ADVISORY COMMITTEE ON THE FEDERAL RULES OF EVIDENCE

Minutes of the Meeting of May 9-10, 1994

New York, New York

The Advisory Committee on the Federal Rules of Evidence met at the United States Courthouse at Foley Square on May 9 and 10, 1994. The meeting commenced on May 9 at 8:30 a.m. A copy of the agenda is attached.

Present were:

Hon. Ralph K. Winter, Jr.

Hon. Wayne D. Brazil

Hon. Jerry E. Smith

Hon. Fern M. Smith

Hon. Milton I. Shadur

Hon. James T. Turner

Professor Margaret A. Berger, Reporter

Professor Kenneth S. Broun

Gregory P. Joseph, Esq.

John M. Kobayashi, Esq.

Roger Pauley, Esq., Justice Department

Dean James K. Robinson

Professor Stephen A. Saltzburg

Also present:

Joe Cecil, Federal Judicial Center

Professor Daniel Coquillette, Reporter to

the Standing Committee on Rules and Practice

Mary Harkenrider, Esq., Justice Department

Peter McCabe, Administrative Offices

John Rabiej, Administrative Offices

Professor Leon Whinery

Rule 412.

Judge Winter started the meeting by discussing the Supreme Court's action with regard to Rule 412 -- it promulgated the criminal rule but rejected the civil rule. A copy of the Chief Justice's letter explaining the Court's action is attached to these Minutes. Judge Winter expressed concern about the ability of the Evidence Committee to carry on its work if the Supreme Court will reject any amendment of a rule with which it has hitherto dealt. In addition, Judge Winter explained to the Committee that the House of Representatives wants guidance since the Senate version of the crime bill contains a different version of Rule 412 than that submitted to the Supreme Court.

The Committee discussed the problem for a considerable time. Comments were made about the fact that there had been no inquiry by the Court as to the reasoning of the Committee, and, indeed there seems to be no mechanism for such inquiries. The Committee had been aware of the Court's Meritor opinion and had indicated in the proposed Note that the balancing test would be responsive to developments with regard to sexual harassment.

Mr. Rabiej suggested that the Committee could send the rule back to the Standing Committee and submit a memo explaining its position -- that the proposed rule is not beyond the Committee's power under the Rules Enabling Act. A number of members also suggested that the Committee might approach the conferees on the crime bill. A further suggestion was to recast the balancing test for civil cases as a Rule 403 test, as at least part of the problem seems to be that some members of the Court do not like the proposed rule. Judge Winter thought, however, that adopting a rule 403 approach would amount to no rule for civil cases.

Ultimately, the Committee agreed that the proposed rule did not overrule Meritor since it was a fact specific rule that would require taking that opinion into account, and that it did not exceed the bounds of the Rules Enabling Act. Dean Coquillette proposed that a concrete communication should be made to the Standing Committee commenting on Meritor and advising the Committee about what the Advisory Committee thinks should be done. Dean Coquillette also noted that the Rules Enabling Act amendments of 1988 specifically included evidentiary rules within the ambit of rulemaking.

The Committee agreed to resubmit Rule 412 to the Standing Committee with some modifications to the Note explaining why there is no Rules Enabling Action problem. If Rule 412 is mooted by congressional action, the Standing Committee should be asked if it could inquire into the Supreme Court's position

through other channels and advise us about the implications for the work of the Evidence Committee.

Rule 1102 Amendment.

Wayne Brazil reported that the Civil Rules Committee thought the amendment in subdivision (b) a good idea but ultra vires. The Civil Committee agreed that the Judicial Conference should recommend such a change to Congress for action. Stephen Saltzburg reported that the Criminal Rules Committee had found that the amendment was technically all right, and that it would be a waste of time to proceed other than as proposed in the amendment. After some discussion the Committee voted to approve Rule 1102(b). Jim Turner pointed out that the proposed title for Rule 1102 was misleading and that it should refer only to amendments. His suggestion was approved by the Committee.

Rule 404(b).

The Committee discussed Rule 404 and the various solutions that had been suggested in the Reporter's memorandum: 1) a rejection of the Huddleston opinion, 2) deferring the prosecution's other crimes evidence when offered to proved intent until it is clear that the defense intends to controvert this issue, and 3) making the rule subject to a more stringent balancing test. Reasons advanced by members of the Committee for not changing the rule ranged from "political suicide," a feeling that there was nothing to be fixed, and that this was a problematic area that could not be improved. Although there were a number of votes for considering some of the proposed solutions further, none of the proposed solutions commanded a majority and consequently it was agreed that the rule should not be amended for the time being.

Rule 405.

The Committee also decided that it did not have to amend Rule 405 to refer to Rule 412 because the rule does not cause any problems at this time despite the existence of Rule 412.

Rule 408.

The Committee spent a good deal of time discussing numerous fact patterns pursuant to Rule 408. Professor Saltzburg thought that the rule worked well; other members of the Committee were not sure that this was always the case but saw no way of amending the rule to eliminate problem cases. Mr. Kobayashi thought that taking out the third and fourth sentences of the rule might help, and he agreed to try to work out a version for consideration at the next meeting.

Rule 611.

The Committee considered the advisability of amending Rule 611 so as to make it clearer that when a proponent of a witness is permitted to examine by cross-examination because the witness is hostile the opponent should not necessarily be allowed to cross-examine the witness. Mr. Joseph felt that this was not a problem and that most judges understood the issue. The Committee agreed that there was no need to amend the rule.

Rule 103(a).

The Reporter had suggested to the Committee either abrogating the rule of United States v. Luce, or taking a broader view of the rule and revising it so that a party who raised an objection through an in limine motion would not in all circumstances have to renew the objection at trial. The Committee agreed that there might be some aberrant cases in which parties did not realize that they would forfeit their right to appeal. The Reporter was asked to look at this issue in greater depth, and to collect the cases in each circuit that deal with this issue.

Reports from the Civil and Criminal Rules Committee.

Wayne Brazil Reported on the recent meeting of the Advisory Committee on the Federal Rules of Civil Procedure. He reported that class actions were under study, that it was agreed not to go forward with amendments of Rule 68, and that the special master rules were being considered. Mr. Saltzburg reported that the Criminal Rules Committee had agreed to place video conferencing on hold, and that it was pushing forward with its amendment to Rule 16 requiring the prosecution to disclose the names and statements of witnesses seven days prior to trial. The Justice Department is opposed to this amendment.

Rule 407.

Although at its last meeting the Committee approved by straw vote the concept of extending Rule 407 to product liability cases, after further discussion the Committee was undecided on how to proceed. Some members thought the rule worked well and that the courts were really following state practice. An issue arose as to whether the rule should be amended so as to redefine "event" so as to adopt the minority Third Circuit view that repairs made after manufacture or sale but before the accident being sued on would also be excluded. The Committee was still undecided about how to treat recall evidence and expressed doubts about whether all recalls should be treated the same way, or whether a distinction should be made between a recall ordered by a governmental agency, and a "voluntary" recall initiated by the defendant in compliance with a statutory scheme. The Committee decided that it wanted to see many more cases on Rule 407 before it decided whether the rule should be amended.

Article VII.

The Committee discussed a number of Article VII problems, such as the impact of Daubert, whether Daubert should be codified, whether Daubert should be extended beyond the scientific evidence area, whether Rule 702 should be amended to require reliable evidence, and whether portions of Rule 703 that seem to govern admissibility should be combined with Rule 702. Professors Broun, Saltzburg and the reporter will all present versions of amended Article VII rules at the next meeting of the Committee.

Judge Shadur wants a sentence added to the Article VII rules to provide that the court should not qualify a witness as an expert in the hearing of the jury.

Hearsay Rules.

The Committee discussed some of the general problems about hearsay rules and some specific issues with regard to admissions. It was suggested that a personal knowledge requirement should be specifically added to the rules on authorized and vicarious admissions. The Committee also considered whether it should amend Rule 801(d) (2)(E) to reject the Supreme Court's ruling in Bourjaily v. United States which eliminates the need for independent evidence of a co-conspirators statement. The Committee also discussed the recent declaration against penal interest case currently pending in the Supreme Court.

Further Plans.

Judge Winter suggested that we should ask the Standing Committee for permission to advise the Bar that the Evidence Committee has decided not to take action with certain rules, and to treat this non-action as the equivalent of the draft of a proposed amendment to a rule. The consequence might be public hearings with regard to the rules that the Committee has decided not to amend. Judge Winter thought that such an unusual way of proceeding was warranted because no Evidence Committee exited for the past twenty years; consequently, the Bar does not yet realize that there is a body to which suggestions for amendments should be made.

Next Meeting.

The Committee agreed to meet next on October 17 - 18, in Washington, D.C.