ADVISORY COMMITTEE ON EVIDENCE RULES

Minutes of the Meeting of April 14-15, 1997

Washington, D.C.

The Advisory Committee on the Federal Rules of Evidence met on April 14th and 15th in the Judicial Conference Center of the Thurgood Marshall Building in Washington, D.C.

The following members of the Committee were present:

Hon. Fern M. Smith, Chair

Hon. Milton I. Shadur

Hon. Jerry E. Smith

Hon. James T. Turner

Professor Kenneth S. Broun

Mary F. Harkenrider, Esq.

Gregory P. Joseph, Esq.

Frederic F. Kay, Esq.

John M. Kobayashi, Esq.

Dean James K. Robinson

Professor Daniel J. Capra, Reporter

Hon. David C. Norton and Hon. Ann K. Covington were unable to attend.

Also present were:

Hon. David S. Doty, Liaison to the Civil Rules Committee

Hon. David D. Dowd, Liaison to the Criminal Rules Committee

Professor Daniel R. Coquillette, Reporter, Standing Committee on Rules of Practice and Procedure

Professor Stephen A. Saltzburg, ABA representative

Professor Leo Whinery, Reporter, Uniform Rules of Evidence Committee

Roger Pauley, Esq., Justice Department

Joe Cecil, Esq., Federal Judicial Center

Joseph F. Spaniol, Jr., Esq., Federal Judicial Center

Peter G. McCabe, Esq., Secretary, Committee on Rules of Practice and Procedure

John K. Rabiej, Esq., Chief, Rules Committee Support Office

Mark Shapiro, Esq., Rules Committee Support Office

Opening Business

The Chair opened the meeting by asking for approval of the minutes of the November, 1996 meeting. Those minutes were unanimously approved. The Chair reported on the Standing Committee meeting of January, 1997, in which the proposal of the Evidence Rules Committee to recommend against the codification of a rape counsellor privilege was considered. This recommendation was unanimously approved by the Standing Committee and ultimately approved by the Judicial Conference.

Omnibus Crime Bill

The Committee considered provisions in the Omnibus Crime Bill of 1997 that would amend Federal Rule of Evidence 404 in two respects: 1. Rule 404(a)(1) would be amended to provide that if the defendant

proves a pertinent character trait of the victim, the prosecution can prove a pertinent character trait of the defendant; 2. Rule 404(b) would be amended to add "disposition toward another" to the list of permissible purposes for evidence of uncharged misconduct.

Preliminary discussion was had on the merits of these two proposals. Most members of the Committee agreed conceptually with a rule permitting the prosecution to introduce evidence of the defendant's character, once the defendant introduces evidence of the victim's character. By bringing in character evidence, the defendant has admitted that character is relevant to the case; therefore it makes sense that his own pertinent character traits should be admissible. A minority of the Committee, however, viewed the Congressional proposal as being a misapplication of the "opening the door principle." Concern was also expressed that the provision might be read to permit evidence attacking the defendant's credibility whenever the defendant attacked the victim's credibility.

As to the proposal to amend Rule 404(b), most members of the Committee believed that it is unnecessary to amend the Rule to include "disposition toward another" as a permissible purpose. The list of permissible purposes in the Rule is not intended, nor has it been read, to be exclusive. Adding another purpose to the Rule might create the misimpression that uncharged misconduct evidence could not be admitted unless offered for a purpose specified in the Rule. Further, evidence of disposition toward another would virtually always be admissible to prove intent, identity, or some other not-for-character purpose--therefore no change to the Rule is necessary.

The Committee agreed upon language to be recommended as part of a letter from the Standing Committee to Congress commenting on the Omnibus Crime Control Act. In this language, the Committee states that it has preliminarily reviewed the proposed changes to Rule 404, and that it would appreciate the opportunity to consider them further at the next Committee meeting; it asked that the Congressional proposal be delayed until the Committee has a chance to consider the matter more fully. The Committee agreed to place the substance of the proposed amendments on the agenda for its October, 1997 meeting, with a view to determining whether Rule 404 should be amended, through the rulemaking process, along the lines suggested by the Omnibus Crime Bill proposal. The Reporter was directed to survey the case law on "disposition toward another" evidence, to determine whether there are any cases in which such evidence was erroneously excluded.

Rule 103

At the November, 1996 Committee meeting, a subcommittee was directed to prepare a draft for a new Rule 103(e) to govern *in limine* practice. The subcommittee agreed upon a draft based on Kentucky Rule 103. The draft covered pretrial rulings on admissibility, and provided that objection to a final, on-the-record pretrial ruling was sufficient to preserve error. It also codified *Luce v. United States,* and its progeny. *Luce* held that a defendant must testify at trial to preserve an *in limine* objection to prior convictions offered to impeach the defendant. The *Luce* rule has been extended to other situations in which an advance ruling is conditioned on an occurrence at trial, e.g., the bringing of a defense or the elicitation of certain testimony.

A long discussion ensued on the draft. The following points were made, and the draft changed in response to those points:

1. The rule should deal not only with pretrial motions, but also with motions made at trial in advance of the evidence being offered.

2. The rule should not state that a party "may move" for an in limine hearing, since there are some circumstances (e.g., Criminal Rule 12) in which a party *must* move for an advance ruling to preserve an objection.

3. The rule should not take a position on whether error is preserved when evidence is brought out at trial by the objecting party. The Commentary should state explicitly that while taking the stand is necessary to preserve error under *Luce*, it is not always sufficient.

Committee members also discussed whether it was appropriate to codify *Luce* and its progeny. There was general agreement that *Luce,* and the cases extending it, were sound. It was also agreed, however, that the *Luce* principles should be limited to criminal cases.

Several suggestions for stylistic changes were addressed, and most of them were incorporated into the Rule. The Committee specifically considered the suggested changes from the Style Subcommittee of the Standing Committee. These comments were very helpful, and were adopted unless they resulted in substantive change or were inconsistent with other language used throughout the Evidence Rules.

A motion was made to submit the Rule as amended, and the Advisory Committee comment as amended, to the Standing Committee, with the recommendation that the Rule be published for public comment. The motion passed by a unanimous vote. The approved draft and Advisory Committee Comment are attached to these minutes.

Rule 615

At the request of the Committee, the Reporter submitted a draft of a revised Evidence Rule 615, along with a proposed Advisory Committee Comment. The purpose of the draft was to incorporate two recent legislative developments with respect to victim's rights: 1. the Victim of Crime Bill of Rights, under which a crime victim cannot be excluded from the trial unless his or her testimony would be materially affected by other evidence presented at the trial; 2. the Victim's Rights Clarification Act of 1997, which

provides that a victim cannot be excluded from trial on the ground that he or she would testify at a sentencing hearing.

During discussion on the Reporter's draft, some stylistic suggestions were made and adopted, including those suggested by the Style Subcommittee of the Standing Committee on the new language proposed in the Rule. The Committee decided unanimously, however, that no change should be made, stylistic or otherwise, to the existing language in the Rule. It was agreed that any amendment should only be for the purpose of adding language to make the Rule consistent with the recent legislation.

A suggestion was made that the definition of "victim", which the draft Rule incorporates by reference from the Victim's Bill of Rights, should be set forth specifically in the Comment. This proposal was approved by all Committee members.

A proposal was made to add language to the Comment to specify that the sequestration provided for in the Rule concerns courtroom exclusion only, and was not intended to limit the inherent authority of the Trial Judge to impose more stringent requirements on witnesses. It was agreed, however, that the proposed amendment should only address the statutory developments--the rule was not causing problems sufficient to warrant a broader review.

A motion was made to submit the Rule as amended, and the Advisory Committee comment as amended, to the Standing Committee, with the recommendation that the Rule be published for public comment. The motion passed by a unanimous vote. The approved draft and Advisory Committee Comment are attached to these minutes.

Rule 706

At the November, 1996 Committee meeting, the Reporter was instructed to review the case law and commentary under Rule 706 to provide some guidance as to whether that Rule should be amended. With the assistance of Joe Cecil of the Federal Judicial Center, the Reporter prepared a report on several issues that have arisen under the Rule. These issues include: 1) problems of funding in civil cases; 2) difficulties in selecting experts; 3) concerns about ex parte communications and depositions; 4) how to distinguish, if necessary, between the roles of court-appointed witness, special master, and technical adviser; and 5) whether the court-appointed status of the expert should be disclosed to the jury.

After reviewing these issues, the Reporter recommended in a written memorandum that consideration of any amendment to Rule 706 be deferred. Problems existing under Rule 706 do not appear so prevalent as to warrant an amendment at this time. The Chair noted that the Committee on Court Administration and Case Management is overseeing a pilot project on court-appointed experts; Judge Pointer's multidistrict litigation involving breast implant cases has been designated as the pilot project. The Chair suggested, and the Committee agreed, that any consideration of an amendment to Rule 706 should be deferred at least until CACM reported on the pilot project.

The Reporter agreed to keep the Committee updated on any new cases arising under Rule 706, and noted that Joe Cecil of the Federal Judicial Center continues to monitor Rule 706 developments in the context of broader empirical research on expert testimony. John Kobayashi agreed to act as a liaison between the Evidence Rules Committee and CACM.

Rules 404(b) and 609--Procedural Aspects

At the November, 1996 meeting, the Reporter was instructed to prepare a draft of proposed amendments adding procedural requirements to Rules 404(b) and 609. The Reporter prepared a draft of these Rules, based on proposals made by the ABA, the Uniform Rules Drafting Committee, and other sources. The Committee discussed these proposals extensively. Most Committee members were of the view that it was unnecessary to add procedural requirements--such as a hearing requirement, on-the-record balancing, articulation of balancing factors, etc.--to two Rules that were already working well under an extensively developed case law. There was also concern that the failure to follow codified procedural requirements might lead to unnecessary reversals.

The Chair pointed out that the Committee should be reluctant to propose an amendment to a Rule unless that Rule was clearly not working or, as in the case of Rule 615, an amendment was necessary to bring a Rule into line with legislative changes.

All but two members of the Committee were against proceeding at this time on an amendment to Rule 404(b) to include procedural provisions. All members were against proceeding with procedural amendments to Rule 609 at this time.

Rule 703

At the November, 1996 meeting, the Reporter was instructed to review the case law and commentary under Rule 703, and to report on whether that Rule was being used as a "back-door" hearsay exception. The Reporter's responsive memorandum concluded that there were some cases in which hearsay had been offered as the basis of an expert's opinion, but without a limiting instruction. The Reporter reviewed some other versions of Rule 703 in the states and in the academic commentary, and provided a working draft for the Committee. The draft set forth a balancing approach, applying the principles of Rule 403.

Several members of the Committee found merit in the approach taken by the draft. They believed that the draft would provide trial judges with important guidance, and that without this guidance, Rule 703 would be used as a blank check to admit all kinds of hearsay. Others thought that the amendment would create

problems by forcing parties to call witnesses to provide a foundation for records that formed the basis of an expert's opinion. The response to that concern was that the Rule only prohibited the disclosure of hearsay information when its probative value in explaining the basis of an expert's opinion was substantially outweighed by the risk that the hearsay would be used for its truth. The Rule would not require all records used by an expert to be established through foundation testimony. Other members contended that all aspects of the amendment could be found in other rules; therefore there was no need to amend Rule 703.

The Chair suggested that given the fact that there was dispute within the Committee on the merits of any amendment to Rule 703; that the Committee must respond to legislative initiatives on Rule 702, presenting issues potentially related to those in Rule 703; and that the Committee had already proposed two amendments to be submitted for public comment, the matter should be taken under advisement and reconsidered at the next meeting. All members of the Committee agreed with this suggestion. A new working draft of Rule 703 will be prepared by the Reporter for the next meeting, taking account of the suggestions for stylistic change made by the Committee during discussion and by the Style Subcommittee of the Standing Committee.

Rule 803(6)

At the November, 1996 meeting, the Reporter was instructed to prepare a draft amendment that would permit the foundation requirements under the business records exception to be established through certification. The Reporter reviewed some state versions permitting proof of business records through certification, and also considered 18 U.S.C. § 3505, which permits the certification of foreign business records in criminal cases. The reporter prepared a draft of Rule 803(6) that would permit proof of business records through certification, as well as two draft amendments to Rule 902 (one for domestic records and one for foreign records), which would be necessary to solve the authentication problem for records that are not introduced through a live witness.

A preliminary vote was taken and six members of the Committee were in favor of the concept of self-authentication of business records, while two were opposed. Discussion ensued on the drafts. Those in favor of the proposal contended that self-authentication will avoid the wasteful process of presenting a qualified witness to give essentially conclusory and perfunctory testimony. Members also noted that the trend in the states is toward permitting certification. Others noted the anomaly under current law--that foreign business records can be proved through certification in criminal cases, whereas domestic business records cannot be proved through certification in any case.

The Committee members opposed to the proposal were concerned that permitting proof of business records through certification would shift the burden of proof on admissibility from the proponent to the opponent. The response to these concerns was that the protections included in the draft would provide the proponent with more of a real opportunity to attack the trustworthiness of a proffered record than exists under the current law.

At the suggestion of the Chair, a subcommittee was appointed to consider whether language could be added to the draft, which would require foundation through a qualified witness where a legitimate question is raised as to the trustworthiness or authenticity of the record. The Subcommittee members are Greg Joseph, Jim Robinson, Mary Harkenrider, and the Reporter. The proposal of the Subcommittee will be considered at the next Committee meeting.

Amending or Updating the Advisory Committee Notes

The general question of whether Advisory Committee notes can be amended without amending the Rules was raised by several Committee members. There were two possibilities for amendments raised: 1) to amend the original Advisory Notes in the few instances in which they were clearly wrong as written and in the more frequent instances in which the Advisory Committee Draft was substantially changed by Congress; and 2) to add a set of updated Advisory Committee Notes to take account of intervening practice and case law. After some discussion, the latter alternative was rejected by the Committee on the ground that it would constitute a massive project with uncertain results. Discussion thereafter focussed on how and whether the Committee could correct the original Advisory Committee Notes to the extent they were clearly wrong as written or rendered confusing or irrelevant due to Congressional changes in the Advisory Committee Draft.

It was noted that it would be problematic to actually amend the original Advisory Committee Notes, because the Notes were part of a congressional enactment. Moreover, the Notes, even if commenting on a version of the Rule different from that actually promulgated, are important legislative history. The Reporter to the Standing Committee commented that the Standing Committee is reluctant to treat the Advisory Committee Notes as anything other than legislative history. Committee members also pointed out that the authority of the Advisory Committee comes from the Enabling Act process--so there is no way to act outside it; the statute states that the Rules are to be accompanied with an explanatory note.

Another possibility considered was whether the Reporter should contact all of the publishers of the Federal Rules of Evidence, and provide them with a list, approved by the Committee, of short editorial comments to be placed in those Advisory Committee Notes that are outmoded by legislation or clearly wrong as written. Some publishers might not agree to include these provisions, however. Another possibility discussed was to revive the Federal Judicial Center comments, which state how and whether an Advisory Committee draft was changed by Congress. Again, it is not certain that publishers would agree to include the FJC notes.

After lengthy discussion, a motion was made that the Reporter prepare a list of statements in the original Advisory Committee Notes that are either wrong as written, or that comment on a draft that was materially changed by Congress; and further that the Committee consult the Standing Committee for guidance as to the appropriate course for alerting lawyers and judges about these outmoded and/or inaccurate provisions. This motion was approved with one dissent.

Effect of Automation

John Kobayashi was asked at the November, 1996 meeting to prepare a report on whether the Federal Rules should be amended to take account of technological developments in presenting evidence. He reported at the April meeting that the problems are complex, and he was not at this point sure that a rule could be drafted to cover all potential developments. He noted that the new Maryland rule on computer-generated evidence, which had been distributed to the Committee, was really a rule of procedure, and could not be used as a model for any evidentiary change.

Some members of the Committee suggested amending the definition of "writings and recordings" in Evidence Rule 1001 to make it applicable throughout the Rules, rather than simply to Article 10. It would be critical, however, to make certain that the term "writings and recordings" is used consistently throughout the Rules.

It was resolved that John Kobayashi would submit a written report on whether and how the Rules should be amended to accommodate technological changes; this Report should consider the possibility of simply applying the Rule 1001 definition to all the Rules.

Circuit Splits

The Committee asked the Reporter to keep it apprised of circuit splits over the interpretation of any Federal Rule of Evidence. The Reporter submitted a memorandum of three circuit splits bearing on evidence that had recently been discussed in circuit court opinions. None of these splits, however, dealt directly with a construction of a Federal Rule of Evidence. One of the splits--over the standard of review for a district court's exclusion of evidence under *Daubert*--is now before the Supreme Court in *Joiner.* It was generally agreed that none of the circuit splits set forth in the memorandum warranted an amendment to any Federal Rule of Evidence at this point.

The Reporter apprised the Committee that a number of recent cases indicated a split in the circuits over the interpretation of Evidence Rule 106. Some courts have held that Rule 106 does not allow the admission of hearsay statements, even if that statement would correct a misimpression arising from the introduction of only part of a record. Other courts have said that hearsay can be introduced insofar as necessary to correct such a misimpression. The Reporter agreed to submit a memorandum on this matter

for consideration by the Committee at the next meeting.

Statutes Affecting Admissibility

At the November, 1996 meeting, the Reporter was asked to collect the Federal statutes that bear on admissibility of evidence in Federal courts. It was thought that it could be useful to amend the Federal Rules to incorporate these statutes by reference. The Reporter found over 100 statutes that affected the admissibility of evidence in Federal courts, and was not confident that he had found all such statutes. The Committee unanimously agreed that it would not be practical to amend the Rules to incorporate by reference all the statutes that might affect admissibility in the Federal courts, now and in the future.

Proposed Congressional Amendment to Evidence Rule 702

Congress is considering proposals to amend Evidence Rule 702, purportedly to codify the *Daubert* framework for assessing expert testimony. These proposals were distributed to the Committee and discussed at the meeting. There was general agreement that the proposals--particularly the Senate proposal--imposed such strict requirements that all parties, including the prosecution, could be severely hampered in introducing expert testimony. Expert testimony routinely admitted under current law--such as fingerprint identification and handwriting identification--could possibly be excluded under the Congressional proposals. It was supposed that this was not the intent of the drafters. The conclusion of the Committee was that neither the House nor the Senate provisions accurately codified *Daubert*, and that neither took account of the large body of post-*Daubert* case law.

The congressional proposals also seek to expand the *Daubert* framework beyond scientific expert testimony. While taking no position on the merits of this extention, the Committee unanimously agreed that the congressional proposals would create confusion as to how to delineate between scientific and technical evidence on the one hand, and between technical and non-technical evidence on the other.

Several members noted that Federal Judges and lawyers are expecting the Evidence Rules Committee to deal with the *Daubert* problem, and that it was no longer appropriate, especially in light of Congressional attempts to amend Rule 702, to continue to take a wait and see attitude. The Reporter was directed, by unanimous vote, to prepare a number of alternative draft proposals for an amendment to address the issues created by *Daubert* and its progeny. These alternatives will be considered by the Committee at its next meeting. The Committee also voted unanimously to submit its comments on the proposed legislation to the Standing Committee for possible referral to Congress. The Committee unanimously agreed that it was not, at this point, deciding that Rule 702 should actually be amended.

Forfeiture

Judge Dowd reported that the Criminal Rules Committee had approved an amendment to Criminal Rule 32, providing for comprehensive treatment of forfeiture proceedings. Roger Pauley reported on legislation that would treat forfeiture proceedings as part of sentencing rather than as part of trial, to accord with the Supreme Court's analysis in the recent case of *Libretti v. United States*. The import of both of these developments is that forfeiture proceedings would not be governed by the Federal Rules of Evidence. At its last meeting, the Evidence Rules Committee discussed the advisability of amending the Federal Rules of Evidence to make them applicable to sentencing proceedings, and decided not to propose such an amendment. No suggestion was made at the April meeting to revisit this decision.

Uniform Rules of Evidence

Professor Leo Whinery, the Reporter for the Uniform Rules of Evidence drafting committee, reported on developments in the drafting process. The drafting committee has now reviewed Tentative Draft #2 of Articles 1-6, and Tentative Draft #1 of Article 8. Professor Whinery noted that Article 3 of the committee's proposal takes a definitional approach to presumptions, distinguishing between substantive and procedural presumptions. He stated that consideration was being given to placing the *Luce* rule in Rule 609; but based on the Evidence Rules Committee's proposal, the Uniform Rules Committee would give thought to whether the *Luce* principle should be applied more broadly and therefore placed in Rule 103. Professor Whinery noted that the Reporters of the Uniform Rules Committee and the Evidence Rules Committee had established a cooperative relationship, and would continue to confer with and assist each other in the future.

Committee Business

The Chair noted with regret that the terms of John Kobayashi and Judge Jerry Smith expire in October, 1997. She thanked them for all their hard work and assistance to the Committee, and invited them to attend the next Committee meeting.

Next Meeting

The Chair announced that the next meeting of the Committee would take place on October 20th and 21st, in Charleston.

Respectfully submitted,

Daniel J. Capra

Reed Professor of Law

Reporter