendments**

DATE: **September 5, 1996**

At the Committee's April 1996, meeting the Department of Justice offered proposed amendments which would modify forfeiture procedures. Following discussion of the item, the matter was deferred until the Fall meeting to consider whether any amendments should be made to other rules.

Attached is material explaining the Department's proposed changes This matter is on the agenda for the October meeting

U. S. Department of Justice

Criminal Division

Office of the Assistant Attorney General *Washington, D.C. 20530*

September 6, 1996

Honorable D. Lowell Jensen
United States District Judge
United States Courthouse
1301 Clay Street, 4th Floor
Oakland, California 94612

Dear Judge Jensen:

At the last meeting of the Advisory Committee on Criminal Rules, the Committee considered a proposal of the Department of Justice to amend Rule 31(e) to reduce the role of the petit jury in criminal forfeiture proceedings in the wake of Libretti v. United States, 116 S. Ct. 356 (1995). After considerable discussion, the Committee invited the Department to rethink and redraft its proposal in a more comprehensive fashion, and to present it at the upcoming meeting in October.

Attached is the product of our reconsideration, consisting of a proposed new rule and an explanation which is designed to serve as the basis for a Committee Note should the proposal be adopted. As you will see, upon further study, we have concluded that, since forfeiture is an aspect of sentencing under the holding in Libretti, the court should make criminal forfeiture determinations, just as it is entrusted with all other non-capital sentencing matters including the determination of such economic sanctions as fines and restitution.

We have also sought to resolve the difficulty and confusion that occur as a result of the overlap between Rule 31(e)'s requirement that the "extent" of the defendant's interest in the property be determined as part of the criminal trial, and the statutory requirement that that issue be resolved in the ancillary proceeding that follows the conclusion of the trial.

Finally, as the Committee suggested, we have attempted to consolidate in a single new rule the four current rules addressing various aspects of criminal forfeiture procedure.

Your and the other Committee members' consideration of this proposal is greatly appreciated.

Sincerely,

John C. Keeney
Acting Assistant Attorney General

Enclosure

Rules 7(c)(2), 31(e), and 32(d)(2) are repealed and replaced by the following new Rule. Rule 38(e) is amended by striking "3554," and by striking "Criminal Forfeiture" in the heading:

32.2 Criminal Forfeiture

(a) Indictment and Information. No judgment of forfeiture may be entered in a criminal proceeding unless the indictment or the information shall allege that the defendant or defendants have an interest in property that is subject to forfeiture in accordance with the applicable statute.

(b) Hearing and entry of preliminary order of forfeiture after verdict. Within 10 days of the entry of a verdict of guilty or the acceptance of a plea of guilty or nolo contendere as to any count in the indictment or information for which criminal forfeiture is alleged, the court shall conduct a hearing solely to determine what property is subject to forfeiture under any applicable statute because of its relationship to the offense. Upon finding that property is thus subject to forfeiture, the court shall enter a preliminary order directing the forfeiture of whatever interest each defendant may have in the property, without determining what that interest may be. A determination of the extent of each defendant's interest in the property shall be deferred until any third party claiming an interest in the property has petitioned the court pursuant to statute for consideration of the claim. If no such petition is timely filed, the property shall be forfeited in its entirety.

(c) Preliminary Order of Forfeiture. The entry of a

preliminary order of forfeiture shall authorize the Attorney General to seize the property subject to forfeiture, to conduct such discovery as the court may deem proper to facilitate the identification, location or disposition of the property, and to commence proceedings consistent with any statutory requirements pertaining to ancillary hearings and the rights of third parties. At the time of sentencing, the order of forfeiture shall become final as to the defendant, and shall be made a part of the sentence and included in the judgment. The court may include in the order of forfeiture such conditions as may reasonably be necessary to preserve the value of the property pending any appeal.

(d) Ancillary proceedings. (1) If, in accordance with the applicable statute, any third party files a petition asserting an interest in the forfeited property, the court shall conduct an ancillary proceeding. In such proceeding, the court may entertain a motion to dismiss the petition for lack of standing, for failure to state a claim upon which relief could be granted under this section, or for any other ground. For the purposes of such motion, all facts set forth in the petition shall be assumed to be true.

(2) If a motion referred to in paragraph (1) is denied, or if no such motion is made, the court may, in its discretion, permit the parties to conduct discovery in accordance with the Federal Rules of Civil Procedure to the extent that the court determines such discovery to be necessary or desirable to resolve

factual issues before conducting an evidentiary hearing. At the conclusion of such discovery, either party may seek to have the court dispose of the petition on a motion for summary judgment in the manner described in Rule 56 of the Federal Rules of Civil Procedure.

(3) At the conclusion of the ancillary proceeding, the court shall enter a final order of forfeiture amending the preliminary order as necessary if any third-party petition is granted.

(4) Where multiple petitions are filed in the same case, an order dismissing or granting fewer than all of the petitions shall not be appealable until all petitions are resolved, unless the court determines that there is no just reason for delay and directs the entry of final judgment with respect to one or more but fewer than all of the petitions.

(e) Stay of forfeiture pending appeal. If an appeal of the conviction or order of forfeiture is taken by the defendant, the court may stay the order of forfeiture upon such terms as the court finds appropriate in order to ensure that the property remains available in the event the conviction or order of forfeiture is vacated. Such stay, however, shall not delay the conduct of the ancillary proceeding or the determination of the rights or interests of any third party. If the defendant's appeal is still pending at the time the court determines that the order of forfeiture must be amended to recognize the interest of a third party in the property, the court shall amend the order of forfeiture but shall refrain from directing the transfer of any

property or interest to the third party until the defendant's appeal is final, unless the defendant, in writing, consents to the transfer of the property or interest to the third party.

(f) Substitute property. If the applicable forfeiture statute authorizes the forfeiture of substitute property, the court may at any time entertain a motion by the government to forfeit substitute property, and upon the requisite showing, shall enter an order forfeiting such property, or shall amend an existing preliminary or final order to include such property.

EXPLANATION OF RULE 32.2

Rule 32.2 brings together in one place a single set of procedural rules governing the forfeiture of assets in a criminal case. Existing Rules 7(c)(2), 31(e) and 32(d)(2) are repealed and replaced by the new Rule. In addition, the forfeiture-related provisions of Rule 38(e) are stricken.

Subsection (a) is derived from Rule 7(c)(2) which provides that notwithstanding statutory authority for the forfeiture of property following a criminal conviction, no forfeiture order may be entered unless the defendant was given notice of the forfeiture in the indictment or information. As courts have held, subsection (a) is not intended to require that an itemized list of the property to be forfeited appear in the indictment or information itself; instead, such an itemization may be set forth in one or more bills of particulars. See United States v. Moffitt, Zwerling & Kemler, P.C., 83 F.3d 660, 665 (4th Cir. 1996), aff'g 846 F. Supp. 463 (E.D. Va. 1994) (Moffitt I) (indictment need not list each asset subject to forfeiture; under Rule 7(c), this can be done with bill of particulars). The same applies with respect to property to be forfeited only as "substitute assets." See United States v. Voight, ___ F.3d ___, 1996 WL 380609 (3rd Cir. Jul. 9, 1996) (court may amend order of forfeiture at any time to include substitute assets).

Subsection (b) replaces Rule 31(e) which provides that the jury in a criminal case must return a special verdict "as to the extent of the interest or property subject to forfeiture." This Rule has proven problematic in light of changes in the law that have occurred since the Rule was promulgated in 1972.

The first problem concerns the role of the jury. When the Rule was promulgated, it was assumed that criminal forfeiture was akin to a separate criminal offense on which evidence would be presented and the jury would have to return a verdict. In Libretti v. United States, 116 S. Ct. 356 (1995), however, the Supreme Court held that criminal forfeiture constitutes an aspect of the sentence imposed in a criminal case, and that accordingly the defendant has no constitutional right to have the jury determine any part of the forfeiture. The special verdict requirement in Rule 31(e), the Court said, is in the nature of a statutory right that can be modified or repealed at any time.

Even before Libretti, lower courts had determined that criminal forfeiture is a sentencing matter and concluded that criminal trials therefore should be bifurcated so that the jury first returns a verdict on guilt or innocence and then returns to hear evidence regarding the forfeiture. In the second part of the bifurcated proceeding, the jury is instructed that the government must establish the forfeitability of the property by a preponderance of the evidence. See United States v. Myers, 21 F.3d 826 (8th Cir. 1994) (preponderance standard applies because criminal forfeiture is part of the sentence in money laundering

cases); United States v. Voight, ___ F.3d ___, 1996 WL 380609 (3rd Cir. Jul. 9, 1996) (following Myers); United States v. Smith, 966 F.2d 1045, 1050-53 (6th Cir. 1992) (same for drug cases); United States v. Bieri, 21 F.3d 819 (8th Cir. 1994) (same).

In light of Libretti, it is questionable whether the jury should have any role in the forfeiture process. Traditionally, juries do not have a role in sentencing other than in capital cases, and elimination of that role in criminal forfeiture cases would streamline criminal trials. Undoubtedly, it is confusing for a jury to be instructed regarding a different standard of proof in the second phase of the trial, and it is burdensome to have to return to hear additional evidence after what may have been a contentious and exhausting period of deliberation regarding the defendant's guilt or innocence.

For these reasons, the proposal replaces Rule 31(e) with a provision that requires the court alone, at any time within 10 days after the verdict in the criminal case, to hold a hearing to determine if the property was subject to forfeiture, and to enter a preliminary order of forfeiture accordingly.

The second problem with the present rule concerns the scope of the determination that must be made prior to entering an order of forfeiture. This issue is the same whether the determination is made by the court or by the jury.

As mentioned, the current Rule requires the jury to return a special verdict "as to the extent of the interest or property subject to forfeiture." Some courts interpret this to mean only that the jury must answer "yes" or "no" when asked if the property named in the indictment is subject to forfeiture under the terms of the forfeiture statute -- e.g. was the property used to facilitate a drug offense? Other courts also ask the jury if the defendant has a legal interest in the forfeited property. Still other courts, including the Fourth Circuit, require the jury to determine the extent of the defendant's interest in the property vis a vis third parties. See United States v. Ham, 58 F.3d 78 (4th Cir. 1995) (case remanded to the district court to empanel a jury to determine, in the first instance, the extent of the defendant's forfeitable interest in the subject property).

The notion that the "extent" of the defendant's interest must be established as part of the criminal trial is related to the fact that criminal forfeiture is an in personam action in which only the defendant's interest in the property may be forfeited. United States v. Riley, 78 F.3d 367 (8th Cir. 1996). When the criminal forfeiture statutes were first enacted in the 1970's, it was clear that a forfeiture of property other than the defendant's could not occur in a criminal case, but there was no mechanism designed to limit the forfeiture to the defendant's

interest. Accordingly, Rule 31(e) was drafted to make a determination of the "extent" of the defendant's interest part of the verdict.

The problem, of course, is that third parties who might have an interest in the forfeited property are not parties to the criminal case. At the same time, a defendant who has no interest in property has no incentive, at trial, to dispute the government's forfeiture allegations. Thus, it was apparent by the 1980's that Rule 31(e) was an inadequate safeguard against the inadvertent forfeiture of property in which the defendant held no interest.

In 1984, Congress addressed this problem when it enacted a statutory scheme whereby third party interests in criminally forfeited property are litigated by the court in an ancillary proceeding following the conclusion of the criminal case and the entry of a preliminary order of forfeiture. See 21 U.S.C. § 853(n); 18 U.S.C. § 1963(l). Under this scheme, the court orders the forfeiture of the defendant's interest in the property -- whatever that interest may be -- in the criminal case. At that point, the court conducts a separate proceeding in which all potential third party claimants are given an opportunity to challenge the forfeiture by asserting a superior interest in the property. This proceeding does not involve relitigation of the forfeitability of the property; its only purpose is to determine whether any third party has a legal interest in the property such that the forfeiture of the property from the defendant would be invalid.

The notice provisions regarding the ancillary proceeding are equivalent to the notice provisions that govern civil forfeitures. Compare 21 U.S.C. § 853(n)(1) with 19 U.S.C. § 1607(a); see United States v. Bouler, 927 F. Supp. 911 (W.D.N.C. 1996) (civil notice rules apply to ancillary criminal proceedings). Notice is published and sent to third parties who have a potential interest. See United States v. BCCI Holdings (Luxembourg) S.A. (In re Petition of Indosuez Bank), 916 F. Supp. 1276 (D.D.C. 1996) (discussing steps taken by government to provide notice of criminal forfeiture to third parties). If no one files a claim, or if all claims are denied following a hearing, the forfeiture becomes final and the United States is deemed to have clear title to the property. 21 U.S.C. § 853(n)(7); United States v. Hentz, 1996 WL 355327 (E.D. Pa. 1996) (once third party fails to file a claim in the ancillary proceeding, government has clear title under § 853(n)(7) and can market the property notwithstanding third party's name on the deed).

Thus, the ancillary proceeding has become the forum for determining the extent of the defendant's forfeitable interest in the property. It allows the court, in the first instance, to

forfeit "whatever interest the defendant may have," and then to conduct a proceeding in which all parties can participate that ensures that the property forfeited actually belongs to the defendant.

Since the enactment of the ancillary proceeding statutes, the requirement in Rule 31(e) that the court (or jury) determine the extent of the defendant's interest in the property as part of the criminal trial has become an unnecessary anachronism that leads more often than not to duplication and a waste of judicial resources. There is no longer any reason to delay the conclusion of the criminal trial with a lengthy hearing over the extent of the defendant's interest in property when the same issues will have to be litigated a second time in the ancillary proceeding if someone files a claim challenging the forfeiture. For example, in United States v. Messino, 921 F. Supp. 1231 (N.D. Ill. 1996), the court allowed the defendant to call witnesses to attempt to establish that they, not he, were the true owners of the property. After the jury rejected this evidence and the property was forfeited, the court conducted an ancillary proceeding in which the same witnesses litigated their claims to the same property.

A more sensible procedure would be for the court, once it determines that property was involved in the criminal offense for which the defendant has been convicted, to order the forfeiture of whatever interest a defendant may have in the property without having to determine exactly what that interest is. If third parties assert that they have an interest in all or part of the property, those interests can be adjudicated at one time in the ancillary proceeding. And if no third party files a claim, the property can be forfeited in its entirety.

This approach would also address confusion that occurs in multi-defendant cases where it is clear that each defendant should forfeit whatever interest he may have in the property used to commit the offense, but it is not at all clear which defendant is the actual owner of the property. For example, suppose A and B are co-defendants in a drug and money laundering case in which the government seeks to forfeit property involved in the scheme that is held in B's name but of which A may be the true owner. It makes no sense to invest the court's time in determining which of the two defendants holds the interest that should be forfeited. Both defendants should forfeit whatever interest they may have. Moreover, to the extent that the current rule forces the court to find that A is the true owner of the property, it gives B the right to file a claim in the ancillary proceeding where he may attempt to recover the property despite his criminal conviction. United States v. Real Property in Waterboro, 64 F.3d 752 (1st Cir. 1995) (co-defendant in drug/money laundering case who is not alleged to be the owner of the property is considered a third party for the purpose of challenging the forfeiture of

the other co-defendant's interest).

The revised Rule resolves these difficulties by postponing the determination of the extent of the defendant's interest until the ancillary proceeding. Under this procedure, the court, at any time within 10 days after the verdict in the criminal case, would hold a hearing to determine if the property was subject to forfeiture in accordance with the applicable statute -- e.g., whether the property represented the proceeds of the offense, was used to facilitate the offense, or was involved in the offense in some other way. It would not be necessary to determine at this stage what interest any defendant might have in the property. Instead, the court would order the forfeiture of whatever interest each defendant might have in the property and conduct the ancillary proceeding. If no one filed a claim in the ancillary proceeding, the court would enter a final order forfeiting the property in its entirety. On the other hand, if someone did file a claim, the court would determine the respective interests of the defendants versus the third party claimants and amend the order of forfeiture accordingly.

Subsection (c) replaces Rule 32(d)(2) (effective December 1, 1996). It provides that once the court enters a preliminary order of forfeiture directing the forfeiture of whatever interest each defendant may have in the forfeited property, the government may seize the property and commence an ancillary proceeding to determine the interests of any third party. Again, if no third party files a claim, the court, at the time of sentencing, will enter a final order forfeiting the property in its entirety. If a third party files a claim, the order of forfeiture will become final as to the defendant at the time of sentencing but will be subject to amendment in favor of a third party pending the conclusion of the ancillary proceeding.

Subsection (d) sets forth a set of rules governing the conduct of the ancillary proceeding. When the ancillary hearing provisions were added to 18 U.S.C. § 1963 and 21 U.S.C. § 853 in 1984, Congress apparently assumed that the proceedings under the new provisions would involve simple questions of ownership that could, in the ordinary case, be resolved in 30 days. See 18 U.S.C. § 1963(l)(4). Presumably for that reason, the statute contains no procedures governing motions practice or discovery such as would be available in an ordinary civil case.

Experience has shown, however, that ancillary hearings can involve issues of enormous complexity that require years to resolve. See United States v. BCCI Holdings (Luxembourg) S.A., 833 F. Supp. 9 (D.D.C. 1993) (ancillary proceeding involving over 100 claimants and $451 million); United States v. Porcelli, CR-85-00756 (CPS), 1992 U.S. Dist. LEXIS 17928 (E.D.N.Y Nov. 5, 1992) (litigation over third party claim continuing 6 years after RICO conviction). In such cases, procedures akin to those

available under the Federal Rules of Civil Procedure should be available to the court and the parties to aid in the efficient resolution of the claims.

Because an ancillary hearing is part of a criminal case, it would not be appropriate to make the civil Rules applicable in all respects. The amendment, however, describes several fundamental areas in which procedures analogous to those in the civil Rules may be followed. These include the filing of a motion to dismiss a claim, the conduct of discovery, the disposition of a claim on a motion for summary judgment, and the taking of an appeal from final disposition of a claim. Where applicable, the amendment follows the prevailing case law on the issue. See, e.g., United States v. Lavin, 942 F.2d 177 (3rd Cir. 1991) (ancillary proceeding treated as civil case for purposes of applying Rules of Appellate Procedure); United States v. BCCI Holdings (Luxembourg) S.A. (In re Petitions of General Creditors), 919 F. Supp. 31 (D.D.C. 1996) ("If a third party fails to allege in its petition all elements necessary for recovery, including those relating to standing, the court may dismiss the petition without providing a hearing"); United States v. BCCI (Holdings) Luxembourg S.A. (In re Petition of Department of Private Affairs), 1993 WL 760232 (D.D.C. 1993) (applying court's inherent powers to permit third party to obtain discovery from defendant in accordance with civil rules). The provision governing appeals in cases where there are multiple claims is derived from Fed.R.Civ.P. 54(b).

Subsection (e) replaces the forfeiture provisions of Rule 38(e) which provide that the court may stay an order of forfeiture pending appeal. The purpose of the provision is to ensure that the property remains intact and unencumbered so that it may be returned to the defendant in the event his appeal is successful. Subsection (e) makes clear, however, that a district court is not divested of jurisdiction over an ancillary proceeding even if the defendant appeals his or her conviction. This allows the court to proceed with the resolution of third party claims even as the appeal is considered by the appellate court. Otherwise, third parties would have to await the conclusion of the appellate process even to begin to have their claims heard. See United States v. Messino, 907 F. Supp. 1231 (N.D. Ill. 1995) (the district court retains jurisdiction over forfeiture matters while an appeal is pending).

Finally, subsection (e) provides a rule to govern what happens if the court determines that a third-party claim should be granted but the defendant's appeal is still pending. The defendant, of course, is barred from filing a claim in the ancillary proceeding. See 18 U.S.C. § 1963(l)(2); 21 U.S.C. § 853(n)(2). Thus, the court's determination, in the ancillary proceeding, that a third party has an interest in the property superior to that of the defendant cannot be binding on the

defendant. So, in the event that the court finds in favor of the third party, that determination is final only with respect to the government's alleged interest. If the defendant prevails on appeal, he recovers the property as if no conviction or forfeiture ever took place. But if the order of forfeiture is affirmed, the amendment to the order of forfeiture in favor of the third party becomes effective.

Subsection (f) makes clear, as courts have found, that the court retains jurisdiction to amend the order of forfeiture to include substitute assets at any time. See United States v. Hurley, 63 F.3d 1 (1st Cir. 1995) (court retains authority to order forfeiture of substitute assets after appeal is filed); United States v. Voight, ___ F.3d ___, 1996 WL 380609 (3rd Cir. Jul. 9, 1996) (following Hurley). Third parties, of course, may contest the forfeiture of substitute assets in the ancillary proceeding. See United States v. Lester, 85 F.3d 1409 (9th Cir. 1996).

INTRODUCTORY NOTE: ADMIRALTY RULES B, C, and E

These proposals to amend the Admiralty Rules come from the Maritime Law Association. The Department of Justice is responsible for Rule C(1), which reflects an effort to adapt the Supplemental Rules to the special circumstances presented by forfeiture proceedings.

The proposals have been on the agendas for earlier meetings, but in circumstances that have prevented adequate drafting review by the Reporter or any study by the Committee. The drafting nits have now been picked, at least in part. The mood of the proposals, so far as drafting is concerned, is to avoid the temptation to improve the opaque drafting of the original rules. The MLA committee resists unnecessary departures from the familiar. The ever-present risk that style revisions may bring unanticipated consequences supports this approach. Some style questions are reflected in the drafts and in the notes that follow.

The substance of these proposals reflects the judgment of the MLA committee and the Department of Justice.

Only the most recent correspondence is attached, and it may not be necessary. The draft Committee Notes are intended to describe the changes and the underlying purposes.

Rule C. Actions in Rem: Special Provisions

* * * * *

(2) Complaint. In an actions in rem the complaint shall:

(a) be verified [on oath or solemn affirmation];

(b) ~~It shall~~ describe with reasonable particularity the property that is the subject of the action;

(c) ~~and~~ in an admiralty and maritime proceeding, state that the property is within the district or will be within the district during the pendency of the action;

(d) in a forfeiture proceeding, if the property is located outside the district, state the statutory basis for the court's exercise of jurisdiction over the property; and

(e) ~~I~~in an actions ~~for the enforcement of~~ to enforce a forfeitures for violation of a[ny] statute of the United States, ~~the complaint shall~~ state the place of seizure and whether it was on land or on navigable waters, and ~~shall~~ contain [~~such~~][the] allegations [~~as may be~~] required by the statute ~~pursuant to~~ under which the action is brought.

(3) Judicial Authorization and Process.

(a) In actions by the United States for forfeitures for federal statutory violations, the clerk, upon filing of the complaint, shall forthwith issue a [summons and] warrant for the arrest of the vessel or other property without requiring a certification of exigent circumstances. In other actions ~~Except in actions by the United States for forfeitures for federal statutory violations~~, the verified complaint and any supporting papers shall be reviewed by the court and, if the conditions for an action in rem appear to exist, an order

so stating and authorizing a warrant for the arrest of the vessel or other property that is the subject of the action shall issue and be delivered to the clerk who shall prepare the warrant. If the plaintiff or the plaintiff's attorney certifies that exigent circumstances make review by the court impracticable, the clerk shall issue a ~~summons and~~ warrant for the arrest and the plaintiff shall have the burden on a post-arrest hearing under Rule E(4)(f) to show that exigent circumstances existed.

(b) If the property is a vessel or ~~a vessel and~~ tangible property on board ~~the~~ a vessel, the warrant or[and?] any supplemental process shall be delivered to the marshal for service.

(c) If other property, tangible or intangible[,] is the subject of the action, the warrant shall be delivered by the clerk to a person or organization authorized to enforce it, who may be a marshal, a person or organization contracted with by the United States, a person specially appointed by the court for that purpose, or, if the action is brought by the United States, any officer or employee of the United States.

(d) If the property that is the subject of the action consists in whole or in part of freight, or the proceeds of property sold, or other intangible property, the clerk shall issue a summons directing any person having control of the funds to show cause why they should not be paid into court to abide the judgment.

(e) Supplemental process enforcing the court's order may be issued by the clerk upon application without further order of the court.

~~If the plaintiff or the plaintiff's attorney certifies that exigent circumstances make review by the court impracticable, the clerk~~

~~shall issue a summons and warrant for the arrest and the plaintiff shall have the burden on a post-arrest hearing under Rule E(4)(f) to show that exigent circumstances existed. In actions by the United States for forfeitures for federal statutory violations, the clerk, upon filing of the complaint, shall forthwith issue a summons and warrant for the arrest of the vessel or other property without requiring a certification of exigent circumstances.~~

(4) **Notice.** No notice other than the execution of process is required when the property that is the subject of the action has been released ~~in accordance with~~ under Rule E(5). If the property is not released within 10 days after execution of process, the plaintiff shall promptly or within such time as may be allowed by the court cause public notice of the action and arrest to be given in a newspaper of general circulation in the district, designated by order of the court. ~~Such~~ The notice shall specify the time within which a[ny] claim against the property seized, appearance, or ~~the~~ answer is required to be filed as provided by subdivision (6) [(a) or (b)] of this rule. This rule does not affect the requirements of notice in actions to foreclose a preferred ship mortgage ~~pursuant to~~ under the Act of June 5, 1920, ch. 250, § 30, as amended.

* * * * *

(6) **~~Claim and Answer~~ Responsive Pleading; Interrogatories**

(a) **Civil Forfeiture[s].** In an[y] action in rem to enforce a forfeiture for violation of a federal statute, a[ny] person who asserts a right of possession or an equity ownership interest in the property or a claim against the property that is the subject of the action must file an appearance and statement identifying [~~their~~][the] interest or a claim against the property within 20 days after [the] receipt of actual notice of [the] execution of [the] process or the final publication of [such] notice as provided in [~~subsection~~][subdivision] (4),

whichever is earlier, or within such additional time as may be allowed by the court, and shall serve an answer within 20 days after [the] filing [of] the appearance and statement of interest or claim against the property. [Any such] [The] appearance and statement of interest or claim shall be verified [by oath or solemn affirmation]. If the appearance and statement of interest or claim against the property is made [~~on behalf of~~] [by] an agent, bailee, or attorney for the appearing party or claimant, it shall state that the agent, bailee, or attorney is [~~duly~~] authorized to file the appearance and statement of interest or claim against the property. At the time of answering the appearing party or claimant must also serve answers to any interrogatories served with the complaint. In actions in rem interrogatories may be so served without leave of court.

(b) **Maritime Arrests and Other Proceedings.** A[ny] person who asserts a right of possession or an equity ownership interest in ~~The claimant of~~ property that is the subject of an action in rem shall file ~~a claim~~ an appearance and statement identifying [~~their~~][the] interest within 10 days after process has been executed or within 10 days after the last date of publication [as provided by][under] subdivision (4) of this rule, whichever is earlier, or within such additional time as may be allowed by the court, and shall serve an answer within 20 days after [the] filing [of] the appearance and statement of interest ~~claim~~. The [appearance and] statement of interest ~~claim~~ shall be verified [on oath or solemn affirmation], and shall state the interest in the property by virtue of which ~~the claimant~~ [said party][the appearing party] demands its restitution ~~and~~ or the right to defend the action. If the ~~claim~~ appearance and statement of interest is made [~~on behalf of~~] ~~the person entitled to possession~~ [~~the appearing party~~] by an

agent, bailee, or attorney for the appearing party, it shall state that the agent, bailee, or attorney is ~~duly~~ authorized to ~~make~~ file the ~~claim~~ appearance and statement of interest. At the time of answering the ~~claimant~~ appearing party shall also serve answers to any interrogatories served with the complaint. In actions in rem interrogatories may be so served without leave of court.

[(c) Interrogatories. Interrogatories may be served with the complaint in an in rem action without leave of court. Answers to the interrogatories must be served at the time of answering under paragraph (a) or (b).](This would replace the last two sentences of both (a) and (b).)

Committee Note

Subdivision (2). In rem jurisdiction originally extended only to property within the judicial district. Since 1986, Congress has enacted a number of jurisdictional and venue statutes for forfeiture and criminal matters that in some circumstances permit a court to exercise authority over property outside the district. 28 U.S.C. § 1355(b)(1) allows a forfeiture action in the district where an act or omission giving rise to forfeiture occurred, or in any other district where venue is established by § 1395 or by any other statute. § 1355(b)(2) allows an action to be brought as provided in (b)(1) or in the United States District Court for the District of Columbia when the forfeiture property is located in a foreign country or has been seized by authority of a foreign government. § 1355(d) allows a court with jurisdiction under § 1355(b) to cause service in any other district of process required to bring the forfeiture property before the court. § 1395 establishes venue of a civil proceeding for forfeiture in the district where the forfeiture accrues or the defendant is found; in any district where the property is found; in any district into which the property is brought, if the property initially is outside any judicial district; or in any district where the vessel is arrested if the proceeding is an admiralty proceeding to forfeit a vessel. Section 1395(e) deals with a vessel or cargo entering a port of entry closed by the President, and transportation to or from a state or section declared to be in insurrection. 18 U.S.C. § 981(h) creates expanded jurisdiction and venue over property located elsewhere that is related to a criminal prosecution pending in the district. These amendments, and related amendments to Rule E(3), bring the Admiralty rules into step with the new statutes. No change is made as to admiralty and maritime proceedings that do not involve a forfeiture governed by one of the new statutes.

Subdivision (2) has been broken into separate paragraphs to facilitate understanding.

Subdivision (3). Subdivision (3) has been rearranged and divided into lettered paragraphs to facilitate understanding.

Paragraph (b) is amended to make it clear that any supplemental process as well as the original warrant is to be served by the marshal.

References to issuance of "summons" by the clerk in the provisions now relocated in paragraph (a) have been deleted as unnecessary. Ordinarily it is the clerk, not the court, that issues the summons.

Subdivision (4). Subdivision (4) has required that public notice state the time for filing an answer, but has not required that the notice set out the earlier time for filing a claim or appearance. Rule C(6) requires both an appearance or claim and an answer. Subdivision (4) is amended to require that both times be stated.

Subdivision (6). Subdivision (6) has applied a single set of undifferentiated provisions to civil forfeitures and to in rem admiralty proceedings. These proceedings are distinguished by adopting a new paragraph (a) for civil forfeitures and recasting the present rule as paragraph (b) for in rem admiralty proceedings. [The provision for interrogatories and answers is carried forward as paragraph (c).]

Paragraph (a) provides more time for filing an appearance or claim than paragraph (b) provides for filing an appearance. In forfeiture proceedings governed by paragraph (a), the time is 20 days from actual notice of execution of process or 20 days from final publication of subdivision (4) notice. In maritime in rem proceedings, the time is 10 days from execution of process or 20 days after the last date of publication. Paragraph (b) provides a shorter time because admiralty cases frequently involve great expense both in diverting arrested property from its ordinary use and in caring for the arrested property.

Paragraph (a) provides for filing claims in forfeiture proceedings. There is no parallel provision in paragraph (b), which reflects a decision to adhere to t he traditional practice in maritime in rem proceedings. An appearance and statement of interest is required and appropriate in a maritime proceeding only as to those who assert ownership or a right to possession. Other claims should be raised by a motion to intervene under Civil Rule 24, as it may be supplemented by local admiralty rules.

Paragraph (b) does not limit the right to make a restricted appearance under Rule E(8).

Expert Testimony Proposals

A number of proposals have been made with respect to expert witness testimony. All are in the stages of early experimentation. All are interesting. All may be premature. This Note sketches some of the proposals and some related possibilities, with an eye to stimulating discussion of possible Committee approaches.

Common Grounds

All of the proposals spring from common concerns about the use of adversary expert testimony. None of them advances an agenda for dramatic reform. All assume that adversary-selected, adversary-coached, adversary-paid expert witnesses will continue as the primary source of expert assistance to judges and juries.

One concern is that the most expert of experts are not willing to appear as expert witnesses because of the time and disruption required to appear at trial.

A closely related concern is that these best experts may not be willing to appear on behalf of a party in the role of sworn advocate.

Both of these first concerns arise with respect to one-shot litigation arising from unique events. They also may arise with respect to regularly repeated litigation. Product-liability actions offer a common example of a setting in which the same basic events may be tried again and again, presenting the same experts on wheel-rim design, quality control measures in drug manufacturing, the carcinogenic or teratogenic qualities of a product, and so on.

Proposals

The concern arising from demands on the expert witness' s time can be addressed by adopting a rule that allows presentation of expert witness testimony by deposition. The deposition can be scheduled at the convenience of the witness. The obvious place for such a provision would be in Civil Rule 32. This is the simplest proposal. It would have to be decided whether the trial deposition could be noticed only by the party calling the witness, or by any party. Probably the rule should provide that the purpose of using the deposition at trial should be included in the notice. Perhaps provision should be made for use against parties added after the notice or after the deposition.

Although it would complicate the revisions made when Rule 26(a)(2) was adopted to require disclosure of expert witness testimony, it also would be possible to provide for two depositions if the opportunity to take one deposition after disclosure does not seem a sufficient safeguard. A "discovery" deposition could be scheduled first, followed by a "trial" deposition. This approach might best be implemented by working through both Rule 26(b)(4) and 32.

Some thought might be given to the desirability of providing

for a presiding officer at a trial deposition. It is difficult to guess whether an explicit trial deposition procedure would encourage such frequent obstructive deposition behavior as to justify a provision for a neutral presiding officer. The broadest likely provision would allow any party to request designation of a judicial officer (including a special master) before the deposition begins. Narrower provisions would tail down to one that simply reminds the parties that actual bad behavior will be met by sanctions and completion of the deposition before judge, magistrate judge, or other appointed officer.

Unwillingness to appear as an adversary expert can be addressed by expanding Evidence Rule 706, or perhaps by encouraging more active use of Rule 706 as it stands. In combination with a provision for trial depositions rather than living trial testimony, it might be possible to encourage testimony by many experts who now decline the opportunity.

Repeated litigation of the same issues suggests a special role for trial depositions. The important task would be to define a procedure that is a satisfactory substitute for examination and cross-examination by the parties to each actual action. The problem would arise with respect to defendants as well as plaintiffs – in a product-liability action, for example, successive actions would involve not only different plaintiffs, but often different defendants as well. It may be easier to develop persuasive safeguards with respect to court-appointed experts than with respect to adversary experts. Cross-examination by a set of experienced and representative plaintiffs and defendants might be protection enough; initial examination by the court might be possible as well, and indeed less of a problem than it is when trial examination of an expert witness is conducted by the court that appointed the expert for one specific trial. Current MDL procedures may support this practice in many of the situations that make it most attractive.

Attached are Orders Nos. 31 and 31B entered by Judge Sam Pointer in the silicone gel breast implant litigation. They provide both an illustration of a way in which an inventive judge has begun to address problems like these in very large-scale litigation and a basis for thinking about related problems. They also suggest a related topic that is on the "holding" agenda of this committee. A committee of special masters is used to help the court with the process of selecting expert witnesses; it may be that a nonexpert will be appointed, probably also under Civil Rule 53, to help the expert witnesses perform their witnessing functions. This is but one illustration of the myriad ways in which the use of special masters has grown beyond the limits contemplated when Rule 53 was drafted. The illustration may be some stimulus for bringing Rule 53 back closer to the agenda of topics for active consideration.

Other Witnesses

Multiple depositions of the same witnesses affect fact

witnesses as well as expert witnesses. Both state and federal courts have been devising means to get around the limits of discovery and evidence rules to facilitate "once-for-all" deposition practice. It is proper to ask whether the time has come to take on this topic as well. Fact witnesses should be approached more cautiously than expert witnesses. They play an unquestionably central and legitimate role that cannot be claimed by expert witnesses. Unfettered individual adversary opportunity to engage in discovery is accordingly more important. There also may be greater problems with individual witnesses whose fact knowledge overlaps common and indidivudal issues.

The purpose of joint depositions could be aimed, as the expert proposals, at trial use. It could be limited more narrowly to discovery, leaving use at trial to present rules. The distinction might be confounded by summary judgment practice, however, and in any event may be more difficult to draw than appears at first sight.

The first step to take in considering joint deposition practice that reaches across the boundaries of separate actions is simple. Information should be gathered on the means that have been used by adventurous federal and state judges. It should not be difficult to identify a reasonable number of judges to ask for help.

Once practical information is in hand, it will be easier to begin thinking about the obvious questions. A conservative practice, for example, would limit joint depositions to use in actions that were pending when the deposition was taken, and would allow use of the depositions over objection only as to parties who had been given notice and an opportunity to participate. Managing depositions on that scale might prove challenging. Less conservative methods likely would require parallel amendments of Civil and Evidence rules. It might be possible to think of "class" depositions that are not incident to a class action – it would be an interesting question whether the Enabling Act would support a federal class deposition that would be usable in any state action on terms dictated by the federal rule, or on the same terms as a deposition taken under state practice for that specific action.

The threshold for allowing joint depositions also would demand attention. Should it be enough that two parallel actions are pending, or should the procedure be reserved for more dramatic settings? How much overlap of fact should be required, and how important should the common issues be to the individual actions?

The inevitable overlap between joint and individual discovery also must be confronted. Some witnesses will have information that bears on common issues, and other information that bears on individual issues. The simplest approach would be to limit the joint deposition to common issues, leaving the witness for as many individual depositions as may be useful on individual issues. This approach would be essential if the joint deposition were to be available for use against litigants who were not notified of it.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
Southern Division

In re:
SILICONE GEL BREAST IMPLANT PRODUCTS LIABILITY LITIGATION
(MDL 926)

Master File No. CV 92-P-10000-S

This Order Applies to All Cases

ORDER No. 31
(Appointment of Rule 706 Expert Witnesses)

Several federal Transferor Courts[1] have, after remand, indicated the desirability of designating one or more court-appointed experts under Fed. R. Evid. 706 to evaluate and critique pertinent scientific literature and studies bearing on issues in breast implant litigation pending in, or to be remanded to, such courts. It is likely that other federal courts will also wish to take advantage of Rule 706 for such purposes and that some state courts may likewise wish to utilize state-law counterparts of Rule 706.

Before this Court is a motion by the National Plaintiffs' Steering Committee ("PSC") requesting that, given the objective of coordinated pretrial proceedings under 28 U.S.C. § 1407, this Court assume responsibility for the appointment on a national basis of such Rule 706 experts as may be appropriate. Although expressing reservations about the utility and role of such experts at least at the present time, the PSC argues that, in the interest of avoiding potentially redundant or even conflicting results in potential testimony arising from multiple Rule 706 appointments by different courts, it would be preferable to have a single set of nationally-appointed experts, whose testimony might be potentially usable in the many federal courts to which breast-implant cases have been (or in the future may be) remanded,[2] as well as in state courts in which there are state-law counterparts of Rule 706. There is also the potential that such

---

1. In an order dated April 3, 1996, Judges Weinstein and Baer of the United States District Courts for the Eastern and Southern Districts of New York, concurred in by Judge Lobis of the state Supreme Court for New York County, appointed a three-person panel to assist those federal courts in selecting an appropriate panel of knowledgeable and neutral experts pursuant to Rule 706. Judge Jones of the United States District Court for Oregon has also begun efforts to locate appropriate experts for appointment under Rule 706.

2. Over 21,000 cases have been transferred to this Court under 28 U.S.C. § 1407 from 92 of the 94 federal districts, no cases having yet been transferred from Guam or the Northern Marianas. Over 300 cases have already been remanded by this Court to 45 separate district courts.

appointments and resulting testimony might be of value in the bankruptcy proceedings involving Dow Corning now pending in the Bankruptcy Court for the Eastern District of Michigan. The defendants say they object to formation of a Rule 706 Panel.[3] Upon consideration, after reviewing the parties' written and oral submissions—and after consulting with, and receiving encouragement from, Judges Baer, Jones, and Weinstein, as well as other state and federal judges—this Court concludes that the motion should be granted, and conditionally, as indicated in paragraph 5, orders as follows:

1. Procedure. Appointments will be made on a national basis by this Court, for potential use in all federal courts and as permitted in state courts, in a two-step process patterned after the procedures adopted in the New York federal courts: first, by utilizing a "Selection Panel" to assist in the selection process, as described in paragraph 2; and second, by then appointing persons to serve under Rule 706 as court-appointed experts and as members of a "Science Panel," as described in paragraph 3.

2. Selection Panel.

(a) As an initial step, this Court, acting under Rule 706 and under the supervisory powers conferred by Fed. R. Civ. P. 16(c)(4),(8), (12), and (16), hereby designates the following to act as Special Masters under Fed. R. Civ. P. 53 and Rule 706, collectively referred to as the "Selection Panel"—

(1) the persons previously designated by the Eastern and Southern Districts of New York; namely,

Professor Margaret A. Berger (Chair), Brooklyn, New York,
Dr. Joel E. Cohen, New York, New York, and
Dr. Alan Wolf, New York, New York; and,

(2) as additional members, suggested by federal or state judges in other parts of the country, the following—

Dr. Judith L. Craven, Houston, Texas,
Dr. Richard Jones, Portland, Oregon, and
Dr. Keith Marton, San Francisco, California.

(b) This Court requests that the Selection Panel provide it with names of neutral, impartial persons who have the indicated expertise, who would be able to communicate effectively with judges and jurors, and who, if selected, would be willing to serve under Rule 706 on the Science Panel as outlined in paragraph 3. The Selection Panel should not solicit, or receive, suggestions from the parties regarding the names of potential nominees for appointment to the Science Panel, but may receive general suggestions from the parties respecting criteria, qualifications, and possible areas affecting bias or conflicts.

---

3. It is unclear whether the defendants are mimicking Br'er Rabbit or are concerned about courts receiving testimony from impartial experts.

(1) The Selection Panel should recommend to this Court one to three neutral persons with appropriate expertise in each of the following four fields (and, to the extent needed, in statistics): epidemiology, immunology, rheumatology, and toxicology. After receiving the advice of the Selection Panel and hearing from the parties, the Court will determine whether to accept from the parties "challenges for cause" or, if three such persons are recommended by the Selection Panel for such a position, to allow each side a "peremptory challenge."

(2) The Selection Panel need not wait to communicate its recommendations until its nominees for all three fields have been determined. As the Selection Panel determines the person(s) whom it will nominate for appointment as an expert in any of the indicated fields, it should submit such recommendation(s) to this Court so that, upon appointment, the expert may receive additional instructions as indicated in paragraph 3(b) and then commence his or her work under Rule 706 even if the full Science Panel has not been appointed.

(3) The Selection Panel may also recommend one or more persons with special expertise in the interrelationship between the forensic sciences and legal processes and procedures, for appointment as Chair of the Science Panel and to be of assistance to other members of the Panel in performing their responsibilities. The Court anticipates that such a person, if appointed, would not be called upon to submit findings, be deposed, or present testimony as indicated in paragraph 3, but would rather perform administrative, coordinating, and consultative services for the Science Panel.

(4) As an interim measure, the Court directs the plaintiffs (acting jointly through the PSC) and the defendants (acting jointly) to each provide to this Court by June 17, 1996, the designation of a rheumatologist who has not been retained (and will not be) retained by any parties to provide testimony in this litigation. These party-designated rheumatologists are to be available to members of the Selection Panel for joint consultation in identifying neutral rheumatologists for possible appointment to the Science Panel. While the parties are not precluded from designating for this purpose a rheumatologist with known and strong views concerning potential issues or with whom they may have previously consulted, they are cautioned that the members of the Selection Panel are likely to give less attention and weight to suggestions expressed by rheumatologists who themselves appear to be partisan or lacking in objectivity. The Court hopes that, with the special assistance of these party-designated rheumatologists, the Selection Panel will be able to identify, for potential court-appointment under Rule 706, one or more rheumatologists whose credentials, objectivity, and impartiality could not be reasonably questioned by plaintiffs or defendants.

(5) The Court will welcome suggestions from the Selection Panel regarding the composition, responsibilities, compensation, operation, procedures, and utilization of the Science Panel, including appropriate modifications or additions to this Order.

(c) Members of the Selection Panel may, from time to time, be assigned additional duties by this Court, such as providing guidance to the Science Panel with respect to preparation of reports and preparation for providing testimony that would be acceptable under Rules 702, 703, 705, and 706.

(d) Although the Court has no plans to appoint any members of the Selection Panel to the Science Panel, membership on the Selection Panel does not automatically disqualify a person from such appointment.

3. Science Panel.

(a) It is anticipated that on the Science Panel there will be one person whose principal area of expertise is in epidemiology, one whose principal area of expertise is in immunology, one whose principal area of expertise is in rheumatology, and one whose principal area of expertise is in toxicology—each having also such familiarity with statistics as may be needed or desirable to perform their functions and responsibilities—and perhaps an additional person to serve as Chair of the Panel, whose primary field of expertise would be the interrelationship between forensic sciences and legal procedures and processes. This Court reserves the right to appoint additional persons with special expertise in the same disciplines or in other fields and disciplines if that appears appropriate in the future.

(b) After this Court has appointed an expert in a field under Rule 706, the parties will be afforded the opportunity under Rule 706(a) to participate at a conference in which this Court will delineate the duties of the expert and indicate any topics on which the expert should, at least initially, commence reviews of the existing scientific research. Subject to further modification as may be appropriate, the following principles will serve as preliminary guidelines under Rule 706(a) for such duties.

(1) The primary function of the court-appointed experts, as presently contemplated, will be to review, critique, and evaluate existing scientific literature, research, and publications—addressing such matters as the meaning, utility, significance, and limitations of such studies—on topics as, from time to time, may be identified by the Court as relevant in breast-implant litigation, particularly on issues of "general causation." The parties may submit to the Court requests for reviews by the Science Panel relating to particular issues, indicating and describing the literature and research relied upon—or criticized—by the parties' experts when testifying on such issues.

(2) At the present time, and subject to further directions, these court-appointed experts will not be asked to conduct any independent research, to evaluate the credentials or expertise of persons who may be called by the parties to provide expert testimony, or to assess the particular claims of individual plaintiffs.

(3) The present contemplation is that—

(A) each of the Rule 706 court-appointed experts will, as appropriate to such expert's areas of expertise, individually conduct such reviews, critiques, and evaluations, and will then, after consultation with other members of the Science Panel, present written findings pursuant to Rule 706(a),[4] drawing upon other panelists' expertise in related disciplines as appropriate and to the extent permitted under Rule 703;

(B) these findings would be made and presented on particular topics and issues as they are completed (*i.e.*, without delaying until findings are completed on all topics and issues that may be referred to the Panel);

---

4. Subject to further modification, it is anticipated that the written report would contain a relatively complete statement of the opinions to be expressed by the expert; the basis and reasons therefor; the data or other information relied on in forming such opinions, and any exhibits to be used as a summary of or support for such opinions. Additionally, the first report submitted by a court-appointed expert should summarize the expert's qualifications, including a list of all publications authored within the preceding ten years and a list of any other cases in which the expert has testified at trial or by deposition within the preceding four years.

(C) a particular issue presented to the Science Panel may be reviewed (with findings made) by only one of the court-appointed experts, or the issue may be reviewed by more than one such expert, with findings made by each as appropriate to that expert's discipline and expertise; and

(D) the Science Panel may conclude that, because of the insufficiency of reported research[5] or because of research in progress, they should decline to review, or postpone review of, research with respect to particular issues or topics. It is further anticipated that the Science Panel would, through a preliminary and informal report to the Court, indicate the general nature of the expected findings by the court-appointed experts so that the Court could determine whether such findings would have sufficient probative value to justify preparation of a formal report, triggering the provisions of paragraph 3(c) and 3(d) below.

(4) Until such time that the Court appoints a rheumatologist to the Science Panel, panel members, when needing special help on rheumatological subjects, may consult on a joint basis with the rheumatologists designated by the parties under paragraph 2(b)(4) above. They may also utilize the services of other persons with special expertise in related fields and disciplines as, from time to time, may be appropriate and permissible under Rule 703, such as applied mathematics, biology, biomedicine, polymer chemistry, hematology, internal medicine, neurology, oncology, plastic and reconstructive surgery, radiology, and statistics.

(c) After receiving the report of findings of a court-appointed expert, the parties will, as provided in Rule 706, be afforded the opportunity to conduct a "discovery-type" non-videotaped deposition of the expert, subject to appropriate guidelines and limitations imposed by this Court, which may include direct supervision of the conduct of the deposition by this Court or by another judicial officer designated by this Court and which would, taking into account the details provided in the written report, limit examination to that needed by the parties to fairly prepare for the trial-perpetuation deposition described in paragraph 3(d) below. The Court hopes that the parties may agree that, before such a trial-perpetuation deposition commences, they engage in an informal discussion with the expert regarding his or her potential testimony, rather than take a formal discovery-type deposition.

(d) It is anticipated that, after the opportunity for a discovery-type deposition or informal discussion, the trial testimony of the court-appointed expert will be perpetuated by means of a videotaped deposition at which this Court (or another judicial officer designated by this Court) will preside. It is further anticipated that this Court (or the judicial officer designated by this Court) may conduct the initial direct examination of such expert, with the plaintiffs and defendants then being allowed to cross-examine the expert. Experts retained by the parties may attend the deposition in order to assist counsel in examining the court-appointed expert.

(e) Except for good cause shown to this Court, plaintiffs and defendants will not be permitted to depose a court-appointed expert except as provided in paragraph 3(c) and 3(d) above or to subpoena a court-appointed expert to testify in person at a trial. These restrictions are essential to protect court-appointed experts from potential demands for attendance at depositions or trials in the hundreds or perhaps thousands of cases in which their testimony might be deemed desirable by the trial judge presiding over such cases or by one of the parties.

---

5. Insufficiency of research on an issue should not necessarily, however, result in the Panel's declining to approve issuance of findings, since, on some topics, a determination that no pertinent research exists could itself be a significant finding.

(f) This Court finds that, by analogy to Fed. R. Civ. P. 32(a)(3)(D) and (E), the videotaped trial-perpetuation deposition (or an edited version of such deposition) will be usable in all federal courts (and in all state courts to the extent permitted by applicable state law) as determined to be relevant by the judge presiding over such trial. As provided in Rule 706(a), the expert may be called to testify (by means of the deposition) either by the trial court or by a party. As provided in Rule 706(c), the trial court will determine, in the exercise of its discretion, whether or not the fact that the deponent is a court-appointed expert should be disclosed to the jury (and, as needed, to direct appropriate editing of the deposition consistent with that determination).

(g) As provided in Rule 706(d), neither the appointment of the Science Panel nor the findings by members of the Science Panel will preclude the parties from calling expert witnesses of their own selection.[6] This Court does not view entry of this Order as calling for the delay or rescheduling of any trials that may have been set by other courts; it will be for the trial judge before whom a case is pending to determine whether the pendency of any review by the Science Panel should affect the trial setting of that case.

4. Compensation and Funding.

(a) As provided in Rule 706, the persons appointed to the Selection Panel and to the Science Panel will be entitled to reasonable compensation for their services, together with reimbursement for reasonable expenses, as this Court may from time to time allow. This will include compensation and reimbursement for services already undertaken by the persons named in paragraph 2(a)(1) under appointment from the Eastern and Southern Districts of New York. The fees and reimbursement of the consulting rheumatologists named under paragraph 2(b)(4) shall be borne by the parties designating such persons.

(b) This Court will seek at least partial funding of these costs from the Administrative Office of the United States Courts. To the extent these costs exceed any funds so available, they shall be paid (1) one-half by the plaintiffs, through a charge against the National PSC and against the Common Benefit Fund established under Order No. 13, and (2) one-half by the national defendants in a manner to be agreed upon by them.

5. Effect. Under Rule 706, the parties in MDL 926 are directed to show cause to this Court by June 10, 1996, why this order should not take effect on June 12, 1996. Although, pending consideration of any such responses, this order is conditional and, based on such responses, might be vacated or modified prior to June 12, 1996, the persons appointed in paragraph 2(a) to the Selection Panel may, and are encouraged to, proceed with preliminary efforts to identify appropriate persons for possible nomination as members of the Science Panel.

This the 30th day of May, 1996.

United States District Judge

Service on: National Liaison Counsel
Members of Selection Panel

---

6. Findings by the court-appointed experts may, however, be relevant to, and be considered by trial courts in ruling on, issues raised under Rules 104, 403, 702, 703, and 803(18) regarding admissibility of expert testimony and published research offered by the parties.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
Southern Division

In re:
SILICONE GEL BREAST IMPLANT PRODUCTS LIABILITY LITIGATION
(MDL 926)

Master File No. CV 92-P-10000-S

ORDER No. 31B
(Confirming Order No. 31)

In Order No. 31 the parties were directed to show cause why the terms of that order should not be made effective. No opposition to the terms of that order has been submitted by plaintiffs. Responses have been filed by certain of the settling defendants; namely, Baxter, Bristol-Myers, and 3M.[1]

As a fundamental matter, the settling defendants question whether this court, acting under 28 U.S.C. § 1407 on pretrial matters, has authority to appoint "trial" experts under Fed. R. Evid. 706. The short, but correct, answer is that any implementation of Rule 706 procedures must be commenced during the pretrial stage of a case and that many, if not most, of the pretrial activities of a transferee judge under §1407—such as supervision of depositions and production of documents—are undertaken for the very reason that such matters may be needed at a trial. Nor, given the procedures tentatively established under Order No. 31 and the modifications that may be made at the time of assigning specific responsibilities to panel members, should there be any impermissible infringement on the powers of the trial judge before whom a particular case may be

1. Additionally, counsel for Dow Corning has filed a response regarding the potential use in the bankruptcy proceedings involving Dow Corning of findings by members of the national Science Panel. Questions raised in that response are ones that would be presented and considered by the Bankruptcy Judge and District Judge before whom the bankruptcy is pending.

set for trial.

The defendants raise a series of specific concerns, which are listed below, followed by the Court's evaluation of such concerns:

(1) "The parties and the Court may have too much influence in the front end of the process" (*e.g.*, selection of experts and subjects). Court: Rule 706 contemplates, and effectively mandates, such involvement by parties and the court.

(2) "There is not enough influence from lawyers and the trial courts at the back end of the process" (*e.g.*, presentation of findings at a trial). Court: Under Order No. 30 (and further details may be developed as the process continues), trial courts will have ample powers to control how, and to what extent (if any), findings would be usable at trial.

(3) Party-designated rheumatologists should be used as consultants to the Selection Panel only as a last resort and should never be used, even jointly, as consultants to the Science Panel. Court: The order contemplates this "last resort" use by party-designated rheumatologists in helping the Selection Panel find appropriate rheumatologists who might be appointed to the Science Panel by the Court. Only if no such rheumatologist can be located would the party-designated rheumatologists be available—if needed—to consult jointly with the court-appointed experts serving on the Science Panel.

(4) The parties should have the opportunity to depose court-appointed experts on more than one occasion. Court: Should it be shown to this Court that there is a need to redepose a court-appointed expert, that could be done. However, it would not be appropriate to permit each of the potentially hundred of judges around the country to authorize such additional depositions, and, instead, if it were shown to another judge that an additional deposition was necessary, that judge could rule that, absent such additional deposition, the video-taped trial deposition could not be used.

(5) There should be no preliminary report by court-appointed experts on the basis of which the court could determine whether the expected findings would have sufficient probative value to justify preparation of a formal report (and implementation of the deposition procedures). Court: This is a matter that is more appropriately considered at the time a particular issue is to be referred to the Science Panel.

(6) The Science Panel should produce a joint report. Court: Under the rules of evidence there would be significant problems of admissibility if findings were submitted as joint findings of the panel, rather than as findings by an individual expert (albeit after consultation with other panel members and considering their views and opinions to extent permitted under

Rule 703).

(7) The court should not conduct the direct examination of the court-appointed experts. Court: The order indicates only that this "may" occur; it certainly can be reconsidered further along in the process. However, initial examination by the court has the advantage of avoiding the appearance that the court-appointed expert has, because of the content of the findings, become an expert for the plaintiffs or for the defendants.

(8) Parties should be allowed to present in camera questions of competency and bias before appointments are made by the court. Court: This is a matter that will be further explored before any appointments are made.

(9) The portion of costs chargeable against plaintiffs should not be paid from the Common Benefit/Expense Fund. Court: It appears highly unlikely that this fund will ever be sufficiently large to pay all of the common benefit expenses incurred by plaintiffs' counsel, and charging the costs of the Rule 706 process against that fund is an equitable method for assessing those costs among all plaintiffs and claimants.

(10) The court should not appoint a non-scientist Chair of the Science Panel. Court: Whether or not such an appointment may be made is problematic, and the court is seeking the advice of the Selection Panel as to whether such an appointment should be made and, if so, who should be appointed. The Court rejects the defendants' implications that knowledge of judicial processes and procedures would taint the integrity of findings by members of the Science Panel.

After considering the responses, the Court concludes that the appointment process under Rule 706 should proceed and that Order No. 30 should therefore be treated as effective, but with appropriate reserved power in the court to make appropriate changes and modifications as the process continues.

This the 13th day of June, 1996.

Chief Judge Sam C. Pointer, Jr.

LEONIDAS RALPH MECHAM
Director

CLARENCE A LEE, JR
Associate Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K RABIEJ
Chief
Rules Committee Support Office

November 8, 1996
Via Facsimile

MEMORANDUM TO ADVISORY COMMITTEE ON EVIDENCE RULES

SUBJECT: *Agenda Material for the November 12, 1996, Committee Meeting*

Judge Smith requested Professor Capra to prepare the attached memorandum on the expanded use of the residual exception, which was left open at the April 1996 committee meeting for further attention. The matter will be considered at the upcoming committee meeting. Earlier we had sent to you via facsimile another agenda item prepared by Professor Capra, dealing with the residual exception notice requirement.

John K. Rabiej

Attachment

cc: Honorable Alicemarie H. Stotler
Professor Daniel R. Coquillette

FORDHAM
University School of Law

Lincoln Center, 140 West 62nd Street, New York, NY 10023-7485

Daniel J. Capra
Philip Reed Professor of Law

Phone: 212-636-6855
e-mail:dcapra@mail.lawnet.fordham.edu
Fax: 212-636-6899

Memorandum To: Members of the Advisory Committee on the Federal Rules of Evidence
From: Daniel Capra, Reporter
Re: Expanded Use of the Residual Exception
Date: November 7, 1996

I. Introduction

The minutes of the April, 1996 meeting of the Advisory Committee indicate that the Reporter "should look into the expanded use of the residual exception." This memorandum is addressed to that issue. The basic conclusions are as follows:

1. The residual exception has undoubtedly received expansive treatment in many courts, which is probably contrary to the intent of Congress.

2. One type of expansive treatment--liberal application of the trustworthiness requirement--presents less of a pure legal question and more of a question of application of fact to law. Whether a court has admitted residual hearsay of questionable trustworthiness obviously depends on the facts and is often a question on which reasonable minds can differ. If the Committee decides that courts are being too liberal because they are admitting hearsay of questionable trustworthiness, the Rule's language could be strengthened from the current "equivalence" standard that is currently in the Rule. But the evidence in the cases of a lessened threshold of trustworthiness is anecdotal.

3. Another type of expansive treatment--using the residual exception for classes of evidence that narrowly miss other hearsay exceptions--is more a question of law. Generally, courts have rejected the argument that a hearsay statement is "specifically covered" by another exception when the statement is in fact inadmissible under that exception. The residual exception has often been employed to admit hearsay that is a "near miss" from another hearsay exception. If the Committee decides that "near misses" should not be admissible under the residual exception, then more specific language should be included to that effect.

II. The Rule and Its History

Proposed Rule 807, which is an amalgam of current Rules 803(24) and 804(b)(5), provides:

> A statement not specifically covered by Rule 803 or 804, but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence that the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. But a statement may not be admitted under this exception unless its proponent makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

The residual exceptions were designed to leave room for growth and development in the law of hearsay. Federal drafters thought it "presumptuous to assume that all possible desirable exceptions to the hearsay rule have been catalogued" and therefore adopted these provisions to allow Judges to admit hearsay in "new and presently unanticipated situations which demonstrate a trustworthiness within the spirit of the specifically stated exceptions."[1] It is clear, however, that the intent of the drafters was that the exception would be used sparingly; the concern was that overuse of the residual exceptions would undermine the categorical approach to the hearsay exceptions set forth in the Federal Rules.[2] An original draft of the Federal Rules contained only one hearsay exception, which mandated a case-by-case inquiry to determine the trustworthiness of each proffered hearsay statement. This approach was rejected because it was too unpredictable and time-

---

[1] Advisory Committee Note to Fed. R. Evid. 803(24).

[2] See, e.g., S.Rep. No. 93-1277, 93d Cong., 2d Sess. 19-20 (1974) ("It is intended that the residual hearsay exceptions will be used very rarely, and only in exceptional circumstances"). See also Rock v. Huffco Gas & Oil Co., 922 F.2d 272 (5th Cir. 1991) (noting that the exception must be used "sparingly", and holding that statements of the deceased concerning the cause of his injury were not sufficiently trustworthy).

consuming, and was replaced by a system of categorical admissibility requirements. The residual exception was the safety valve to the underinclusiveness of the categorical approach. Liberal use of the residual exception runs the risk of establishing, de facto, the dominance of the case-by-case approach that was rejected previously. To put it another was, to broaden the residual exception could permit the case-by-case exception to swallow the categorical rules.

III. Equivalent Guarantees of Trustworthiness

The most important requirement for residual hearsay is that it possess guarantees of trustworthiness equivalent to those supporting the enumerated exceptions. No inclusive list of factors determining admissibility can be devised since admissibility hinges upon the peculiar factual context within which the statement was made. But some non-dispositive generalizations can be made from a review of the cases.

There are certain standard factors which courts appear to consider in evaluating the trustworthiness of a declarant's statement. These include:

1. the relationship between the declarant and the person to whom the statement was made. For example, a statement to a trusted confidante would be considered more reliable than a statement to a total stranger.
2. the capacity of the declarant at the time of the statement. For instance, if the declarant was drunk or on drugs at the time, that would cut against a finding of trustworthiness, and vice versa.[3]
3. the personal truthfulness of the declarant. If the declarant is an inveterate liar, this cuts against admissibility, while unimpeachable veracity cuts in favor of admitting the statement.[4]

---

[3] See, e.g., United States v. Wilkus, 875 F.2d 649 (7th Cir. 1989) (affidavit signed while declarant was under heavy medication, and as to which declarant has no current memory, is insufficiently trustworthy to qualify as residual hearsay).

[4] See, e.g., United States v. Fernandez, 892 F.2d 976 (11th Cir. 1989) (grand jury testimony held not sufficiently trustworthy where the declarant "was an almost comically unreliable character"; "the government cannot seriously argue that the trust due an isolated statement should not be colored by compelling evidence of the lack of credibility of its source: although a checkout aisle tabloid might contain unvarnished truth, even a devotee would do well to view its claims with a measure of skepticism")

4. whether the declarant appeared to carefully consider his statement. [5]

5. whether the declarant recanted or repudiated the statement after it was made. [6]

6. whether the declarant has made other statements that are either consistent or inconsistent with the proffered statement.

7. whether the declarant by his conduct, exhibited his own belief in the truth of the statement.[7]

8. whether the declarant had personal knowledge of the event or condition described.[8]

9. whether the declarant's memory was impaired due to the

---

[5] See, e.g., United States v. York, 852 F.2d 221, 226 (7th Cir. 1988) (where declarant answered affirmatively to every question asked by United States Attorney, trustworthiness could not be found: "Apparently, not even a single placebo question was amongst the lot to ensure that Tommy was considering the substance of each question and answering responsively, rather than simply agreeing with every question that the government posed.").

[6] See, e.g., United States v. York, 852 F.2d 221, 226 (7th Cir. 1988) (statement not trustworthy where declarant recanted). Compare United States v. Curro, 847 F.2d 325 (6th Cir. 1988) (grand jury testimony is trustworthy, in part because the declarant never tried to disavow the statement).

[7] See, e.g., United States v. Workman, 860 F.2d 140 (4th Cir. 1988), *cert. denied*, 109 S. Ct. 1529 (1988) (statement by an accomplice to law enforcement official met the trustworthiness requirement of the residual exception; the statement subjected the declarant to criminal liability and was made by a person who agreed to meet with one of the defendants and to wear a tape recorder to the meeting).

[8] See, e.g., United States v. Doerr, 886 F.2d 944 (7th Cir. 1989) (grand jury testimony held admissible as residual hearsay, in part because it "was based entirely on [the declarant's] own personal knowledge—he revealed what he saw on the job"). *Compare* United States v. Fernandez, 892 F.2d 976 (11th Cir. 1989) (grand jury testimony held not sufficiently trustworthy where it contained many instances of hearsay within hearsay: "Although the government argues that each individual piece of double or triple hearsay would come in under one of the standard exceptions, see Fed. R. Evid. 805, experience suggests an inverse relationship between the reliability of a statement and the number of hearsay layers it contains").

lapse of time between the event and the statement.[9]

10. whether the statement, as well as the event described by the statement, is clear and factual, or instead is vague and ambiguous.

11. whether the statement was made under formal circumstances or pursuant to formal duties, such that the declarant would have been likely to consider the accuracy of the statement when making it.[10]

12. whether the statement appears to have been made in anticipation of litigation and is favorable to the preparer.[11]

13. whether the declarant was cross-examined by one who had interests similar to those of the party against whom the

---

[9] See, e.g., United States v. Sinclair, 74 F.3d 753 (7th Cir. 1996) (statement offered by the defendant as residual hearsay was properly excluded, in part because of the great lapse of time between the declarant's statement and the events described); United States v. York, 852 F.2d 221, 226 (7th Cir. 1988) (statement about events occurring five years earlier was insufficiently trustworthy).

[10] See, e.g., Hal Roach Studios v. Richard Feiner & Co., 896 F.2d 1542 (9th Cir. 1990) (S-1 registration statement filed with Securities Exchange Commission held admissible as residual hearsay to prove the corporate history of plaintiff; "The standard of due diligence applied by securities lawyers with regard to Registration Statements is sufficient to guarantee the requisite circumstantial guarantees of trustworthiness"). United States v. Curro, 847 F.2d 325 (6th Cir. 1988) (grand jury testimony admissible as residual hearsay, in part because it was made under oath subject to penalty of perjury). Compare United States v. Snyder, 872 F.2d 1351 (7th Cir. 1989) (fact that grand jury testimony was made under oath is relevant but not dispositive; testimony not admissible as residual hearsay where declarant was serving two life sentences at the time of his testimony).

[11] See, e.g., Kirk v. Raymark Industries, Inc., 51 F.2d 1206 (3rd Cir. 1995) (Trial Court erred in admitting, as residual hearsay, interrogatory responses from a codefendant who had settled; the responses, which denied liability, were offered by the plaintiff to rebut the non-settling defendant's contention that the plaintiff's injury was solely caused by the settling defendant; the interrogatory responses were not sufficiently trustworthy because they were made while the declarant was still a defendant in the litigation and "had every incentive to set forth the facts in a light most favorable to itself.").

statement is offered.[12]

14. whether the statement was given voluntarily or pursuant to a grant of immunity.[13]

15. whether the declarant is a disinterested bystander or rather an interested party.[14]

One of the dangers of the trustworthiness requirement is that it can be applied lackadaisically, given the mandated case-by-case approach and the fact that there is little meaningful appellate review. At least one commentator has argued that a permissive attitude toward the trustworthiness requirement has

---

[12] See, e.g., United States v. Zannino, 895 F.2d 1 (1st Cir. 1990) (testimony of witness who was cross-examined in the trial of defendant's accomplices held admissible as residual hearsay in defendant's separate trial; "though Zannino's counsel never had an opportunity to question Smoot, the declarant was vetted at the earlier trial by defense attorneys who shared appellant's interest in denigrating Smoot's credibility ... the functional equivalent of cross-examination by the defendant was present here, bolstering the inherent reliability of the testimony); United States v. Deeb, 13 F.3d 1532 (11th Cir. 1994) (cross-examination by accomplices in a prior trial satisfied the residual exception's trustworthiness requirement).

[13] See, e.g., United States v. Doerr, 886 F.2d 944 (7th Cir. 1989) (grand jury testimony held admissible as residual hearsay, in part because it was given voluntarily: "Because Barbaro's testimony was not given under a grant of immunity, he exposed himself to potential criminal liability.... Thus, his grand jury testimony has the circumstantial guarantee of trustworthiness supporting the hearsay exception for statements against interest"). Compare United States v. Fernandez, 892 F.2d 976 (11th Cir. 1989) (grand jury testimony held not sufficiently trustworthy where the declarant testified under a grant of immunity).

[14] See, e.g., United States v. Doerr, 886 F.2d 944 (7th Cir. 1989) ("Another indicium of reliability is the declarant's disinterest; the testimony of a mere bystander with no axe to grind tends to be more trustworthy"); Dogan v. Hardy, 587 F. Supp. 967 (D. Miss. 1984) (the Court held inadmissible in a personal injury action a self-serving statement by the driver of a car, made while he was hospitalized).

fallen hard on criminal defendants.[15] One possible example of a permissive attitude is found in *United States v. Clarke*, 2 F.3d 81 (4th Cir. 1993). Officers in *Clarke* seized a toolbox containing a large quantity of cocaine. The toolbox was in a car driven by Latimer. Latimer identified Michael Clarke as a co-conspirator. Michael moved to suppress the cocaine. At the suppression hearing, in order to establish standing, Michael testified that he had directed his brother, Christopher, to buy the toolbox and arrange for Latimer to distribute the cocaine. This testimony was used against Christopher at his trial; Michael refused to testify at Christopher's trial. The Court held that the suppression hearing testimony was not admissible under Rule 804(b)(1), the prior testimony exception, because Christopher was not present at Michael's suppression hearing, and had no opportunity to cross-examine Michael at that time. But the Court found the testimony properly admitted against Christopher under the residual exception.

The *Clarke* Court concluded that Michael's suppression hearing testimony was sufficiently trustworthy, by relying on the following factors: Michael was cross-examined by a government attorney; the statement was under oath and contemporaneously recorded; Michael knew that his suppression hearing testimony could not be used against him at his own trial, so any incentive to lie to avoid conviction was removed; Michael was subject to a perjury charge if he did lie; and he had no incentive to specifically implicate Christopher in order to establish standing with respect to the toolbox, since "he could have simply referred to an anonymous source."

The factors relied upon by the *Clarke* Court are subject to dispute. For example, the government's cross-examination of Michael at the suppression hearing was not conducted with the intent of doing Christopher any favors. The Court's assumption, that Michael had no incentive to implicate Christopher rather than an anonymous source in order to establish his own standing, is arguable. It is always more effective in establishing a point to blame or implicate a specific person rather than an anonymous source.[16]

---

[15] See Raeder, *The Effect of the Catchalls on Criminal Defendants: Little Red Riding Hood Meets the Hearsay Wolf and is Devoured*, 25 Loyola L.Rev. 1326 (1992) (arguing that the residual exception affects criminal defendants disproportionately).

[16] For a case similar to *Clarke*, see United States v. Seavoy, 995 F.2d 1414 (7th Cir. 1993): Robert and Ronald were brothers charged with robbing a bank. Robert decided to plead guilty, and at the guilty plea hearing, Robert made a statement implicating himself and Ronald. Part of the plea agreement was that the

Because the trustworthiness analysis is so fact-intensive, it is difficult to draw any conclusions as to whether the residual exception has been unacceptably expanded to admit evidence of dubious reliability. Certainly, there are cases which exclude proffered evidence as insufficiently trustworthy, which could have just as easily been decided the other way under a more permissive approach.[17] On the other hand, because the Congress intended the residual exception to be sparingly applied, it could be argued that *any* permissive application of the trustworthiness requirement is unwarranted. If the Committee is of the view that the trustworthiness requirement is insufficiently rigorous, it could give thought to changing the requirement from one of

---

government would recommend a two-level reduction in Robert's sentence for acceptance of responsibility. Robert then filed a motion to withdraw his plea, and refused to testify at Ronald's trial. The government proffered and the Trial Court admitted the plea transcript as residual hearsay against Ronald. The Court found no error. It reasoned that the hearsay was sufficiently trustworthy, relying on the following factors: 1. Robert's character as a witness was not tarnished by any prior criminal activity (apparently not even by the crime for which he was charged); 2. The testimony was given under oath, and both the prosecutor and his counsel (though not Ronald) questioned Robert about the bank robbery; 3. There was no apparent attempt to shift blame to Ronald; and 4. The testimony was heavily corroborated by the physical evidence. The Court rejected the defendant's arguments that Robert's motivation to obtain a sentence reduction, and his subsequent recantation of the guilty plea statement, rendered the statement untrustworthy.

[17] See, e.g., United States v. Trenkler, 61 F.3d 45 (1st Cir. 1995): Although the Court affirmed the conviction of a defendant on various charges resulting from a bomb explosion, it concluded that the Trial Judge erroneously admitted evidence concerning information obtained from an ATF database (EXIS) of explosion and arson incidents. The prosecution sought to show that, out of more than 14,000 bombing and attempted bombing incidents, only the bombing charged and one prior incident alleged to have been committed by the defendant shared certain queried characteristics. The government's expert explained that the database derived from reports by a variety of law enforcement agencies, and that no agency was required by law to send reports to the database. The Court found that "it is far from clear the extent to which information memorialized in any of the reports derives from laboratory analyses, on-the-scene observations of police officers, second-hand descriptions of the device by layperson witnesses, or some other source." It concluded that the reports lacked sufficient guarantees of trustworthiness to be admitted.

"equivalence" to a stricter standard, such as "circumstantial guarantees which clearly indicate the trustworthiness of the statement."

IV. Near Misses

The residual exception applies to statements "not specifically covered" by Rule 803 or 804. Thus, courts face the issue whether hearsay which almost, but not quite, fits another exception may be admitted under the residual exception. A major concern of some members of Congress was that certain types of hearsay deliberately excluded from the categorical exceptions might nevertheless be admitted as residual hearsay.[18] Most courts have demonstrated that there were good grounds for the congressional concerns, often admitting hearsay under the residual exception where it is a "near miss" of an enumerated exception.[19]

---

[18] See 120 Cong. Rec. H12255-57 (Dec. 18, 1974) (expressing concern that the residual exceptions would result in the erosion of the admissibility requirements of the standard exceptions).

[19] See, e.g., United States v. Furst, 886 F.2d 558 (3d Cir. 1989) ("Rule 803(24) is not limited in availability as to types of evidence not addressed in the other exceptions; [it] is also available when the proponent fails to meet the standards set forth in the other exceptions"); United States v. Valdez-Soto, 31 F.3d 1467 (9th Cir. 1994) (prior inconsistent statement not under oath is not admissible under Rule 801(d)(1)(A) but may be received under the residual exception); Dartez v. Fibreboard Corp., 765 F.2d 456 (5th Cir. 1985) (deposition offered against defendant who was not a party to the litigation in which deposition was taken; party who cross-examined deponent was not a predecessor in interest as that term is used in Rule 804(b)(1); however, since defendant could have added nothing to the cross-examination which did take place, the deposition was admissible against the defendant under the residual exception, as a "near miss" of the prior testimony exception); United States v. Doe, 860 F.2d 488 (1st Cir. 1988) (telexes and certificate issued by Honduran Naval Force, verifying that permission had been granted to board a vessel, were not admissible under Rule 803(6) since no foundation witness had been called to testify; however, they were admissible under Rule 803(24) since they were normal and regular like business records); Turbyfill v. International Harvester Co., 486 F. Supp. 232 (E.D. Mich. 1981) (statement which fails to meet the requirements of Rule 803(5) because preparer of the record is not available to testify is admitted on "near miss" grounds under Rule 804(b)(5)).

One important question as to the meaning of "not specifically covered" is whether grand jury statements can be offered by the government as residual hearsay. Criminal defendants have argued that they cannot, since such statements are similar to, but do not fall within, Rule 804(b)(1) when they are offered by the government (because there was no opportunity for the defendant to cross-examine). Defendants argue that if Congress had wanted to make an exception for grand jury statements, it could have done so, and that it is not an appropriate use of the residual exception to engraft a judicially-created exception for grand jury statements.

Most courts have rejected the argument that grand jury statements are "specifically covered" by Rule 804(b)(1) and thus not admissible as a matter of law under the residual exception. One Court has explained the predominant Federal approach as follows:

> We decline to rally behind appellants' call for a per se ban on the admission of grand jury testimony under the residual exception. If a statement does not satisfy all of the requirements of Rule 804(b)(1), then it is not a statement "covered by [one] of the foregoing exceptions" within the meaning of Rule 804(b)(5). We consider admissible those statements that are similar though not identical to hearsay clearly falling under ... the codified exceptions, if the statements otherwise bear indicia of trustworthiness equivalent to those exceptions. The contrary reading would create an arbitrary distinction between hearsay statements that narrowly, but conclusively, fail to satisfy one of the formal exceptions, and those hearsay statements which do not even arguably fit into a recognized mold. If the proponent can show that a particular piece of hearsay carries "circumstantial guarantees of trustworthiness" ... that statement should be admissible regardless of its affinity to a statement falling squarely within a codified exception.[20]

Similarly, in *United States v. Clarke*, 2 F.3d 81 (4th Cir. 1993), the Court held that suppression hearing testimony was admissible under the residual exception, where it did not qualify as prior testimony because the defendant was not a party to the

---

[20] United States v. Fernandez, 892 F.2d 976, 981 (11th Cir. 1989) (finding ultimately that the grand jury testimony was not sufficiently reliable to qualify under the residual exception).

hearing and thus had no opportunity to cross-examine the declarant. The Court rejected the argument that a statement cannot qualify as residual hearsay if it is a "near miss" of another specific exception. While the residual exception refers to hearsay "not specifically covered" by the other exceptions, the Court argued that a broad reading of this language would render the residual exceptions "a nullity": "We believe that 'specifically covered' means exactly what it says: If a statement does not meet all of the requirements for admissibility under one of the prior exceptions, then it is not 'specifically covered.'"[21]

In other words, the Federal Courts read the language "not specifically covered" as meaning "not admissible under." One possible problem with this reading is that it arguably renders the language superfluous. If the statement were admissible under one of the categorical exceptions, the applicability of the residual exception would never arise.

Judge Easterbrook took the contrary view in his concurring opinion in *United States v. Dent*, 984 F.2d 1453 (7th Cir. 1993).[22] He argued that the residual exception could not be used as a means of admitting grand jury testimony, because the exception is applicable only to hearsay statements "not covered" by the other exceptions. According to Judge Easterbrook, grand jury testimony *is* covered by another exception--that for prior testimony. Judge Easterbrook read the Supreme Court's decision in *United States v. Salerno*, 112 S.Ct. 2503 (1992), as implicitly deciding that grand jury testimony was "covered" by Rule 804(b)(1). He argued that the prosecution should not be permitted to evade the limitations on grand jury testimony placed in Rule 804(b)(1) by simply proffering the same testimony under the residual exception. [23]

---

[21] See also United States v. Donlon, 909 F.2d 650 (1st Cir. 1990) (holding grand jury testimony admissible and arguing that "the very use of the word 'equivalent,' suggesting there must be something special about the guarantee of trustworthiness, offers, in principle, a safeguard against the courts' use of the residual exception to swallow up the hearsay rule.").

[22] The majority in *Dent* noted that the Circuit Courts are in conflict as to whether grand jury testimony can be admitted against a criminal defendant under the residual exception, and found it unnecessary to decide this question of law, since the grand jury testimony admitted at trial was insufficiently reliable to qualify as residual hearsay at any rate.

[23] See also United States v. Vioga, 656 F. Supp. 1499 (D.N.J. 1987), *aff'd*, 857 F.2d 1467 (3d Cir. 1988) (although the Court recognized that several Circuits have approved the admission of

Another question of expanded use of the residual exception arises with respect to law enforcement reports offered against criminal defendants. Rule 803(8) contains language excluding some law enforcement reports. Can such reports nonetheless be admitted as residual hearsay? The courts have generally held in the negative, but not because of the "not specifically covered" language in the residual exception. Rather, under the predominant view of Rule 803(8), law enforcement reports will only be excluded where they are prepared under adversarial circumstances and thus suffer from suspect motivation. [24] Such reports are thus excluded because they are untrustworthy, and so they will also be excluded under the residual exception.

If the Committee believes that hearsay which nearly misses one of the categorical exceptions should never be admissible under the residual exception, then the residual exception must be amended. The "not specifically covered" language has not served to exclude "near miss" hearsay. One possibility is to state that hearsay which meets all but one of the admissibility requirements of one of the other exceptions shall not be admissible under the residual exception. Whether this is a desired result is a policy question for the Committee.

---

grand jury testimony under the residual exception, it concluded that the residual exception is unavailable when grand jury testimony is offered, since Rule 804(b)(1) specifically covers former testimony and does not include grand jury testimony).

[24] See, e.g., United States v. Enterline, 894 F.2d 287 (8th Cir. 1990) (computerized list prepared by police of vehicles reported stolen held admissible despite exclusionary language in Rule 803(8)(B) and (C): "The computer report does not contain contemporaneous observations by police officers at the scene of a crime, and thus presents none of the dangers of unreliability that such a report presents. Rather, the report is based on facts: that cars with certain vehicle numbers were reported to have been stolen. Neither the notation of the vehicle identification numbers themselves nor their entry into a computer presents an adversarial setting or an opportunity for subjective observations by law enforcement officers"). United States v. DeWater, 846 F.2d 528, 530 (9th Cir. 1988) (breathalyzer report admitted because "the preparation of this report is a routine, non-adversarial act made in a non-adversarial setting... [N]othing in the record reveals a motivation to misrepresent the test results or records."); United States v. Dancy, 861 F.2d 77 (5th Cir. 1988) (fingerprint card in penitentiary packet, offered to show that defendant was a convicted felon, was admissible under Rule 803(8)(B) because it is unrelated to a criminal investigation; the Rule excludes only records that report the observation or investigation of crimes).

LEONIDAS RALPH MECHAM
Director

CLARENCE A LEE, JR
Associate Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D C 20544

JOHN K RABIEJ
Chief
Rules Committee Support Office

November 6, 1996
Via Facsimile

MEMORANDUM TO ADVISORY COMMITTEE ON EVIDENCE RULES

SUBJECT: *Agenda Material for the November 12, 1996, Committee Meeting*

Judge Smith requested Professor Capra to prepare the attached memorandum on the residual exception notice requirement, which was left open at the April 1996 committee meeting for further attention. The matter will be considered at the upcoming committee meeting.

John K. Rabiej

Attachment

cc: Honorable Alicemarie H. Stotler
Professor Daniel R. Coquillette

FORDHAM
University

School of Law

Lincoln Center, 140 West 62nd Street, New York, NY 10023-7485

Daniel J. Capra
Philip Reed Professor of Law

Phone: 212-636-6855
e-mail:dcapra@mail.lawnet.fordham.edu
Fax: 212-636-6899

Memorandum To: Members of the Advisory Committee on the Federal Rules of Evidence
From: Professor Daniel Capra, Reporter
Re: **Residual Exception Notice Requirement**
Date: November 11, 1996

I. INTRODUCTION

The minutes of the April, 1996 meeting of the Committee indicate that the Reporter was directed to report on whether courts have reached different results when applying the notice requirement in the residual exception to the hearsay rule. This memorandum addresses that question and some others related to the notice requirement. The conclusions are as follows:

1. There is no consistent approach to the various notice requirements found throughout the Federal Rules.

2. Only one Circuit applies the notice requirement absolutely, i.e., holding residual hearsay inadmissible whenever the proponent fails to give pretrial notice. The rest of the Circuits hold that the notice requirement can be excused for good cause, so long as the opponent is given a sufficient opportunity to prepare to meet the evidence.

3. One Circuit holds that the opponent must receive notice not only of the evidence itself, but also of the proponent's intent to offer it as residual hearsay. The rest of the Circuits hold that the notice requirement is satisfied when the opponent is somehow made aware, in advance of trial, of the existence of the evidence and its potential admission at trial.

4. A strong argument can be made that the flexible approach to the notice requirement, taken by the majority of the courts, is at odds with the apparent intent of Congress that the notice requirement be applied rigidly.

II. LANGUAGE OF THE RULE

The residual exception provides that hearsay offered thereunder shall not be admissible

> unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

III. COMPARISON TO OTHER NOTICE PROVISIONS IN THE FEDERAL RULES

There is a good deal of inconsistency in the notice requirements found throughout the Federal Rules. For example, the residual exception notice requirement, set forth above, is different from the notice provision added to Rule 404(b) in 1991. Rule 404(b) expressly permits notice during trial "if the court excuses pretrial notice on good cause shown * * *." A similar good cause requirement is found in Rule 412, but that Rule has a different approach as well: it requires notice by way of a *written motion*, and sets forth a specific time period--notice must be provided at least 14 days before trial. Rule 412 explicitly contains a good cause exception. Rules 413-15 take another approach. These Rules require advance notice at least 15 days before trial, but the notice need not be in writing and there is an exception for good cause. Finally, the notice provision contained in Rule 609(b) requires written notice and does not admit on its face of any good cause exception; no explicit time period is set forth.

The Committee may wish to consider whether it is appropriate to amend the various notice requirements so that they are more consistent with one another. A consistent approach could be taken to three questions: 1. Whether an advance notice requirement can be excused for good cause; 2. Whether notice must be in writing; 3. Whether notice must be given a specific number of days before trial. At the least, the Committee might wish to think through the reasons, if any, for differentiating between the notice requirements.

Given the history of Rules 413-15, and the previous efforts of the Committee with respect to the notice requirements therein, it is possible that an integrated approach cannot encompass those rules. However, there may be sufficient inconsistency in the other notice requirements to warrant the Committee's attention.

III. LEGISLATIVE HISTORY OF THE NOTICE REQUIREMENT

The legislative history of Rules 804(b)(5) and 803(24) can be summarized as follows. The House of Representatives deleted the forerunners of the residual hearsay exceptions "as injecting too much uncertainty into the law of evidence and impairing the ability of practitioners to prepare for trial." H.R.Rep.No.650, 93d Cong., 1st Sess. 5-6 (1973), Reprinted in (1974) U.S.Code Cong. & Admin.News, p. 7079. The Senate reinstated the provisions in a narrower form, believing that "exceptional circumstances" would on rare occasions justify the admission of hearsay not covered by other exceptions, and stating its expectation that "the court will give the opposing party a full and adequate opportunity to contest the admissibility of any statement sought to be introduced . . . ." S.Rep.No.1277, 93d Cong., 2d Sess. 18-20, Reprinted in (1974) U.S.Code Cong. & Admin.News, p. 7051, 7065-66. The Conference Committee retained the provisions but added the pretrial notice requirement, without elaborating on the reason for the requirement. Joint Explanatory Statement of the Committee on Conference, H.R.Rep.No.1597, 93d Cong., 2d Sess. 13, Reprinted in (1974) U.S.Code Cong. & Admin.News, p. 7105-06.

During the debates on the floor, two representatives who had participated in the conference commented upon the pretrial notice provision. Representative Hungate said of the notice requirement:

> We met with opposition on that. There were amendments offered that would let them do this right on into trial. But we thought the requirement should stop prior to trial and they would have to give notice before the trial. That is how we sought to protect them.

120 Cong.Rec. H12,256 (daily ed. Dec. 18, 1974). Representative Dennis said that, although he disliked the residual hearsay provisions, he thought that the insertion of a notice requirement so that counsel could get ready for such evidence was an adequate compromise. 120 Cong.Rec. H12,256-57 (daily ed. December 18, 1974).

The legislative history thus indicates (1) congressional concern over the expansive use of the residual exception; (2) the inclusion of a notice requirement as an explicit means to protect the opponent; and (3) the specific rejection in the Conference of a proposal to allow notice "on into trial". Given all these factors, it is probably fair to state, as the Court did in *United States v. Ruffin*, 575 F.2d 346 (2d Cir. 1978): "There is absolutely no doubt that Congress intended the requirement of advance notice be rigidly enforced."

IV. CASE LAW APPLICATION OF THE NOTICE REQUIREMENT

A. Advance Notice

Some courts have purported to apply the advance notice requirement rigidly. Others use an avowedly more liberal approach. In terms of result, however, it appears that every Circuit, with one major exception, allows the trial judge to forego a rigid adherence to the requirement of pretrial notice, so long as two conditions are met: 1. the proponent is not at fault for failing to give pretrial notice; and 2. the opponent is given a fair opportunity to meet the evidence. Where a court has applied the notice requirement "strictly", it has usually done so in a fact situation where the proponent had no excuse for failure to comply. Where a court has applied the notice requirement "liberally", it has done so when the aforementioned requirements have been met. Thus, while a good cause limitation is not set forth in the Rule, it has generally been applied by the courts--again, with one exception.

The Second Circuit is the only circuit which has rejected a "good cause" defense. In *United States v. Ruffin*, 575 F.2d 346 (2d Cir. 1978), the government was not made aware of the need to proffer documents under the residual exception until defense experts had testified. Moreover, the trial judge offered to call a recess to allow the defense time to prepare for the evidence. Nonetheless, the Court held that it was error, though harmless, for the trial court to admit the evidence under the residual exception. Allowing a recess for preparation, as here, might have been "the most efficient and evenhanded way to deal with the troublesome question with which [the trial judge] was confronted." Approval of that remedy would, however, "countenance outright circumvention of the carefully considered and drafted requirements of Fed.R.Evid. 803(24)."

A more common application of the "strict" approach to notice is found in *Kirk v. Raymark Industries, Inc.*, 61 F.3d 147 (3d Cir. 1995). The Court held that it was error to admit residual hearsay where no pretrial notice was given. It noted, however, that the notice requirement "can be met where the proponent of the evidence is without fault in failing to notify his adversary and the trial judge has offered sufficient time, by means of granting a continuance, for the proponent to prepare to contest its admission." Here, there was no showing of lack of fault, and therefore admission was error. See also *United States v. Furst*, 886 F.2d 558 (3d Cir. 1989) (where the government's first reference to the residual exception was on the first day of trial, one day prior to the introduction of the evidence, and where no excuse for the late notice was proffered, the statement was not admissible as residual hearsay); *United States v. Beard*, 39 F.3d 1193 (10th Cir. 1994) (notice requirement cannot be excused where the government made no attempt to provide notice

and had no good cause for failing to notify: "Admitting hearsay evidence under this exception without notice to the adverse party exceeds the bounds of permissible choice under the circumstances.").

Courts taking a "liberal" approach to the pretrial notice requirement generally do so only where good cause for excusing that requirement has in fact been found. Thus, in *United States v. Doe*, 860 F.2d 488 (1st Cir. 1988), the Court noted that it was opting for a "flexible" approach to the notice requirement. The government offered a telex at trial under the residual exception, but it did not become aware of the existence of the telex until after the trial had begun. The defendant was given an opportunity for a continuance, which he did not take. The Court held that, under these circumstances, the failure to provide pretrial notice would be excused, but that "[e]ven under a flexible approach, evidence should be admitted only when the proponent is not responsible for the delay and the adverse party has an adequate opportunity to examine and respond to the evidence." See also *United States v. Baker*, 985 F.2d 1248 (4th Cir. 1993) (notice requirement flexibly applied where the evidence did not appear to be needed until an unexpected development at trial, and the opponent was given time to meet the evidence; in light of these "exceptional circumstances" the court upheld "notice flexibility"); *United States v. Lyon*, 567 F.2d 777 (8th Cir. 1977) (transcribed interview of witness held admissible under residual exception despite lack of pretrial notice: "The government was not aware of Mrs. Lorts' poor memory prior to trial and Lyon had copies of her statement.").

B. Notice of Intent to Invoke the Residual Exception

There is some dispute among the courts as to the type of notice that the opponent of the evidence must receive. The Third Circuit holds that the opponent must be notified not only about the evidence itself but also of the proponent's intent to invoke the residual exception. All of the other Circuits that have decided the question appear to hold that the opponent need only be made aware in advance of the existence of the evidence and its potential proffer at trial. The usual fact situation in which this question arises is where the proponent has not even purported to give pretrial notice, and yet the opponent is well aware before trial of the existence of the evidence and its possible admission at trial.

The minority position is found in *United States v. Pelullo*, 964 F.2d 193 (3d Cir. 1992). The *Pelullo* Court noted that while the Rule could be read to require notice only of the statement itself, the Third Circuit requires specific notice of the proponent's intent to use the residual exception. Here, even though the defendant was given the documents months before trial,

there was no specific notice of the government's intent to invoke the residual exception, so the statement was held improperly admitted as residual hearsay. See also *Kirk v. Raymark Industries, Inc.*, 61 F.3d 147 (3d Cir. 1995)("[T]he proponent must give notice of the hearsay statement itself as well as the proponent's intention specifically to rely on the rule as a grounds for admissibility of the statement.")

The more common result is that the notice requirement is deemed satisfied when the opponent has received actual notice, before trial, of the existence of the evidence and its possible use at the trial. The reasoning is that under these circumstances, the opponent cannot complain about surprise or inability to prepare. Thus, in *United States v. Bachsian*, 4 F.3d 796 (9th Cir. 1993), the Court declared that "failure to give [explicit] pretrial notice will be excused if the adverse party had an opportunity to attack the trustworthiness of the evidence." In *Bachsian*, the government did not give notice under the residual exception, but the defendant was more generally notified two months before trial that the government intended to use the evidence, and the defendant was given copies. Also, the defendant did not move for a continuance. Under these circumstances, the Court found that the spirit of the notice requirement was met. See also *Furtado v. Bishop*, 604 F.2d 80 (1st Cir. 1979) (no prejudice from lack of notice since the defendants had the affidavit for 7 1/2 years and anticipated that it would be used at trial; also, the defendants rejected the offer of a continuance); *Prudential Insurance Co. v. Kaltofen*, 951 F.2d 352 (7th Cir. 1991) (where it was clear in the defendant's opening statement that he anticipated the evidence, there was no surprise, and therefore residual hearsay was not to be excluded for lack of notice); United States v. Munoz, 16 F.3d 1116 (11th Cir. 1994)(defendants knew about the statements, but did not know of the intent to offer them under the residual exception: "There is no particular form of notice required under the rule. As long as the party against whom the document is offered has notice of its existence and the proponent's intention to introduce it--and thus has an opportunity to counter it and protect himself against surprise--the rule's notice requirement is satisfied.") Compare *LLoyd v. Professional Realty Services, Inc.*, 734 F.2d 1428 (11th Cir. 1984)(the opponent knew about the evidence, but not about its intended admission as residual hearsay, so the trial court excluded it: "While some appellate courts have affirmed district court findings that an adverse party's knowledge of the substance of the testimony will render formal notice unnecessary * * * these cases do not suggest that a trial court following the strict language of the rule to exclude testimony is guilty of an abuse of discretion.").

Query whether the cases finding the notice requirement satisfied whenever the opponent somehow becomes aware of the evidence, are consistent with the terms of the Rule. The Rule

specifies that the proponent must herself provide notice to the adverse party. On the other hand, where the proponent has in fact given advance notice about the hearsay evidence, but has failed to invoke the residual exception specifically, the Rule is, as the Third Circuit admits, vague as to whether the notice requirement is satisfied.

V. CASE LAW AND CONGRESSIONAL INTENT

As discussed above, the vast majority of courts have employed a liberal construction to the notice requirement of the residual hearsay exception. The terms of the Rule do not admit of a good cause exception, and yet most courts have adopted one. A strict construction of the Rule could require the proponent to provide specific notice of her intent to invoke the residual exception, and yet most courts do not impose such a requirement. While the majority, flexible approach may be preferable on the merits, it is in tension with the rigid approach envisioned by Congress. The Committee may wish to address the disparity between the approach of most courts and the approach envisioned by Congress.

LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

JOHN K. RABIEJ
Chief
Rules Committee Support Office

WASHINGTON, D.C. 20544

October 31, 1996
Via Federal Express

MEMORANDUM TO ADVISORY COMMITTEE ON EVIDENCE RULES

SUBJECT: Agenda Materials for the November 12, 1996 Committee Meeting

I have attached the following agenda materials for the November 12, 1996 Committee Meeting:

1. Agenda for the November 12, 1996 committee meeting.

2. Minutes of the April 1996 Committee meeting.

3. Information on Judge Sam Pointer's proposed national use of a court appointed expert witness panel to facilitate breast implant silicone gel litigation.

4. Information on the Department of Justice proposals regarding forfeiture proceedings in criminal cases and in admiralty cases.

A memorandum on Agenda Item III from Professor Capra, dated October 22, 1996, was sent earlier to you. Item IV of the agenda will be spent on identifying potential rule amendments for future committee consideration. Judge Smith requests that you review the rules and be prepared to identify areas that warrant the committee's attention.

John K. Rabiej

Attachments

cc: Honorable Alicemarie H. Stotler
Professor Daniel R. Coquillette

FORDHAM
University School of Law

Lincoln Center, 140 West 62nd Street, New York, NY 10023-7485

Daniel J. Capra
Philip Reed Professor of Law

Phone: 212-636-6855
e-mail:dcapra@mail.lawnet.fordham.edu
Fax: 212-636-6899

Memorandum To: **Members of the Advisory Committee on the Federal Rules of Evidence**
From: Professor Daniel Capra, Reporter
Re: **Residual Exception Notice Requirement**
Date: November 11, 1996

I. INTRODUCTION

The minutes of the April, 1996 meeting of the Committee indicate that the Reporter was directed to report on whether courts have reached different results when applying the notice requirement in the residual exception to the hearsay rule. This memorandum addresses that question and some others related to the notice requirement. The conclusions are as follows:

1. There is no consistent approach to the various notice requirements found throughout the Federal Rules.

2. Only one Circuit applies the notice requirement absolutely, i.e., holding residual hearsay inadmissible whenever the proponent fails to give pretrial notice. The rest of the Circuits hold that the notice requirement can be excused for good cause, so long as the opponent is given a sufficient opportunity to prepare to meet the evidence.

3. One Circuit holds that the opponent must receive notice not only of the evidence itself, but also of the proponent's intent to offer it as residual hearsay. The rest of the Circuits hold that the notice requirement is satisfied when the opponent is somehow made aware, in advance of trial, of the existence of the evidence and its potential admission at trial.

4. A strong argument can be made that the flexible approach to the notice requirement, taken by the majority of the courts, is at odds with the apparent intent of Congress that the notice requirement be applied rigidly.

II. LANGUAGE OF THE RULE

The residual exception provides that hearsay offered thereunder shall not be admissible

> unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

III. COMPARISON TO OTHER NOTICE PROVISIONS IN THE FEDERAL RULES

There is a good deal of inconsistency in the notice requirements found throughout the Federal Rules. For example, the residual exception notice requirement, set forth above, is different from the notice provision added to Rule 404(b) in 1991. Rule 404(b) expressly permits notice during trial "if the court excuses pretrial notice on good cause shown * * *." A similar good cause requirement is found in Rule 412, but that Rule has a different approach as well: it requires notice by way of a *written motion*, and sets forth a specific time period--notice must be provided at least 14 days before trial. Rule 412 explicitly contains a good cause exception. Rules 413-15 take another approach. These Rules require advance notice at least 15 days before trial, but the notice need not be in writing and there is an exception for good cause. Finally, the notice provision contained in Rule 609(b) requires written notice and does not admit on its face of any good cause exception; no explicit time period is set forth.

The Committee may wish to consider whether it is appropriate to amend the various notice requirements so that they are more consistent with one another. A consistent approach could be taken to three questions: 1. Whether an advance notice requirement can be excused for good cause; 2. Whether notice must be in writing; 3. Whether notice must be given a specific number of days before trial. At the least, the Committee might wish to think through the reasons, if any, for differentiating between the notice requirements.

Given the history of Rules 413-15, and the previous efforts of the Committee with respect to the notice requirements therein, it is possible that an integrated approach cannot encompass those rules. However, there may be sufficient inconsistency in the other notice requirements to warrant the Committee's attention.

III. LEGISLATIVE HISTORY OF THE NOTICE REQUIREMENT

The legislative history of Rules 804(b)(5) and 803(24) can be summarized as follows. The House of Representatives deleted the forerunners of the residual hearsay exceptions "as injecting too much uncertainty into the law of evidence and impairing the ability of practitioners to prepare for trial." H.R.Rep.No.650, 93d Cong., 1st Sess. 5-6 (1973), Reprinted in (1974) U.S.Code Cong. & Admin.News, p. 7079. The Senate reinstated the provisions in a narrower form, believing that "exceptional circumstances" would on rare occasions justify the admission of hearsay not covered by other exceptions, and stating its expectation that "the court will give the opposing party a full and adequate opportunity to contest the admissibility of any statement sought to be introduced . . . ." S.Rep.No.1277, 93d Cong., 2d Sess. 18-20, Reprinted in (1974) U.S.Code Cong. & Admin.News, p. 7051, 7065-66. The Conference Committee retained the provisions but added the pretrial notice requirement, without elaborating on the reason for the requirement. Joint Explanatory Statement of the Committee on Conference, H.R.Rep.No.1597, 93d Cong., 2d Sess. 13, Reprinted in (1974) U.S.Code Cong. & Admin.News, p. 7105-06.

During the debates on the floor, two representatives who had participated in the conference commented upon the pretrial notice provision. Representative Hungate said of the notice requirement:

> We met with opposition on that. There were amendments offered that would let them do this right on into trial. But we thought the requirement should stop prior to trial and they would have to give notice before the trial. That is how we sought to protect them.

120 Cong.Rec. H12,256 (daily ed. Dec. 18, 1974). Representative Dennis said that, although he disliked the residual hearsay provisions, he thought that the insertion of a notice requirement so that counsel could get ready for such evidence was an adequate compromise. 120 Cong.Rec. H12,256-57 (daily ed. December 18, 1974).

The legislative history thus indicates (1) congressional concern over the expansive use of the residual exception; (2) the inclusion of a notice requirement as an explicit means to protect the opponent; and (3) the specific rejection in the Conference of a proposal to allow notice "on into trial". Given all these factors, it is probably fair to state, as the Court did in *United States v. Ruffin*, 575 F.2d 346 (2d Cir. 1978): "There is absolutely no doubt that Congress intended the requirement of advance notice be rigidly enforced."

IV. CASE LAW APPLICATION OF THE NOTICE REQUIREMENT

A. Advance Notice

Some courts have purported to apply the advance notice requirement rigidly. Others use an avowedly more liberal approach. In terms of result, however, it appears that every Circuit, with one major exception, allows the trial judge to forego a rigid adherence to the requirement of pretrial notice, so long as two conditions are met: 1. the proponent is not at fault for failing to give pretrial notice; and 2. the opponent is given a fair opportunity to meet the evidence. Where a court has applied the notice requirement "strictly", it has usually done so in a fact situation where the proponent had no excuse for failure to comply. Where a court has applied the notice requirement "liberally", it has done so when the aforementioned requirements have been met. Thus, while a good cause limitation is not set forth in the Rule, it has generally been applied by the courts--again, with one exception.

The Second Circuit is the only circuit which has rejected a "good cause" defense. In *United States v. Ruffin*, 575 F.2d 346 (2d Cir. 1978), the government was not made aware of the need to proffer documents under the residual exception until defense experts had testified. Moreover, the trial judge offered to call a recess to allow the defense time to prepare for the evidence. Nonetheless, the Court held that it was error, though harmless, for the trial court to admit the evidence under the residual exception. Allowing a recess for preparation, as here, might have been "the most efficient and evenhanded way to deal with the troublesome question with which [the trial judge] was confronted." Approval of that remedy would, however, "countenance outright circumvention of the carefully considered and drafted requirements of Fed.R.Evid. 803(24)."

A more common application of the "strict" approach to notice is found in *Kirk v. Raymark Industries, Inc.*, 61 F.3d 147 (3d Cir. 1995). The Court held that it was error to admit residual hearsay where no pretrial notice was given. It noted, however, that the notice requirement "can be met where the proponent of the evidence is without fault in failing to notify his adversary and the trial judge has offered sufficient time, by means of granting a continuance, for the proponent to prepare to contest its admission." Here, there was no showing of lack of fault, and therefore admission was error. See also *United States v. Furst*, 886 F.2d 558 (3d Cir. 1989) (where the government's first reference to the residual exception was on the first day of trial, one day prior to the introduction of the evidence, and where no excuse for the late notice was proffered, the statement was not admissible as residual hearsay); *United States v. Beard*, 39 F.3d 1193 (10th Cir. 1994) (notice requirement cannot be excused where the government made no attempt to provide notice

and had no good cause for failing to notify: "Admitting hearsay evidence under this exception without notice to the adverse party exceeds the bounds of permissible choice under the circumstances.").

Courts taking a "liberal" approach to the pretrial notice requirement generally do so only where good cause for excusing that requirement has in fact been found. Thus, in *United States v. Doe*, 860 F.2d 488 (1st Cir. 1988), the Court noted that it was opting for a "flexible" approach to the notice requirement. The government offered a telex at trial under the residual exception, but it did not become aware of the existence of the telex until after the trial had begun. The defendant was given an opportunity for a continuance, which he did not take. The Court held that, under these circumstances, the failure to provide pretrial notice would be excused, but that "[e]ven under a flexible approach, evidence should be admitted only when the proponent is not responsible for the delay and the adverse party has an adequate opportunity to examine and respond to the evidence." See also *United States v. Baker*, 985 F.2d 1248 (4th Cir. 1993) (notice requirement flexibly applied where the evidence did not appear to be needed until an unexpected development at trial, and the opponent was given time to meet the evidence; in light of these "exceptional circumstances" the court upheld "notice flexibility"); *United States v. Lyon*, 567 F.2d 777 (8th Cir. 1977) (transcribed interview of witness held admissible under residual exception despite lack of pretrial notice: "The government was not aware of Mrs. Lorts' poor memory prior to trial and Lyon had copies of her statement.").

B. Notice of Intent to Invoke the Residual Exception

There is some dispute among the courts as to the type of notice that the opponent of the evidence must receive. The Third Circuit holds that the opponent must be notified not only about the evidence itself but also of the proponent's intent to invoke the residual exception. All of the other Circuits that have decided the question appear to hold that the opponent need only be made aware in advance of the existence of the evidence and its potential proffer at trial. The usual fact situation in which this question arises is where the proponent has not even purported to give pretrial notice, and yet the opponent is well aware before trial of the existence of the evidence and its possible admission at trial.

The minority position is found in *United States v. Pelullo*, 964 F.2d 193 (3d Cir. 1992). The *Pelullo* Court noted that while the Rule could be read to require notice only of the statement itself, the Third Circuit requires specific notice of the proponent's intent to use the residual exception. Here, even though the defendant was given the documents months before trial,

there was no specific notice of the government's intent to invoke the residual exception, so the statement was held improperly admitted as residual hearsay. See also *Kirk v. Raymark Industries, Inc.*, 61 F.3d 147 (3d Cir. 1995)("[T]he proponent must give notice of the hearsay statement itself as well as the proponent's intention specifically to rely on the rule as a grounds for admissibility of the statement.")

The more common result is that the notice requirement is deemed satisfied when the opponent has received actual notice, before trial, of the existence of the evidence and its possible use at the trial. The reasoning is that under these circumstances, the opponent cannot complain about surprise or inability to prepare. Thus, in *United States v. Bachsian*, 4 F.3d 796 (9th Cir. 1993), the Court declared that "failure to give [explicit] pretrial notice will be excused if the adverse party had an opportunity to attack the trustworthiness of the evidence." In *Bachsian*, the government did not give notice under the residual exception, but the defendant was more generally notified two months before trial that the government intended to use the evidence, and the defendant was given copies. Also, the defendant did not move for a continuance. Under these circumstances, the Court found that the spirit of the notice requirement was met. See also *Furtado v. Bishop*, 604 F.2d 80 (1st Cir. 1979) (no prejudice from lack of notice since the defendants had the affidavit for 7 1/2 years and anticipated that it would be used at trial; also, the defendants rejected the offer of a continuance); *Prudential Insurance Co. v. Kaltofen*, 951 F.2d 352 (7th Cir. 1991) (where it was clear in the defendant's opening statement that he anticipated the evidence, there was no surprise, and therefore residual hearsay was not to be excluded for lack of notice); United States v. Munoz, 16 F.3d 1116 (11th Cir. 1994)(defendants knew about the statements, but did not know of the intent to offer them under the residual exception: "There is no particular form of notice required under the rule. As long as the party against whom the document is offered has notice of its existence and the proponent's intention to introduce it--and thus has an opportunity to counter it and protect himself against surprise--the rule's notice requirement is satisfied.") Compare *LLoyd v. Professional Realty Services, Inc.*, 734 F.2d 1428 (11th Cir. 1984)(the opponent knew about the evidence, but not about its intended admission as residual hearsay, so the trial court excluded it: "While some appellate courts have affirmed district court findings that an adverse party's knowledge of the substance of the testimony will render formal notice unnecessary * * * these cases do not suggest that a trial court following the strict language of the rule to exclude testimony is guilty of an abuse of discretion.").

Query whether the cases finding the notice requirement satisfied whenever the opponent somehow becomes aware of the evidence, are consistent with the terms of the Rule. The Rule

specifies that the proponent must herself provide notice to the adverse party. On the other hand, where the proponent has in fact given advance notice about the hearsay evidence, but has failed to invoke the residual exception specifically, the Rule is, as the Third Circuit admits, vague as to whether the notice requirement is satisfied.

V. CASE LAW AND CONGRESSIONAL INTENT

As discussed above, the vast majority of courts have employed a liberal construction to the notice requirement of the residual hearsay exception. The terms of the Rule do not admit of a good cause exception, and yet most courts have adopted one. A strict construction of the Rule could require the proponent to provide specific notice of her intent to invoke the residual exception, and yet most courts do not impose such a requirement. While the majority, flexible approach may be preferable on the merits, it is in tension with the rigid approach envisioned by Congress. The Committee may wish to address the disparity between the approach of most courts and the approach envisioned by Congress.

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

OCT 1996

JUDGE WM. TERRELL HODGES
Chairman, Executive Committee

TELEPHONE:
(904) 232-1852

October 3, 1996

MEMORANDUM TO CHAIRS OF JUDICIAL CONFERENCE COMMITTEES

SUBJECT: Judicial Conference Committee's Self-Evaluation

In September 1987, when the Judicial Conference committee structure was substantially revised, the Conference determined that each committee would do a self-evaluation every five years and "recommend to the Executive Committee, with a justification for the recommendation, either that the committee be maintained or that it be abolished." This evaluation was last done in 1992, and should be performed again in 1997.

The Executive Committee would like to review each committee's self-evaluation and recommendations at its February 1997 meeting. Thus, I ask that each of you place this matter on the agenda for your upcoming (winter) committee meeting. To assist you in making this evaluation, I have attached a form, which is also being transmitted to your committee staff. Each committee should complete the form and return it to the Judicial Conference Executive Secretariat.

Thanks for your assistance.

Wm. Terrell Hodges

Attachment

cc: Committee staff (with attachment)

Advisory Committee on
Appellate Rules

1997 Judicial Conference Committees' Self-Evaluation Form

Committee Name: _____

1. Should the Committee _____ continue to exist?

_____ be abolished?

Please explain why:

2. Amount of work: Does the Committee have

____ too much to do?

____ too little to do?

____ the appropriate amount of work?

If too much or too little, please explain?

3. Size/Composition: Is the size of the Committee

____ too big?

____ too small?

____ appropriate?

If too big or too small, please explain:

Is the Committee membership appropriately representative (e.g., of court entities with an interest in the areas within the Committee's jurisdiction; of the geographic circuits; etc)? ____ yes ____ no

If no, please explain:

4. Functions:

Is the work of the Committee appropriate to its jurisdictional statement?
____ yes ____ no

If no, please explain:

Has the Committee been working in any areas which overlap with other committees? ____ yes ____ no

If yes, please explain:

Are there areas within the jurisdiction of this Committee which might be handled by another committee? ____ yes ____ no

If yes, please explain:

Are there areas within the jurisdiction of other committees which might go to this Committee? ____ yes ____ no

If yes, please explain:

5. Meetings:

How often does the Committee meet each year (either face-to-face or by teleconference)? Please specify.

What percentage of Committee meetings are held in Washington, D.C.?

6. Would you suggest any other changes related to this Committee?

7. Would you suggest any changes related to the committee structure as a whole? For example, should the number of committees be enlarged or reduced? Should committees be combined, eliminated or divided?

* * * * * *

Please return to: Judicial Conference Executive Secretariat
Administrative Office of the U.S. Courts
One Columbus Circle, N.E.
Washington, D.C. 20544

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

ALICEMARIE H. STOTLER
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

JAMES K. LOGAN
APPELLATE RULES

ADRIAN G. DUPLANTIER
BANKRUPTCY RULES

PAUL V. NIEMEYER
CIVIL RULES

D. LOWELL JENSEN
CRIMINAL RULES

FERN M. SMITH
EVIDENCE RULES

October 8, 1996

To: Honorable Stephen F. Williams
Honorable Will L. Garwood
Honorable Alex Kozinski
Honorable Pascal F. Calogero, Jr.
Mr. Luther T. Munford
Mr. Michael J. Meehan
Honorable John Charles Thomas
Mr. Robert E. Kopp
Honorable Frank H. Easterbrook
Honorable Alicemarie H. Stotler
Professor Carol Ann Mooney
Mr. Peter G. McCabe
Mr. John K. Rabiej

From: James K. Logan JKL

Re: Self-Evaluation Request from the Executive Committee

I received the attached letter from Judge Wm. Terrell Hodges, Chairman of the Executive Committee of the Judicial Conference of the United States. The letter is self-explanatory and calls for a self-evaluation by our committee. The Executive Committee wants to review this in its February 1997 meeting, and asks that we place the matter on the agenda for our upcoming winter committee meeting. Because we have extended the comment period for the restylization of our rules until the end of this year we are having no fall meeting, or any meeting, before the Executive Committee wants to review our self-evaluation. Thus, the only way we can meet the Executive Committee request, as I see it,

is to poll each of you on the questions by mail first, then follow up by a conference call if the need develops. I ask each of you to fill out the questionnaire as you would respond personally. Send your responses to me; I will review your responses and ascertain whether there are enough differences that we need to have a telephone conference or a follow-up letter requesting further consideration of particular points. In any event, I will provide you, before we send any response to the Executive Committee, the collective judgment of the committee members and others I am polling. I am including in the circulation and solicitation not only all of the appointed members of the committee but Judge Williams (who has just completed two terms on the committee), Judge Frank Easterbrook (our liaison to the Standing Committee), Judge Stotler (Chair of the Standing Committee, who attends nearly all of our meetings), our reporter, Peter McCabe, and John Rabiej. Please give this your early attention and mail your responses back to me at your early convenience (by November 1 if possible). Address them to my Olathe office: P.O. Box 790, Olathe, Kansas 66051-0790. Call me if you have questions at (913) 782-9293.

I thank you in advance.

Enclosure

Evidence San Francisco

I Special thanks for Ralph Winter & Acknowledged for Prof Berger

II Approve Minutes - Approved

III Judicial Conference Approved Proposed Amendments

IV Self-Evaluation
A. Need for [illegible] cont + stable change

Symbolic? Two meetings necessary to maintain consistency, if one meets + someone misses it — you lose a lot

---

Roger Connell?
1. Defer until Jefferson experience

2. Adopt Report (as Proposed)

Uniform Accommodation
Uniform Rules of Evidence
They have revised all rules up to R. 801
A. Tendency to go along with majority view of states
Rule 103 - subdivision (e) - [illegible] a party should [illegible] it is [illegible] to ask the judge or judge [illegible] [illegible] [illegible] declaration that it is final

Talked to Reams + [illegible] on their study [illegible]

Article III = 2/ done [illegible]

---

404 – [illegible] 413-415 – ~~[illegible]~~ [illegible] 404(b)
[illegible] 404(b) – [illegible]
[illegible] "[illegible]" [illegible] with [illegible] &
[illegible] it [illegible] that it
Looks like they oppose the recent Congressional
acts affecting R. 413 415

408: ^(amend to)^ include ADR

412 – [illegible] ~~[illegible]~~ federal [illegible]

Privileges Rule [illegible]
[illegible] Special [illegible]
expand [illegible] procedural rules

609 – [illegible] = [illegible] in balancing test
"[illegible]"
[illegible] type of evidence

~~Define~~ all "writings" to mean "record" &
[illegible] to [illegible] evidence means, etc.
& [illegible] data compilation = [illegible]
overbreadth to handle writings that can
be altered without being detectable

Pauley And Requisite to respond in all pending cases dealing with evidence in the Supreme Ct.

Identifying Precedent for Explanation

Robinson R. 201(g) = application to crim
803(8)(b) = admissible against the govt.
806 = let def. otherwise evidence of 608(b) material
104(b): Advisory Cttee Note [illegible] = [illegible] to [illegible]
[illegible]

Thompson R. 103 = [illegible] so does Kilogyslo, [illegible] + Little
But Joseph *Pauley seems to go the other way

[illegible] = if Judge [illegible] could do it [illegible] if he doesn't want the parties to re-raise it later at trial

[illegible] V [illegible] : should we look into the agenda [illegible], Pauley [illegible]

R 404(b) = Notice Requirement should be beefed up
All procedural checklist
But no vote taken

[illegible]

Pauly — Establish procedures to update advisory committee ; can we revise Notes without going to Congress because five Ls to go to them for production Congress may get involved in other matters.

R.301 — Bruno wants to look at it

Pauley — Foreign Records (1501 33505)

Bill introduced 1st Congress Foreign [illegible] Crimes

[illegible] addressed the

Klonoski — [illegible]

Authentication address with electronic

extends 10's to sentencing proceedings

[illegible]

Residual Exceptions

Notice Requirement

Maybe some split in the circuits - 2d Cir

[illegible]

Content of Notice Requirement = 3d Circuit requires notice of content to describe the

Notice requirement throughout the rules are inconsistent

Expanded use of residual, single + instantaneous issue is all over the Ct
Near Miss exception - [illegible] [illegible]

Seymour [illegible] Kaplan v Pauly agree [illegible] [illegible] [illegible] [illegible]
[illegible] [illegible] which is quite broad + safeguarded

[illegible] Might we still review cases + see whether the judges have been too fair + admitted too much

[illegible] Maybe too much discretion given to judge - hard [illegible] to know what the rules of the game are?

Joseph [illegible] - [illegible] with the find [illegible] we could + get a better rule

---

R. 201 - Judicial Notice + Legislative Facts
No Action

---

803 (8)(b) - Admissibility Against Govt.
No Action

R 806 — Difficult problem but not a realistic problem K's H to

R 6 — Notation

R 103(c) — Remit it + discuss it on the Agenda — Sebastian on it (Jim Turner, Joseph, + Cyprus)

R 404(b) + R 609: mildly procedural rules Look at it

R. 301 — Refute of Presumption — defer until Uniform Rules —

~~Watch~~ Defer

Foreign Business Records — Look at + have review other ~~rules~~ statutes + ~~case~~ law if

F 7106

F 703 - with the Vatican [illegible]

Denied Exception

No Action

Sentencing still left on agenda

* Let the new Chief of Trial [illegible] will be [illegible] recommended

Technology

Identify some problems Itemized items

Appellate

Second Fed. CB [illegible] Immoral

Bill to all Evidence Rules Cards

Read fund ! ~~[illegible]~~ [illegible] the request

to Congress

LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief
Rules Committee Support Office

November 8, 1996
Via Facsimile

MEMORANDUM TO ADVISORY COMMITTEE ON EVIDENCE RULES

SUBJECT: *Agenda Material for the November 12, 1996, Committee Meeting*

Judge Smith requested Professor Capra to prepare the attached memorandum on the expanded use of the residual exception, which was left open at the April 1996 committee meeting for further attention. The matter will be considered at the upcoming committee meeting. Earlier we had sent to you via facsimile another agenda item prepared by Professor Capra, dealing with the residual exception notice requirement.

John K. Rabiej

Attachment

cc: Honorable Alicemarie H. Stotler
Professor Daniel R. Coquillette

FORDHAM
University School of Law

Lincoln Center, 140 West 62nd Street, New York, NY 10023-7485

Daniel J. Capra
Philip Reed Professor of Law

Phone: 212-636-6855
e-mail:dcapra@mail.lawnet.fordham.edu
Fax: 212-636-6899

Memorandum To: Members of the Advisory Committee on the Federal Rules of Evidence
From: Daniel Capra, Reporter
Re: Expanded Use of the Residual Exception
Date: November 7, 1996

I. Introduction

The minutes of the April, 1996 meeting of the Advisory Committee indicate that the Reporter "should look into the expanded use of the residual exception." This memorandum is addressed to that issue. The basic conclusions are as follows:

1. The residual exception has undoubtedly received expansive treatment in many courts, which is probably contrary to the intent of Congress.

2. One type of expansive treatment--liberal application of the trustworthiness requirement--presents less of a pure legal question and more of a question of application of fact to law. Whether a court has admitted residual hearsay of questionable trustworthiness obviously depends on the facts and is often a question on which reasonable minds can differ. If the Committee decides that courts are being too liberal because they are admitting hearsay of questionable trustworthiness, the Rule's language could be strengthened from the current "equivalence" standard that is currently in the Rule. But the evidence in the cases of a lessened threshold of trustworthiness is anecdotal.

3. Another type of expansive treatment--using the residual exception for classes of evidence that narrowly miss other hearsay exceptions--is more a question of law. Generally, courts have rejected the argument that a hearsay statement is "specifically covered" by another exception when the statement is in fact inadmissible under that exception. The residual exception has often been employed to admit hearsay that is a "near miss" from another hearsay exception. If the Committee decides that "near misses" should not be admissible under the residual exception, then more specific language should be included to that effect.

II. The Rule and Its History

Proposed Rule 807, which is an amalgam of current Rules 803(24) and 804(b)(5), provides:

> A statement not specifically covered by Rule 803 or 804, but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence that the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. But a statement may not be admitted under this exception unless its proponent makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

The residual exceptions were designed to leave room for growth and development in the law of hearsay. Federal drafters thought it "presumptuous to assume that all possible desirable exceptions to the hearsay rule have been catalogued" and therefore adopted these provisions to allow Judges to admit hearsay in "new and presently unanticipated situations which demonstrate a trustworthiness within the spirit of the specifically stated exceptions."[1] It is clear, however, that the intent of the drafters was that the exception would be used sparingly; the concern was that overuse of the residual exceptions would undermine the categorical approach to the hearsay exceptions set forth in the Federal Rules.[2] An original draft of the Federal Rules contained only one hearsay exception, which mandated a case-by-case inquiry to determine the trustworthiness of each proffered hearsay statement. This approach was rejected because it was too unpredictable and time-

---

[1] Advisory Committee Note to Fed. R. Evid. 803(24).

[2] See, e.g., S.Rep. No. 93-1277, 93d Cong., 2d Sess. 19-20 (1974) ("It is intended that the residual hearsay exceptions will be used very rarely, and only in exceptional circumstances"). See also Rock v. Huffco Gas & Oil Co., 922 F.2d 272 (5th Cir. 1991) (noting that the exception must be used "sparingly", and holding that statements of the deceased concerning the cause of his injury were not sufficiently trustworthy).

consuming, and was replaced by a system of categorical admissibility requirements. The residual exception was the safety valve to the underinclusiveness of the categorical approach. Liberal use of the residual exception runs the risk of establishing, de facto, the dominance of the case-by-case approach that was rejected previously. To put it another was, to broaden the residual exception could permit the case-by-case exception to swallow the categorical rules.

III. Equivalent Guarantees of Trustworthiness

The most important requirement for residual hearsay is that it possess guarantees of trustworthiness equivalent to those supporting the enumerated exceptions. No inclusive list of factors determining admissibility can be devised since admissibility hinges upon the peculiar factual context within which the statement was made. But some non-dispositive generalizations can be made from a review of the cases.

There are certain standard factors which courts appear to consider in evaluating the trustworthiness of a declarant's statement. These include:

1. the relationship between the declarant and the person to whom the statement was made. For example, a statement to a trusted confidante would be considered more reliable than a statement to a total stranger.
2. the capacity of the declarant at the time of the statement. For instance, if the declarant was drunk or on drugs at the time, that would cut against a finding of trustworthiness, and vice versa.[3]
3. the personal truthfulness of the declarant. If the declarant is an inveterate liar, this cuts against admissibility, while unimpeachable veracity cuts in favor of admitting the statement.[4]

---

[3] See, e.g., United States v. Wilkus, 875 F.2d 649 (7th Cir. 1989) (affidavit signed while declarant was under heavy medication, and as to which declarant has no current memory, is insufficiently trustworthy to qualify as residual hearsay).

[4] See, e.g., United States v. Fernandez, 892 F.2d 976 (11th Cir. 1989) (grand jury testimony held not sufficiently trustworthy where the declarant "was an almost comically unreliable character"; "the government cannot seriously argue that the trust due an isolated statement should not be colored by compelling evidence of the lack of credibility of its source: although a checkout aisle tabloid might contain unvarnished truth, even a devotee would do well to view its claims with a measure of skepticism")

4. whether the declarant appeared to carefully consider his statement. [5]

5. whether the declarant recanted or repudiated the statement after it was made. [6]

6. whether the declarant has made other statements that are either consistent or inconsistent with the proffered statement.

7. whether the declarant by his conduct, exhibited his own belief in the truth of the statement.[7]

8. whether the declarant had personal knowledge of the event or condition described.[8]

9. whether the declarant's memory was impaired due to the

---

[5] See, e.g., United States v. York, 852 F.2d 221, 226 (7th Cir. 1988) (where declarant answered affirmatively to every question asked by United States Attorney, trustworthiness could not be found: "Apparently, not even a single placebo question was amongst the lot to ensure that Tommy was considering the substance of each question and answering responsively, rather than simply agreeing with every question that the government posed.").

[6] See, e.g., United States v. York, 852 F.2d 221, 226 (7th Cir. 1988) (statement not trustworthy where declarant recanted). Compare United States v. Curro, 847 F.2d 325 (6th Cir. 1988) (grand jury testimony is trustworthy, in part because the declarant never tried to disavow the statement).

[7] See, e.g., United States v. Workman, 860 F.2d 140 (4th Cir. 1988), *cert. denied*, 109 S. Ct. 1529 (1988) (statement by an accomplice to law enforcement official met the trustworthiness requirement of the residual exception; the statement subjected the declarant to criminal liability and was made by a person who agreed to meet with one of the defendants and to wear a tape recorder to the meeting).

[8] See, e.g., United States v. Doerr, 886 F.2d 944 (7th Cir. 1989) (grand jury testimony held admissible as residual hearsay, in part because it "was based entirely on [the declarant's] own personal knowledge—he revealed what he saw on the job"). *Compare* United States v. Fernandez, 892 F.2d 976 (11th Cir. 1989) (grand jury testimony held not sufficiently trustworthy where it contained many instances of hearsay within hearsay: "Although the government argues that each individual piece of double or triple hearsay would come in under one of the standard exceptions, see Fed. R. Evid. 805, experience suggests an inverse relationship between the reliability of a statement and the number of hearsay layers it contains").

lapse of time between the event and the statement.[9]

10. whether the statement, as well as the event described by the statement, is clear and factual, or instead is vague and ambiguous.

11. whether the statement was made under formal circumstances or pursuant to formal duties, such that the declarant would have been likely to consider the accuracy of the statement when making it.[10]

12. whether the statement appears to have been made in anticipation of litigation and is favorable to the preparer.[11]

13. whether the declarant was cross-examined by one who had interests similar to those of the party against whom the

---

[9] See, e.g., United States v. Sinclair, 74 F.3d 753 (7th Cir. 1996) (statement offered by the defendant as residual hearsay was properly excluded, in part because of the great lapse of time between the declarant's statement and the events described); United States v. York, 852 F.2d 221, 226 (7th Cir. 1988) (statement about events occurring five years earlier was insufficiently trustworthy).

[10] See, e.g., Hal Roach Studios v. Richard Feiner & Co., 896 F.2d 1542 (9th Cir. 1990) (S-1 registration statement filed with Securities Exchange Commission held admissible as residual hearsay to prove the corporate history of plaintiff; "The standard of due diligence applied by securities lawyers with regard to Registration Statements is sufficient to guarantee the requisite circumstantial guarantees of trustworthiness"). United States v. Curro, 847 F.2d 325 (6th Cir. 1988) (grand jury testimony admissible as residual hearsay, in part because it was made under oath subject to penalty of perjury). Compare United States v. Snyder, 872 F.2d 1351 (7th Cir. 1989) (fact that grand jury testimony was made under oath is relevant but not dispositive; testimony not admissible as residual hearsay where declarant was serving two life sentences at the time of his testimony).

[11] See, e.g., Kirk v. Raymark Industries, Inc., 51 F.2d 1206 (3rd Cir. 1995) (Trial Court erred in admitting, as residual hearsay, interrogatory responses from a codefendant who had settled; the responses, which denied liability, were offered by the plaintiff to rebut the non-settling defendant's contention that the plaintiff's injury was solely caused by the settling defendant; the interrogatory responses were not sufficiently trustworthy because they were made while the declarant was still a defendant in the litigation and "had every incentive to set forth the facts in a light most favorable to itself.").

statement is offered.[12]

14. whether the statement was given voluntarily or pursuant to a grant of immunity.[13]

15. whether the declarant is a disinterested bystander or rather an interested party.[14]

One of the dangers of the trustworthiness requirement is that it can be applied lackadaisically, given the mandated case-by-case approach and the fact that there is little meaningful appellate review. At least one commentator has argued that a permissive attitude toward the trustworthiness requirement has

---

[12] See, e.g., United States v. Zannino, 895 F.2d 1 (1st Cir. 1990) (testimony of witness who was cross-examined in the trial of defendant's accomplices held admissible as residual hearsay in defendant's separate trial; "though Zannino's counsel never had an opportunity to question Smoot, the declarant was vetted at the earlier trial by defense attorneys who shared appellant's interest in denigrating Smoot's credibility ... the functional equivalent of cross-examination by the defendant was present here, bolstering the inherent reliability of the testimony); United States v. Deeb, 13 F.3d 1532 (11th Cir. 1994) (cross-examination by accomplices in a prior trial satisfied the residual exception's trustworthiness requirement).

[13] See, e.g., United States v. Doerr, 886 F.2d 944 (7th Cir. 1989) (grand jury testimony held admissible as residual hearsay, in part because it was given voluntarily: "Because Barbaro's testimony was not given under a grant of immunity, he exposed himself to potential criminal liability.... Thus, his grand jury testimony has the circumstantial guarantee of trustworthiness supporting the hearsay exception for statements against interest"). Compare United States v. Fernandez, 892 F.2d 976 (11th Cir. 1989) (grand jury testimony held not sufficiently trustworthy where the declarant testified under a grant of immunity).

[14] See, e.g., United States v. Doerr, 886 F.2d 944 (7th Cir. 1989) ("Another indicium of reliability is the declarant's disinterest; the testimony of a mere bystander with no axe to grind tends to be more trustworthy"); Dogan v. Hardy, 587 F. Supp. 967 (D. Miss. 1984) (the Court held inadmissible in a personal injury action a self-serving statement by the driver of a car, made while he was hospitalized).

fallen hard on criminal defendants.[15] One possible example of a permissive attitude is found in *United States v. Clarke*, 2 F.3d 81 (4th Cir. 1993). Officers in *Clarke* seized a toolbox containing a large quantity of cocaine. The toolbox was in a car driven by Latimer. Latimer identified Michael Clarke as a co-conspirator. Michael moved to suppress the cocaine. At the suppression hearing, in order to establish standing, Michael testified that he had directed his brother, Christopher, to buy the toolbox and arrange for Latimer to distribute the cocaine. This testimony was used against Christopher at his trial; Michael refused to testify at Christopher's trial. The Court held that the suppression hearing testimony was not admissible under Rule 804(b)(1), the prior testimony exception, because Christopher was not present at Michael's suppression hearing, and had no opportunity to cross-examine Michael at that time. But the Court found the testimony properly admitted against Christopher under the residual exception.

The *Clarke* Court concluded that Michael's suppression hearing testimony was sufficiently trustworthy, by relying on the following factors: Michael was cross-examined by a government attorney; the statement was under oath and contemporaneously recorded; Michael knew that his suppression hearing testimony could not be used against him at his own trial, so any incentive to lie to avoid conviction was removed; Michael was subject to a perjury charge if he did lie; and he had no incentive to specifically implicate Christopher in order to establish standing with respect to the toolbox, since "he could have simply referred to an anonymous source."

The factors relied upon by the *Clarke* Court are subject to dispute. For example, the government's cross-examination of Michael at the suppression hearing was not conducted with the intent of doing Christopher any favors. The Court's assumption, that Michael had no incentive to implicate Christopher rather than an anonymous source in order to establish his own standing, is arguable. It is always more effective in establishing a point to blame or implicate a specific person rather than an anonymous source. [16]

---

[15] See Raeder, *The Effect of the Catchalls on Criminal Defendants: Little Red Riding Hood Meets the Hearsay Wolf and is Devoured*, 25 Loyola L.Rev. 1326 (1992) (arguing that the residual exception affects criminal defendants disproportionately).

[16] For a case similar to *Clarke*, see United States v. Seavoy, 995 F.2d 1414 (7th Cir. 1993): Robert and Ronald were brothers charged with robbing a bank. Robert decided to plead guilty, and at the guilty plea hearing, Robert made a statement implicating himself and Ronald. Part of the plea agreement was that the

Because the trustworthiness analysis is so fact-intensive, it is difficult to draw any conclusions as to whether the residual exception has been unacceptably expanded to admit evidence of dubious reliability. Certainly, there are cases which exclude proffered evidence as insufficiently trustworthy, which could have just as easily been decided the other way under a more permissive approach.[17] On the other hand, because the Congress intended the residual exception to be sparingly applied, it could be argued that any permissive application of the trustworthiness requirement is unwarranted. If the Committee is of the view that the trustworthiness requirement is insufficiently rigorous, it could give thought to changing the requirement from one of

---

government would recommend a two-level reduction in Robert's sentence for acceptance of responsibility. Robert then filed a motion to withdraw his plea, and refused to testify at Ronald's trial. The government proffered and the Trial Court admitted the plea transcript as residual hearsay against Ronald. The Court found no error. It reasoned that the hearsay was sufficiently trustworthy, relying on the following factors: 1. Robert's character as a witness was not tarnished by any prior criminal activity (apparently not even by the crime for which he was charged); 2. The testimony was given under oath, and both the prosecutor and his counsel (though not Ronald) questioned Robert about the bank robbery; 3. There was no apparent attempt to shift blame to Ronald; and 4. The testimony was heavily corroborated by the physical evidence. The Court rejected the defendant's arguments that Robert's motivation to obtain a sentence reduction, and his subsequent recantation of the guilty plea statement, rendered the statement untrustworthy.

[17] See, e.g., United States v. Trenkler, 61 F.3d 45 (1st Cir. 1995): Although the Court affirmed the conviction of a defendant on various charges resulting from a bomb explosion, it concluded that the Trial Judge erroneously admitted evidence concerning information obtained from an ATF database (EXIS) of explosion and arson incidents. The prosecution sought to show that, out of more than 14,000 bombing and attempted bombing incidents, only the bombing charged and one prior incident alleged to have been committed by the defendant shared certain queried characteristics. The government's expert explained that the database derived from reports by a variety of law enforcement agencies, and that no agency was required by law to send reports to the database. The Court found that "it is far from clear the extent to which information memorialized in any of the reports derives from laboratory analyses, on-the-scene observations of police officers, second-hand descriptions of the device by layperson witnesses, or some other source." It concluded that the reports lacked sufficient guarantees of trustworthiness to be admitted.

"equivalence" to a stricter standard, such as "circumstantial guarantees which clearly indicate the trustworthiness of the statement."

IV. Near Misses

The residual exception applies to statements "not specifically covered" by Rule 803 or 804. Thus, courts face the issue whether hearsay which almost, but not quite, fits another exception may be admitted under the residual exception. A major concern of some members of Congress was that certain types of hearsay deliberately excluded from the categorical exceptions might nevertheless be admitted as residual hearsay.[18] Most courts have demonstrated that there were good grounds for the congressional concerns, often admitting hearsay under the residual exception where it is a "near miss" of an enumerated exception.[19]

---

[18] See 120 Cong. Rec. H12255-57 (Dec. 18, 1974) (expressing concern that the residual exceptions would result in the erosion of the admissibility requirements of the standard exceptions).

[19] See, e.g., United States v. Furst, 886 F.2d 558 (3d Cir. 1989) ("Rule 803(24) is not limited in availability as to types of evidence not addressed in the other exceptions; [it] is also available when the proponent fails to meet the standards set forth in the other exceptions"); United States v. Valdez-Soto, 31 F.3d 1467 (9th Cir. 1994) (prior inconsistent statement not under oath is not admissible under Rule 801(d)(1)(A) but may be received under the residual exception); Dartez v. Fibreboard Corp., 765 F.2d 456 (5th Cir. 1985) (deposition offered against defendant who was not a party to the litigation in which deposition was taken; party who cross-examined deponent was not a predecessor in interest as that term is used in Rule 804(b)(1); however, since defendant could have added nothing to the cross-examination which did take place, the deposition was admissible against the defendant under the residual exception, as a "near miss" of the prior testimony exception); United States v. Doe, 860 F.2d 488 (1st Cir. 1988) (telexes and certificate issued by Honduran Naval Force, verifying that permission had been granted to board a vessel, were not admissible under Rule 803(6) since no foundation witness had been called to testify; however, they were admissible under Rule 803(24) since they were normal and regular like business records); Turbyfill v. International Harvester Co., 486 F. Supp. 232 (E.D. Mich. 1981) (statement which fails to meet the requirements of Rule 803(5) because preparer of the record is not available to testify is admitted on "near miss" grounds under Rule 804(b)(5)).

One important question as to the meaning of "not specifically covered" is whether grand jury statements can be offered by the government as residual hearsay. Criminal defendants have argued that they cannot, since such statements are similar to, but do not fall within, Rule 804(b)(1) when they are offered by the government (because there was no opportunity for the defendant to cross-examine). Defendants argue that if Congress had wanted to make an exception for grand jury statements, it could have done so, and that it is not an appropriate use of the residual exception to engraft a judicially-created exception for grand jury statements.

Most courts have rejected the argument that grand jury statements are "specifically covered" by Rule 804(b)(1) and thus not admissible as a matter of law under the residual exception. One Court has explained the predominant Federal approach as follows:

> We decline to rally behind appellants' call for a per se ban on the admission of grand jury testimony under the residual exception. If a statement does not satisfy all of the requirements of Rule 804(b)(1), then it is not a statement "covered by [one] of the foregoing exceptions" within the meaning of Rule 804(b)(5). We consider admissible those statements that are similar though not identical to hearsay clearly falling under ... the codified exceptions, if the statements otherwise bear indicia of trustworthiness equivalent to those exceptions. The contrary reading would create an arbitrary distinction between hearsay statements that narrowly, but conclusively, fail to satisfy one of the formal exceptions, and those hearsay statements which do not even arguably fit into a recognized mold. If the proponent can show that a particular piece of hearsay carries "circumstantial guarantees of trustworthiness" ... that statement should be admissible regardless of its affinity to a statement falling squarely within a codified exception.[20]

Similarly, in *United States v. Clarke*, 2 F.3d 81 (4th Cir. 1993), the Court held that suppression hearing testimony was admissible under the residual exception, where it did not qualify as prior testimony because the defendant was not a party to the

---

[20] United States v. Fernandez, 892 F.2d 976, 981 (11th Cir. 1989) (finding ultimately that the grand jury testimony was not sufficiently reliable to qualify under the residual exception).

hearing and thus had no opportunity to cross-examine the declarant. The Court rejected the argument that a statement cannot qualify as residual hearsay if it is a "near miss" of another specific exception. While the residual exception refers to hearsay "not specifically covered" by the other exceptions, the Court argued that a broad reading of this language would render the residual exceptions "a nullity": "We believe that 'specifically covered' means exactly what it says: If a statement does not meet all of the requirements for admissibility under one of the prior exceptions, then it is not 'specifically covered.'"[21]

In other words, the Federal Courts read the language "not specifically covered" as meaning "not admissible under." One possible problem with this reading is that it arguably renders the language superfluous. If the statement *were* admissible under one of the categorical exceptions, the applicability of the residual exception would never arise.

Judge Easterbrook took the contrary view in his concurring opinion in *United States v. Dent*, 984 F.2d 1453 (7th Cir. 1993).[22] He argued that the residual exception could not be used as a means of admitting grand jury testimony, because the exception is applicable only to hearsay statements "not covered" by the other exceptions. According to Judge Easterbrook, grand jury testimony *is* covered by another exception--that for prior testimony. Judge Easterbrook read the Supreme Court's decision in *United States v. Salerno*, 112 S.Ct. 2503 (1992), as implicitly deciding that grand jury testimony was "covered" by Rule 804(b)(1). He argued that the prosecution should not be permitted to evade the limitations on grand jury testimony placed in Rule 804(b)(1) by simply proffering the same testimony under the residual exception. [23]

---

[21] See also United States v. Donlon, 909 F.2d 650 (1st Cir. 1990) (holding grand jury testimony admissible and arguing that "the very use of the word 'equivalent,' suggesting there must be something special about the guarantee of trustworthiness, offers, in principle, a safeguard against the courts' use of the residual exception to swallow up the hearsay rule.").

[22] The majority in *Dent* noted that the Circuit Courts are in conflict as to whether grand jury testimony can be admitted against a criminal defendant under the residual exception, and found it unnecessary to decide this question of law, since the grand jury testimony admitted at trial was insufficiently reliable to qualify as residual hearsay at any rate.

[23] See also United States v. Vioga, 656 F. Supp. 1499 (D.N.J. 1987), *aff'd*, 857 F.2d 1467 (3d Cir. 1988) (although the Court recognized that several Circuits have approved the admission of

Another question of expanded use of the residual exception arises with respect to law enforcement reports offered against criminal defendants. Rule 803(8) contains language excluding some law enforcement reports. Can such reports nonetheless be admitted as residual hearsay? The courts have generally held in the negative, but not because of the "not specifically covered" language in the residual exception. Rather, under the predominant view of Rule 803(8), law enforcement reports will only be excluded where they are prepared under adversarial circumstances and thus suffer from suspect motivation. [24] Such reports are thus excluded because they are untrustworthy, and so they will also be excluded under the residual exception.

If the Committee believes that hearsay which nearly misses one of the categorical exceptions should never be admissible under the residual exception, then the residual exception must be amended. The "not specifically covered" language has not served to exclude "near miss" hearsay. One possibility is to state that hearsay which meets all but one of the admissibility requirements of one of the other exceptions shall not be admissible under the residual exception. Whether this is a desired result is a policy question for the Committee.

---

grand jury testimony under the residual exception, it concluded that the residual exception is unavailable when grand jury testimony is offered, since Rule 804(b)(1) specifically covers former testimony and does not include grand jury testimony).

[24] See, e.g., United States v. Enterline, 894 F.2d 287 (8th Cir. 1990) (computerized list prepared by police of vehicles reported stolen held admissible despite exclusionary language in Rule 803(8)(B) and (C): "The computer report does not contain contemporaneous observations by police officers at the scene of a crime, and thus presents none of the dangers of unreliability that such a report presents. Rather, the report is based on facts: that cars with certain vehicle numbers were reported to have been stolen. Neither the notation of the vehicle identification numbers themselves nor their entry into a computer presents an adversarial setting or an opportunity for subjective observations by law enforcement officers"). United States v. DeWater, 846 F.2d 528, 530 (9th Cir. 1988) (breathalyzer report admitted because "the preparation of this report is a routine, non-adversarial act made in a non-adversarial setting... [N]othing in the record reveals a motivation to misrepresent the test results or records."); United States v. Dancy, 861 F.2d 77 (5th Cir. 1988) (fingerprint card in penitentiary packet, offered to show that defendant was a convicted felon, was admissible under Rule 803(8)(B) because it is unrelated to a criminal investigation; the Rule excludes only records that report the observation or investigation of crimes).

LEONIDAS RALPH MECHAM
Director

CLARENCE A LEE, JR
Associate Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief
Rules Committee Support Office

October 24, 1996
Via Facsimile

MEMORANDUM TO ADVISORY COMMITTEE ON EVIDENCE RULES

SUBJECT: *Report to Congress on Rape Counselor Privilege*

I am attaching a memorandum responding to Congress' request for a report from the Judicial Conference on the need for rule amendments to protect the confidentiality of communications between sexual assault victims and their therapists. It was prepared by Professor Daniel J. Capra, the new reporter to the Evidence Rules Committee. The item will be discussed at the November 12, 1996, committee meeting.

In May 1996, I had forwarded to you a copy of the Department of Justice report studying the states' experiences on the same subject. If you need another copy, please contact me.

John K. Rabiej

Attachments

cc: Honorable Alicemarie H. Stotler
Honorable C. Arlen Beam
Professor Daniel R. Coquillette

FORDHAM
University

School of Law

Lincoln Center, 140 West 62nd Street, New York, NY 10023-7485

Daniel J. Capra
Philip Reed Professor of Law

Phone: 212-636-6855
e-mail:dcapra@mail.lawnet.fordham.edu
Fax: 212-636-6899

October 22, 1996

To: Advisory Committee on the Federal Rules of Evidence

From: Daniel J. Capra, Reporter

Re: Rape Counselor Privilege

Congress, in 42 U.S.C.§ 13942(c) (1996), directed that:

> The Judicial Conference of the United States shall evaluate and report to Congress its views on whether the Federal Rules of Evidence should be amended, and if so, how they should be amended, to guarantee that the confidentiality of communications between sexual assault victims and their therapists or trained counselors will be adequately protected in Federal court proceedings.

I have been informed by John Rabiej that the Advisory Committee is expected to prepare a report on the advisability of a rape counselor privilege, to be submitted to the Standing Committee some time in December, 1996. After discussions with some members of the subcommittee assigned to this matter, I have prepared the attached draft statement, which will be considered at our meeting on November 12. The draft statement is simply an attempt to "codify" the position that appears to have been taken by the subcommittee and later by the Advisory Committee. If after reading the draft you have any changes or suggestions, please don't hesitate to contact me.

Draft Statement to the Standing Committee

I. Privilege for Communications by Sexual Assault Victims

Congress, in 42 U.S.C.§ 13942(c) (1996), directed that:

> The Judicial Conference of the United States shall evaluate and report to Congress its views on whether the Federal Rules of Evidence should be amended, and if so, how they should be amended, to guarantee that the confidentiality of communications between sexual assault victims and their therapists or trained counselors will be adequately protected in Federal court proceedings.

A subcommittee of the Advisory Committee examined the advisability of amending the Federal Rules of Evidence to include a specific privilege protecting confidential communications from victims of sexual assault to therapists and counselors. The subcommittee examined state laws and cases, federal cases, and a Report to Congress prepared by the Department of Justice, dated December, 1995, entitled "The Confidentiality of Communications Between Sexual Assault or Domestic Violence Victims and Their Counselors." After this extensive review by the subcommittee, and discussion and further review of the pertinent materials within the entire Committee, the Advisory Committee has concluded that it is not advisable to amend the Federal Rules of Evidence to include a privilege for confidential communications from sexual assault victims to their therapists or counselors. An amendment is not necessary to guarantee that the confidentiality of these communications will be fairly and adequately protected in Federal court proceedings.

Federal Rule of Evidence 501 provides that privileges "shall be governed by the principles of the common law as they may be interpreted in the light of reason and experience." The Rule gives the federal courts the primary responsibility for developing evidentiary privileges. Recently the Supreme Court, operating under the common law approach mandated by Rule 501, recognized the existence of a privilege under federal law for confidential statements made in psychological therapy sessions. The Court specifically held that this privilege protected confidential statements made to a licensed clinical social worker in a therapy session. *Jaffee v. Redmond,* 116 S.Ct. 812 (1996). The *Jaffee* Court further held that the privilege was absolute rather than qualified.

While the exact contours of the privilege recognized in *Jaffee* remain to be developed, it is clear that the Court's generous view of the therapeutic privilege can be applied to

protect confidential communications from sexual assault victims to licensed therapists or counselors. In light of the recency of *Jaffee*, and the well-entrenched common law approach to privileges set forth in the Federal Rules, the Advisory Committee concludes that legislative intervention at this time is neither necessary nor advisable. There is every reason to believe that confidential communications from victims of sexual assault to licensed therapists and counselors are and will be adequately protected by the common law approach mandated by Rule 501. At the very least, the federal courts should be given the chance to apply and develop the *Jaffee* principle before legislative intervention is considered.

Most importantly, it is not advisable to single out a sexual assault counselor privilege for legislative enactment. Amending the Federal Rules to include a sexual assault counselor privilege would create an anomaly: that very specific privilege would be the only codified privilege in the Federal Rules. All of the other federally-recognized privileges would be grounded in the common law. The Committee believes that such an inconsistent, patchwork approach to federal privilege law is unnecessary and unwarranted, especially given the infrequency of cases involving sexual assault in the federal courts. Giving special legislative treatment to one of the least-invoked privileges in the federal courts is likely to result in confusion for both Bench and Bar.

For these reasons, the Advisory Committee recommends that the Federal Rules of Evidence not be amended to include a specific privilege for confidential communications from sexual assault victims to therapists or counselors.