ADVISORY COMMITTEE ON EVIDENCE RULES

Minutes of the Meeting of October 17-18, 1994

Washington, D.C.

The Advisory Committee on the Federal Rules of Evidence met on October 17 and 18, 1994 in the Thurgood Marshall Judiciary Building in Washington, D.C. The following members of the

Committee were present:

Circuit Judge Ralph K. Winter, Jr., Chairman

Circuit Judge Jerry E. Smith

District Judge Fern M. Smith

District Judge Milton I. Shadur

Federal Claims Judge James T. Turner

Chief Justice Harold G. Clarke

District Judge David S. Doty

Professor Kenneth S. Broun

Gregory P. Joseph, Esq.

James K. Robinson, Esq.

Professor Stephen A. Saltzburg

Peter G. McCabe, Esq.

Mary F. Harkenrider, Roger Pauley and David Karp, representing the Department of Justice

Professor Margaret A. Berger, Reporter

Also present:

Hon. Alicemarie H. Stotler, Chair, Standing Committee on Rules and Practice

John K. Rabiej, Administrative Office

Peter McCabe, Administrative Office

Joe S. Cecil, Federal Judicial Center

Professor Leon Whinery

Judge Winter called the meeting to order at 8:30 a.m. He reported on the June 1994 meeting of the Standing Committee on Rules of Practice and Procedure. At that meeting, the Standing Committee responded as follows to actions taken by the Evidence Committee at its May 1994 meeting:

Because of pending action on the Crime Bill, the Standing Committee deferred resubmitting to the Supreme Court the civil portion of Rule 412 that the Supreme Court had declined to promulgate. The issue is now moot because the Violent Crime Control and Law Enforcement Act of 1994 enacted the entire text of Rule 412 that had been forwarded to the Supreme Court, including the civil portions.

The Standing Committee rejected the amendment the

Evidence Committee had proposed to Rule 1102(b).

The Standing Committee adopted the Evidence Committee's recommendation that our tentative decision not to amend certain rules be made public, and that comment on these rules should be solicited. An announcement to that effect has been circulated, and a hearing will be held in New York on January 5, 1995 if persons wish to comment.

Judge Winter further reported that the Evidence Committee will meet next in San Diego on January 9 and 10, 1995, and will perhaps meet again on May 4-6, 1995. The Committee approved the minutes of the previous meeting held on May 9 and 10, 1994.

The Committee then turned to the provisions in the Violent Crime Control and Law Enforcement Act of 1994 (Crime Bill) that affect the Rules of Evidence.

Rules 413-415. The Committee first turned to Rules 413-415 which were conditionally passed by Congress with the proviso that if the Judicial Conference makes contrary recommendations within 150 days after the Act's effective date, the rules will not take effect if both Houses of Congress enact changes within 150 days thereafter. These rules make evidence that a person committed prior acts of sexual assault or child molestation admissible in specified criminal and civil proceedings.

Judge Winter made a number of preliminary comments about the rules. He reminded the Committee that it had evinced no interest in a prior version of these rules at the fall 1993 meeting. With regard to legislative history, he noted that statements about Rules 413-415 in this Congress were made after the Crime Bill had passed. The proponents of the rules now state that Rule 403 and the hearsay rules would continue to apply. Many of the comments the Administrative Office received on the rules point out, however, that the language seems to make other evidentiary rules inapplicable although the defendant's rebuttal evidence would be subject to the existing rules. Numerous comments were received; those from non-politicians were overwhelmingly unfavorable. Proponents of the Crime Bill provisions do not like the propensity rule in general, and reject all time limits that might restrict the admissibility of prior acts.

Opponents argue that no empirical evidence supports the proposition that prior sexual offenders are more likely to repeat their acts than other criminals; that the defendant is enormously prejudiced when such evidence is admitted; and that the jury will be diverted and confused by what will be mini-trials about disputed prior acts. In the federal courts, 80-90% of the cases in which these rules would apply involve Native Americans. Judge Winter also advised the Committee that if it decided to rewrite the rules, any accompanying Note would have to be drafted after the meeting and circulated to Committee members via Fax.

Roger Pauley argued that even in the absence of legislative history, it is clear from looking at the structure of other rules using "is admissible" language that Rule 403 would apply to these rules as well. He mentioned Rules 402, 410, 608(a)(2), 1004, 609(e) and 1003. Judge Winter replied that a reading of these other rules persuaded him that their language did not make a case for Rule 403 applying to the Crime Bill provisions.

The Committee decided by straw vote that it did not wish to leave Rules 413-415 in their present form. Members of the Committee expressed concern about ambiguity, potential constitutional infirmities, style, and inconsistency with existing Federal Rules. The Committee discussed at length whether it should rewrite the rules to make substantive changes or whether it should instead redraft the rules so as to better effectuate the stated aims of its principal sponsors. The Committee adopted the latter view after members stated that they feared that inserting restrictions, such as requiring proof of the prior act by "clear and convincing" evidence, would not pass Congress. The Committee also agreed, however, at the suggestion of Professor Broun, that it would make a short, diplomatic statement to the Standing Committee that the Evidence Committee did not agree with the substance of Rules 413-415.

The Committee agreed that the contents of all three rules belonged in present Rule 404 as an exception to the prohibition against using evidence to show that a person had acted in conformity with his or her character. The Committee thought it essential to clarify the applicability of Rule 403 balancing, and other evidentiary rules such as those governing hearsay. The Committee further decided that the rule should specify the factors that determine probative value in connection with Rule 403 balancing so as to makes the courts' task easier when construing these rules. It was agreed that the Note to the rule should point out that other Rule 403 factors apply as well.

After the Reporter submitted a redraft incorporating these suggestions, other issues arose. The Committee realized that some additional changes would have to be made in Rule 404, as well as in Rule 405, so as to enable a party to respond to propensity evidence about prior acts of sexual assault or child molestation. In a civil case, for instance, a defendant who denies that he ever committed the prior acts ought to be able to introduce evidence opinion or reputation evidence. The Department of Justice had no objection to these changes.

The Committee was also concerned that the reference to state law might open the doors to evidence of conduct such as consensual homosexual activity that is not criminal pursuant to federal law. The formula selected by the Committee does expand the scope of the rules in the Crime Bill slightly in that it would potentially allow evidence of prior acts committed outside the United States to be admitted. The Committee felt, however, that the availability of Rule 403 balancing would provide the trial court with adequate discretion to exclude evidence in those instances in which a court concluded that the place in which the prior act occurred had a major impact on the evidence's probative value.

The Committee also agreed to make the time limit on notice in criminal proceedings consistent with the notice provision that already exists in Rule 404(b), and to eliminate time limits with regard to civil cases so as not to interfere with discovery and disclosure provisions in the Federal Rules of Civil Procedure.

All voting members of the Committee were in favor of adopting the proposed changes to Rules 404 and 405; the Department of Justice abstained. The amended rules with an accompanying Note will be forwarded to the Standing Committee.

Confidential Communications Between Sexual Assault Victims and Their Counselors. The Crime Bill also contains a provision requiring the Judicial Conference to study whether the Federal Rules of Evidence should be amended to ensure that the confidentiality of communications between sexual victims and their counselors will be adequately protected in federal courts. No time limit for completing this study is in the Crime Bill, but the Attorney General has been directed to report to Congress within one year on measures that the states have taken to protect the confidentiality of these types of communications. Mary Harkenrider suggested that the Committee might wait for the Attorney General's study to be completed. Judge Winter appointed a subcommittee consisting of Judge Fern M. Smith, Mary Harkenrider, Gregory Joseph, Kenneth Broun and the Reporter to consider the Committee's response.

Rule 407. The Committee discussed at length the advisability of amending Rule 407 so as to impose a uniform rule throughout the circuits with regard to the admissibility of evidence of subsequent remedial measures in products liability cases. Ultimately, the Committee agreed to forward to the Standing Committee an amendment that extends Rules 407's ban to products liability cases. The Committee rejected a special provision for recall evidence. The amendment also clarifies when "the event" occurs that triggers application of the rule. The Committee also approved a Note to be forwarded to the Standing Committee.

Rule 103. The Committee spent considerable time debating whether Rule 103 should be amended to clarify whether waiver of appellate review occurs if the losing party fails to renew at trial an issue that had been raised in limine. The Committee with one negative vote agreed that there should be such a rule. It developed a default rule (a new subdivision (e)) that alerts counsel to the need to make clear that unless the record on the in limine motion indicates that the court's determination is final, counsel must raise the question anew at trial. The amended rule with an accompanying Note will be forwarded to the Standing Committee.

Article VII. The Committee discussed both the Reporter's draft and Professor Broun's draft of possible revisions to Article VII. The Committee decided to defer further action on this Article in light of the recency of the Supreme Court's decision in Daubert v. Merrell Dow Pharmaceuticals, Inc. and the case law that is beginning to develop in response to the opinion.

Other rules. The Committee agreed to add Rules 406, 605, and 606 to the list of rules that it has tentatively decided not to amend.