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OF THE
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MEMORANDUM

TO: Honorable Lee H. Rosenthal, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Judge Robert L. Hinkle, Chair
Advisory Committee on Evidence Rules

RE: Report of the Advisory Committee on Evidence Rules

DATE: May 10, 2010

Introduction

The Advisory Committee on Evidence Rules met on April 22-23 at Fordham Law School in New York. The meeting produced one action item for the Standing Committee to consider at the June 2010 meeting.

As the Standing Committee knows, the Advisory Committee has been restyling the Evidence Rules. At the June 2009 meeting, the Standing Committee approved publishing the entire set of restyled rules for public comment. The Advisory Committee and the Standing Committee's Style Subcommittee have considered the public comments in detail. Most were favorable, and some resulted in changes that have improved the product. The Advisory Committee now asks the Standing Committee to approve the entire set of restyled rules for submission to the Judicial Conference. The Style Subcommittee has approved the rules.

Appendix A sets out the restyled rules as proposed for submission to the Judicial Conference, side by side with the existing rules.

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Action Item — Restyled Evidence Rules 101–1103

Background: the History of Restyling the Rules. Beginning in the early 1990s, Judge Robert Keeton, who was chair of the Standing Committee, and a committee member, University of Texas Professor Charles Alan Wright, led an effort to adopt clear and consistent style conventions for all of the rules. Without consistent style conventions, there were differences from one set of rules to another, and even from one rule to another within the same set. Style varied because a committee seeking to amend a rule did not always consider how another rule expressed the same concept. Style varied based on the membership of a particular advisory committee. Style varied as the membership of a particular advisory committee changed over time. And style varied as the membership of the Standing Committee changed over time. Different rules expressed the same thought in different ways, leading to a risk that they would be interpreted differently. Different rules sometimes used the same word or phrase to mean different things, again leading to a risk of misinterpretation. And in other respects, too, rules drafters who were experts in the relevant substantive and procedural areas sometimes did not express themselves as clearly as they might have.

Judge Keeton appointed Professor Wright to chair a newly formed Style Subcommittee of the Standing Committee. At Professor Wright’s suggestion, the Standing Committee retained a legal-writing authority, Bryan Garner, as its style consultant. Mr. Garner is the author of such books as *The Elements of Legal Style* and *A Dictionary of Modern Legal Usage*. These are generally regarded as the leading authorities on these subjects. Mr. Garner also is the current editor of *Black’s Law Dictionary* and the co-author, with Justice Scalia, of *Making Your Case: The Art of Persuading Judges*.

In conjunction with his work for the Standing Committee, Mr. Garner wrote *Guidelines for Drafting and Editing Court Rules*. First published in 1996, the *Guidelines* manual is now in its fifth printing. It has guided all rules amendments since it was written—whether or not they related to a restyling project. And the *Guidelines* manual has guided successful restylings of the Federal Rules of Appellate, Criminal, and Civil Rules, which took effect in 1998, 2002, and 2007. For matters not addressed in the *Guidelines*, the restylings have followed Garner’s *A Dictionary of Modern Legal Usage*. Professor Daniel R. Coquillette has been the Standing Committee’s reporter through all of these projects.

Mr. Garner was himself the style consultant for the restyled Appellate and Criminal Rules. Professor Joseph Kimble took over near the end of the Criminal Rules restyling project and was the style consultant as the Civil Rules project went forward. Professor Kimble is the editor in chief of *The Scribes Journal of Legal Writing* and the author of *Lifting the Fog of Legalese*, a book that

compiles some of his many essays. He and Mr. Garner are co-authors of a forthcoming book, *The Elements of Legal Drafting*, which West Publishing Company will publish. Professor Kimble has taught legal writing at Thomas Cooley Law School for 26 years.

Despite some initial opposition, each of the restyling projects has proved enormously successful. Indeed, in recognition of their work in restyling the Civil Rules, Professor Kimble, the Standing Committee, and the Civil Rules Advisory Committee each received a Burton Award for Reform in Law. The Burton is probably the nation's most prestigious legal-writing award. Judge Rosenthal, Judge Thrash (of the Style Subcommittee), and Professor Kimble accepted the awards at a black-tie dinner at the Library of Congress on June 4, 2007.

The Division of Responsibility: Substance or Style. The division of responsibility on the restyling projects has conformed generally to the protocol the Standing Committee has adopted for addressing style issues for a proposed amendment to a rule outside the restyling process. For an amendment outside a restyling project, the relevant Advisory Committee must submit its proposed language to the Style Subcommittee. On style issues, the Style Subcommittee, not the Advisory Committee, has the last word. Thus when an Advisory Committee submits a proposed amendment to any rule to the full Standing Committee, the amendment already has gone through a style review, and style issues have been determined by the Style Subcommittee. The Standing Committee chairs have kept the Style Subcommittee small in order to promote consistency. Although the Standing Committee retains the ultimate authority, through the years it has followed the style decisions of the Style Subcommittee, thus ensuring a high level of consistency across all sets of rules.

Preparing the Restyled Evidence Rules as Issued for Public Comment. With this background, the Advisory Committee on Evidence Rules undertook its restyling project beginning in the Fall of 2007. The Committee established a step-by-step process for restyling that was substantially the same as that employed in the earlier restyling projects. Those steps were: 1) draft by Professor Kimble; 2) comments by the Reporter, Professor Daniel J. Capra; 3) response by Professor Kimble and changes to the draft where necessary; 4) expedited review by Advisory Committee members and redraft by Professor Kimble if necessary; 5) review by the Style Subcommittee of the Standing Committee; 6) review by the Advisory Committee; and 7) review by the Standing Committee to determine whether to release the restyled rules for public comment.

The Advisory Committee divided the Evidence Rules into three parts. The process described above thus was conducted in three stages. The Committee also agreed that the entire package of restyled rules should be submitted for public comment at one time.

The Advisory Committee established a working principle for whether a proposed change is one of "style" (in which event the decision is made by the Style Subcommittee) or one of "substance" (in which event the decision is for the Advisory Committee). A proposed change is "substantive" if:

1. Under the existing practice in any circuit, it could lead to a different result on a question of admissibility; or

2. Under the existing practice in any circuit, it could lead to a change in the procedure by which an admissibility decision is made; or

3. It changes the structure of a rule or method of analysis in a manner that fundamentally changes how courts and litigants have thought about, or argued about, the rule; or

4. It changes what Professor Kimble has referred to as a “sacred phrase”—“phrases that have become so familiar as to be fixed in cement.”

At its Spring 2008 meeting the Advisory Committee approved the restyling of the first third of the rules (Rules 101–415). The Standing Committee, at its June 2008 meeting, approved these rules for release for public comment, with the understanding that there could be further changes and that publication would occur after the Standing Committee approved all of the rules.

At its Fall 2008 meeting, the Advisory Committee approved the restyling of the second third of the rules (Rules 501–706). The Standing Committee, at its January 2009 meeting, approved these rules for release for public comment, again with the understanding that there could be further changes and that publication would occur after the Standing Committee approved all of the rules.

At its Spring 2009 meeting, the Advisory Committee approved the restyling of the final third of the rules (Rules 801–1103). The Standing Committee, at its June 2009 meeting, approved these rules and the entire set for release for public comment.

The Public Comments. We received 19 public comments, some brief, some running to many pages. In general, they were strongly favorable, with a number of helpful specific suggestions. The Committee on the Federal Rules of Evidence of the American College of Trial Lawyers said:

Our Committee members commented, time and again, on the excellent work of the restyling sub-committee.

Comment 09-EV-002, second page.

The American Bar Association Section of Litigation said:

We commend the Advisory Committee on their excellent and careful work. The overwhelming majority of the proposed changes will lead to clearer rules that will be of great benefit to the practicing bar and the public.

Comment 09-EV-014, at 1.

A law professor said:

I'd like to start by congratulating the Committee on its work. The restyling will make it easier for students to learn the Federal Rules of Evidence. I wish the rules had been written that way in the first place.

Letter from Roger C. Park, Comment 09-EV-012, at 1. Several other professors made similar comments.

There was a single dissent: the Federal Magistrate Judges Association said it “doubts the value of restyling the Federal Rules of Evidence.” Comment 09-EV-011 at 7. The earlier restyling projects drew much more extensive opposition, but even some of the opponents later came to recognize that the restyled rules were better. That restyling the evidence rules drew only a single negative comment is perhaps a testament to the success of the earlier restyling projects.

Considering the Public Comments. The Evidence Reporter (Professor Capra) and the Style Consultant (Professor Kimble) considered the public comments in detail. They also reviewed all of the rules yet again. They provided their input to the Style Subcommittee (consisting of three Standing Committee members: Judge James A. Teilborg, Judge Marilyn L. Huff, and William J. Maledon). The Style Subcommittee considered the public comments and the input during conference calls that consumed many hours spread over many days. They did this in time for their decisions to be reported to the Advisory Committee in advance of the April 2010 meeting. The Style Subcommittee's prompt work was of enormous assistance to the Advisory Committee.

The Reporter prepared a memorandum to the Advisory Committee that analyzed in detail the public comments, the Style Subcommittee's decisions, and every issue that had been raised by anyone. At the April 2010 meeting, the Advisory Committee considered the public comments and addressed every issue. The draft minutes—which summarize but are by no means a transcript of the two-day meeting—run to 127 pages and are attached to this report. I have not attempted to summarize in this report the extensive discussions and many decisions recounted in the minutes.

The Advisory Committee approved the entire set of restyled rules, thus indicating its belief that the restyled rules are substantively identical to the existing rules. The conclusion is underscored by the committee note to each restyled rule. The note to Rule 101 explains the restyling project. The note for each other rule reiterates that the changes have been made as part of the restyling project, that the changes are stylistic only, and that there is no intent to change any ruling on evidence admissibility. In a few instances, a note includes a further explanation of a specific drafting decision. The notes follow the pattern of earlier restyling projects.

The Advisory Committee also made several recommendations to the Style Subcommittee for changes on matters of style. On those matters, the final decision of course rests with the Style Subcommittee, not with the Advisory Committee. The Style Subcommittee took up the recommendations at an additional conference call. The Style Subcommittee acted on the suggestions and gave its final approval to the entire set of restyled rules. For ease of reference, the Style Subcommittee's decisions have been noted in the minutes of the Advisory Committee meeting, even though they of course came after that meeting.

In sum, the rules and the committee notes come to the Standing Committee with the approval of the Advisory Committee (on matters of substance) and the Style Subcommittee (on matters of style). The degree of cooperation among the Reporter, the Style Consultant, the Advisory Committee, and the Style Subcommittee has been extraordinary.

Recommendation: The Advisory Committee on Evidence Rules recommends that the Standing Committee approve the proposed restyled Evidence Rules 101–1103 and the proposed Committee Notes for submission to the Judicial Conference.