ADVISORY COMMITTEE ON EVIDENCE RULES

Minutes of the Meeting of September 30 - October 2, 1993

Washington, D.C.

The Advisory Committee on the Federal Rules of Evidence met September 30, October 1 and 2 in the Courthouse for the Fifth Circuit Court of Appeals in New Orleans, Louisiana. 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

Professor Kenneth S. Broun

Gregory P. Joseph, Esq.

John M. Kobayashi, Esq.

James K. Robinson, Esq.

Magistrate Judge Wayne D. Brazil

Professor Stephen A. Saltzburg

Roger Pauley, Esq.

Professor Margaret A. Berger, Reporter

The following persons also attended all or a part of the meeting:

Hon. Alicemarie H. Stotler

Dean Daniel R. Coquillette

Irvin B. Nathan, Esq.

William B. Eldridge

John K. Rabiej

Judge Winter called the meeting to order at 8:30 a.m. on September 30, 1993. He suggested that the Committee discuss policy issues at this meeting and leave specific redrafting issues for the next meeting of the committee. A copy of the Agenda for the meeting is attached.

Carnegie Committee Report and Rules of that Management.

The Committee first considered a number of proposals that might have an impact on the Rules of Evidence: the Carnegie Commission Report, and Rules of Trial Management. A number of suggestions were made that in light of the Daubert opinion more thought should be given to Rule 706 and its interrelationship with the special master rule in the Federal Rules of Civil Procedure, as well as commentary to Rule 706 explaining how court-appointed experts could be used in connection with pre-trial proceedings. Professor Saltzburg suggested taking up the Carnegie report in connection with Article VII. Judge Winter said he would put Article VII on the agenda at the next meeting. He also asked that the liaison members ask their committees whether any problems exist.

Judge Winter stated that undertaking to draft Rules of Trial Management without input from the other Advisory Committees would be impossible, and questioned whether the ABA's proposal really amounted to rules. Judge Stotler volunteered to talk to the other committees about the desirability of continuing further with this project. Professor Saltzburg felt that this might be a subject that the Federal Judicial Center could handle. Judge Shadur suggested the possibility of moving toward a proposal for a standardized pretrial order. Professor Broun, however, thought that orders should be thought of in the context of problems with a particular rule such as the Article VII rules. Judge Winter expressed a good deal of skepticism about drafting Rules of Trial Management.

Sentencing Guidelines.

The Committee then discussed whether the Committee should consider the advisability of drafting evidentiary rules that would apply at the sentencing phase. Judge Winter explained that prior to the Sentencing Guidelines judges were free to disregard any evidence they wished to ignore whereas now they must take into account certain factors spelled out by the Guidelines. Judge Winter repeated the jurisdictional argument that appears on p. 6 of his memorandum of June 22, 1993, which is attached. He also cautioned that if the Sentencing Commission does not like proposals by the Evidence Committee, the Commission will go to Congress and get a statute passed.

Roger Pauley explained that §18 U.S.C. 3661 was in effect before the Sentencing Guidelines were developed and that the note to the statute states that there was no intent to modify the original approach which allows otherwise inadmissible evidence such as hearsay to be used. Consequently, it cannot be said that Congress disregarded this issue when it enacted the Sentencing Guidelines.

Judge Shadur pointed out that a judge never had to make factual findings prior to the Sentencing Guidelines. Once factual findings have to be made it becomes essential to define appropriate rules of evidence. Professor Saltzburg stated that this was an extremely important issue that the Evidence Committee could approach but that it was not only an evidentiary issue. One should assume that the Sentencing Commission would have to be a partner in any endeavor to consider evidentiary rules. Mr. Nathan agreed that the issue of evidentiary rules for the sentencing process is extremely important and that he thinks that the Committee has jurisdiction.

Judge Shadur pointed out that no one is suggesting that all evidentiary rules would apply in sentencing. Professor Saltzburg questioned whether evidentiary rules can solve the problems created by making relevant conduct admissible. Professor Broun suggested an inquiry into whether issues and problems exist that could be dealt with in evidentiary terms.

Mr. Eldridge offered to have the Federal Judicial Center gather information about sentencing. The Committee debated at some length whether it should solicit views from knowledgeable persons. The Committee agreed that the Chair of the Committee should send a request that would make no promises about redrafting Rule 1101 but that would merely solicit suggestions about whether problems exist.

Updating rules. The Committee discussed whether it can update notes without amending the rule. Mr. Pauley explained that the Sentencing Commission has taken the position that it can change commentary without changing rules. The Criminal Rules Committee has refused to take such an approach. Mr. Pauley suggested that perhaps one could republish rule without making a change and then amend the notes. The Committee agreed to revisit this issue in the context of a concrete rule like Rule 404.

The Department of Justice Proposal. Mr. Pauley proposed adoption of the Department of Justice proposal set forth in his memorandum of June 15, 1993, which is attached. The proposal would make admissible an expert's report of an analysis of a substance, object or writing. Mr. Joseph pointed out that the proposed rule is one of admissibility rather than a new hearsay exception. Judge Fern Smith objected that the provision does nothing more than can be achieved through a stipulation; defense counsel will object to such a rule because they will be afraid that even if one drafts a very narrow exception, lawyers will start to insert all kinds of imaginative material into the report. Magistrate Judge Brazil noted that the provision would apply to civil cases as well, and would be inconsistent with the proposed amendments to Rule 26 in terms of notice and timing requirements.

Mr. Pauley responded that perhaps one would wish to limit the rule to the DEA and ballistics reports and make the provision part of Rule 803(8). He stated that the DEA finds such a rule useful and few defense counsel object. Dean Robinson responded that this was really a rule that made something presumptively admissible and that defense counsel might fear being labeled as obstructionist. Judge Shadur found a real problem because the report, pursuant to the draft, would get into the jury room; one might want to have it read but not admitted. Professor Broun was concerned that it was premature to take up this proposal which ought to be considered in connection with Articles 7-9. Mr. Nathan agreed that the proposal needed to be fine-tuned.

Judge Winter then proposed working through particular articles of the Rules, beginning with Article IV, to identify particular problems that the Committee wish to have the reporter address.

ARTICLE IV.

Rules 401-403. The Committee had no problems with Rules 401-403.

Rule 407. The Committee then turned to Rule 407, the subsequent remedial measures rule on which the Reporter had prepared a memorandum that was distributed with the agenda for the meeting. It pointed out that there is a split in the circuits since the 10th Circuit views the issue as raising Erie concerns that should be resolved in terms of the forum's substantive law. The memorandum also pointed out that although the other federal circuits, to the extent that they have addressed the issue, bar subsequent remedial measures evidence in products liability cases regardless of the particular cause of action, a majority of the states allow such evidence to be admitted at least in certain types of products liability actions. This federal-state dichotomy obviously produces some forum shopping by plaintiffs and the removal of state instituted actions to federal court by defendants.

Judge Fern Smith observed that were the Committee to require deference to state law, it would become even more difficult to settle or try a products liability action with plaintiffs from a number of different states. Mr. Joseph suggested not amending the rule, but Mr. Kobayashi objected to the forum-shopping that exists in the 10th Circuit. The Committee took a straw vote on four possible resolutions:

1. To leave the circuit split - 3 votes

2. To adopt the 10th circuit rule - 0

3. To adopt the majority state rule and allow the evidence - 0

4. To amend Rule 407 so that the bar would apply in products liability cases, with perhaps some exceptions for recall letters - 5

The Reporter was directed to consider redrafting the rule to add "culpable conduct, defectiveness of a product, or unreasonableness of a design." It was also agreed that the Note should point out the low probative value of evidence (because changes may be made for other reasons) and prejudicial impact of this type of evidence, and that the Note should be careful to take into account that state law may allow in evidence on the issue of feasibility if the substantive rule is that a defendant is liable when a better alternative exists.

The Committee agreed not to vote on an amendment but to consider what the appropriate language should be in light of tort law issues at the next meeting. Mr. Robinson raised the question of whether the rule should be clarified as to the meaning of "the event."

Rule 404. Sex crimes. There was no sentiment in the Committee for amending Rule 404 to allow evidence of defendant's prior sexual behavior in a prosecution for a sexual offense against an adult or child. Among the sentiments expressed was that this was not a federal problem, a concern about prejudice, and that action by the Committee would be unlikely to affect Congress. The Committee was advised by John Rabiej that a bill now pending before the Senate Committee on the Judiciary that would amend Rule 404 with regard to sex crimes is unlikely to pass. According to Roger Pauley, however, it is still too early to make predictions about the bill's passage.

Civil cases. The Committee next considered whether the Rule 404(a) exceptions should be extended to civil cases. Although members of the Committee discussed a number of hypothetical situations in which it would not be unreasonable to treat civil cases like criminal cases, the Committee ultimately decided that it was too difficult to draw a line and too much of a waste of time. Accordingly Rules 404(a)(1) and Rules 404(a)(2) should remain unchanged.

As there have been a few cases in which courts extended the exceptions to civil cases, the Committee also considered the desirability of clarifying the rule by adding "in criminal cases"

at the beginning of each exception. Rule 404(a)(2) also should contain a phrase "except as provided in Rule 412." The Committee discussed whether these are technical amendments that therefore would not have to go through public hearings. On the other hand, Judge Winter pointed out that the full rule-making process could be used as there are a few aberrant cases, and no great need for hurry in clarifying the rule.

The Huddleston standard. The Committee discussed whether either Rule 404(b) or Rule 104(a) should be redrafted so as to overrule the Supreme Court's holding in Huddleston v. United States, 485 U.S. 681 (1988) holding that the proof of "other crimes" evidence is governed by Rule 104(b) and not by Rule 104(a). Although Mr. Pauley questioned whether the Committee could change the burden of proof, the Committee unanimously agreed that changing the standard of proof for the admissibility of evidence is a different issue than changing the ultimate burden of proof, and that the former question is within the authority of the Committee.

Three different suggestions were made as to how to overcome the Huddleston holding, and it was agreed that the Reporter would prepare a draft on all three variations together with an accompanying Advisory

Committee Note for consideration at the next meeting of the Committee. The three possible solutions were:

1. To make Rule 404(b) subject to Rule 104(a) by amending Rule 104(a).

2. To require a "clear and convincing" standard for the admission of Rule 404(b) evidence.

3. To require that in the case of Rule 404(b) evidence the usual balance required by Rule 403 would be reversed so that the burden would be on the prosecution to demonstrate that the evidence must be more probative than prejudicial.

If controverted. The Committee also decided that it would take up at the next meeting a redraft of Rule 404(b) that would deal with the issue of limiting the prosecution's ability to put in evidence on an issue that the defendant has conceded. A possible way of doing this would be to add "if controverted" to the rule. Other possibilities might be to limit the change to "stipulations read to the jury" or "unless conceded by the defendant." The Reporter will draft a number of variations.

Rule 410. The Department of Justice brought to the Committee's attention a recent decision in the Ninth Circuit, United States v. Mazzonata, which held that the government may not impeach the defendant with statements that fall within Rule 410 after he failed to abide by a cooperation agreement. Most circuits have allowed impeachment under these circumstances. The Committee agreed that this was a matter for the Criminal Procedure Committee in the first instance since the text of Rule 410 also appears in the Criminal Procedure Rules as Rule 11**(e)(6).**

Rule 405. The Committee agreed that the rule had to be changed by making it subject to Rule 412. It was decided not to alter the rule otherwise as the rule was not causing problems. It was also agreed not to add cross-references to other rules that might be implicated for fear of causing problems.

Rule 408. A number of members of the Committee raised a number of issues that they wish to have explored for the next meeting: timing issues, i.e. when does a dispute arise that triggers the rule? (the Committee wants the Rule to apply as quickly as possible); to what extent does Rule 408 apply in a second lawsuit? should there be a different rule for admissibility and discoverability and should the rule refer to this issue? if there was a dispute as to liability only does this mean that a statement may not be admitted to show the parties' agreement about a floor with regard to the amount in dispute? to what extent can one use for impeachment statements from settlement negotiations that break down? if one party perceives that there is problem and begins talking to an agency such as the SEC, will a third party be able to get these statements?

The Committee wishes to consider a series of hypotheticals next time in the context of two questions: 1. Does Rule 408 now cover this situation; 2. Should Rule 408 cover this situation?

ARTICLE VI

Rules 601-606. The Committee did not identify any articular problems with these rules.

Rule 607. The Committee requested the Reporter to look at the cases to determine whether any particular problems were arising with respect to impeaching one's own witness.

Rule 608. The Committee agreed that the Rule had been badly drafted but concluded that it should not be amended as the language has acquired a recognized meaning as the result of use. Because evidentiary rules have to be reacted to quickly in a courtroom they should not become too wordy or too different.

Rule 609. The Committee agreed that although issues exist about specific crimes that may be used for impeachment and about whether the prosecution may inquire into the nature of the crime, the Rule has caused such controversy in Congress in the past that one should not open a Pandora's box by recommending changes to Rule 609.

Rule 611. A number of suggestions were made with respect to clarifying the rule. One suggestion was to amend subdivision (c) so as to clarify that the examination that occurs after an adverse witness is examined by the proponent should not be in the nature of cross-examination. One possibility is to rephrase the rule in terms of who "adduces" the testimony. The Note should also be clarified to explain that "impeachment may, of course, require leading questions." The Committee decided not to revisit the proper scope of cross-examination.

Rule 612. Should one make it clearer that if the opponent chooses to introduce the evidence used for refreshing, the evidence is being admitted for impeachment purposes only? The Reporter will look at the cases to determine if such a change would amount to more than an academic exercise. Mr. Robinson agreed to send the Reporter a copy of the Michigan rule that accomplishes this.

Rule 613. The Committee wants to look further at whether the rule makes sense in light of the lack of correspondence that now exists between impeachment and substantive use because of Congressional changes to the hearsay exemption for prior statements.

Rule 614. The Committee discussed the advisability of adding a provision relating to questioning by jurors and whether such a provision should contain limitations such as requiring the questions to be in writing and giving the lawyers an opportunity to object? Instead of specific questions might the jurors indicate subject matter as to which they want more information and why? The Committee was concerned that the problems might not be the same in criminal and civil cases. The Reporter was requested to report further on these issues and to consider the possibility of model jury instructions.

Rule 615. The Committee did not find any serious problems with Rule 615.

ARTICLE I.

Rule 103. Should one rewrite the rule to deal separately with bench-tried and jury tried cases? Should there be a procedure for referring in limine motions to a judge other than the one who will preside at trial? The Committee decided that it wished to revisit at its next meeting the Supreme Court's decision in Luce v. United States, 469 U.S. 38 (1984) which holds that a defendant waives an objection to a trial judge's pretrial ruling refusing to exclude defendant's prior convictions unless the defendant testifies at trial.

Rule 104. Should one revise subdivision (a) to add that rulings on the admissibility of hearsay are governed by this provision? Are there any other categories of evidence that should be added to the subdivision or to the Note?

With regard to subdivision (b) the Reporter was directed to consider whether a problem exists because the rule states "admit" even though it is intended to be subject to Rule 403.

Rule 105. The rule states that a court, "upon request," shall restrict evidence, etc. The Committee wished further inquiry into whether a court may do so on its own and whether the rule as written cause problems.

ARTICLE II

Rule 201. Members of the Committee observed that the rule was not used sufficiently and that there is a

conflict between subdivisions (f) and (g) if the court takes judicial notice on appeal.

ARTICLE III

After discussion, the Committee agreed that it would not be desirable to add a rule on criminal presumptions.

Miscellaneous matters. The Committee approved Rule 84(b) on technical amendments which will become subdivision (b) of Rule 1102.

The Committee discussed at various times the importance of leaving a record of its decisions including its decisions not to amend particular provisions. One possibility that was suggested was to write a report to be published in F.R.D. Another recurring issue during the meeting was the extent to which the Advisory Committee Notes should be updated. It was agreed that if a rule is changed, the commentary could be updated -- as by adding a relevant Supreme Court holding -- even if the rule was not changed with regard to the matter updated. The majority of the Committee did not favor updating a Note in the absence of a revision to the rule.