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Comments on proposed restyling of Federal Rules of Evidence

Richard D. Friedman to Rules_Comments 02/15/2010 04:51 PM

I am a professor at the University of Michigan Law School, and have been engaged in Evidence scholarship since I first began teaching, in 1982. I am writing with some comments on the proposed restyling of the Federal Rules of Evidence.

Rule 104(a): It seems to me that the deletion of the reference to Rule 104(b) is a mistake. I think I understand the thinking that the "preliminary question" for purposes of Rule 104(a) when a Rule 104(b) question is presented is whether "evidence sufficient to support a finding that the condition is fulfilled" has been introduced, but I believe the reference in Rule 104(a) to Rule 104(b) helps emphasize how different the question before the court is depending on whether it is or is not presented in the Rule 104(b) context.

Rule 104(b): I believe that as long as the Rules are being restyled, it would be far preferable to eliminate the outmoded "relevancy" in favor of "relevance".

Rule 104(b): I think the change from "shall" to "may" requires further consideration. If evidence sufficient to support the finding *has* been introduced, then so far as the concerns raised by this Rule are involved, there is no reason not to admit the evidence.

Rule 105: I think the "one purpose" language of the current Rule is preferable -- less weird-sounding -- than "a purpose".

Rule 412(b)(1)(B): I think the term "sexual behavior toward the defendant" should be changed. I don't believe that, in most contexts, one person engages in sexual behavior *toward* another person. The best word may simply be "with".

Rule 801(b): I believe use of the indefinite article is preferable. Rule 801 has defined "statement", but it hasn't identified a particular statement for purposes of Rule 801(b). More substantively, there may be more than one declarant of a given statement.

Rule 801(c): I believe this rule, which is a critical one, should be changed in several respects. As I confirmed by giving an exam question based on it, it is potentially very confusing.

First, the last word should be changed from "declarant" to "Statement". The declarant may be making another statement while testifying, or perhaps the declarant made another pre-trial statement. If you don't pay attention to anything else I say here, I hope you change that word.

Second, the use of the term "prior statement" is very confusing. A witness may testify and then leave the witness stand and make a statement. That is hearsay if offfered to prove the truth of what it asserts. In other words, "prior statement" is not the same as "one the declarant does not

make while testifying at the current trial or hearing".

Third, the revamping of the appositive clause will suggest to some readers that this has something to do with what the declarant left unsaid ("one the declarant does not make")

At a minimum, I think you should address the second and third concerns by adding "that is," before "one the declarant" to try clarify that "prior statement" is a term of art defined by the appositive clause.

Fourth, while you are at it, you should change "the" matter asserted to "a" or "any". This will not do violence to the time-honored phrase. English statements of the rule use "any". A statement may assert many matters; if it is offered to prove one of them it is hearsay to that extent.

So you might consider redrafting this Rule to read something like: "'Hearsay' means a statement (1) other than one the declarant makes while testifying at the current trial or hearing, (2) that a party offers in evidence to prove the truth of a matter asserted by the statement."

Rule 801(d)(2): I appreciate the reasons for wanting to discard the term "admission". But at last "admission" was a term of art. The trouble is that the new heading of the Rule is *not* a term of art, and it is blatantly inaccurate in describing the contents of the Rule. One could perhaps argue that a statement made by a person authorized to do so by a party is the party's statement, though I think even this is dubious. But statements not authorized by the party but made on a matter within the scope of the relationship -- the only type of statement for which subdivision (D) matters -- are plainly *not* statements of the party. And neither are statements falling within subdivision (E), unless the party happens to have authorized the making of the statement. I suggest changing the heading to **A Statement by or Attributed to an Opposing Party.**

Rule 801(d)(2): I don't think you need the word "opposing" in the body of the rule -- it suffices to say that the statement is offered against the party.

Rule 801(d)(2): Given the energy that James Duane has poured into showing that "conspirator" rather than "co-conspirator" is the proper term, I think it would be better to follow his advice.

I should add that I am chair this year of the ABA's Committee on the Federal Rules of Criminal Procedure and Federal Rules of Evidence. I had hoped to generate comments of the Committee on the proposal, but the press of other matters prevented me from doing so. I did as a result of preliminary consideration of making such comments receive a set of comments from Mr. Joshua Camson, and I pass them on, without additional comment by me:

> I think these revisions will be a tremendous help for law students, lawyers, and judges in sorting out evidentiary issues. I looked them over, and wanted to share a few thoughts:
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> The changes to rule 404 make it significantly easier to understand. However, the proposed rules get rid of the phrase "conformity therewith." In the introductory comments, the authors say that they do not want to get rid of any language that is

commonly used and understood in reference to certain rules. They give examples like "truth of the matter asserted." I think the phrase "conformity therewith" falls into that category, and it should come back into 404.

In the proposed rule 405(b), the authors add the word "relevant." Previously, the rule read to allow any specific instances of a person's conduct. Those instances of conduct would have to prove the trait of character in question. However, they need not necessarily be independently relevant to the case at hand. I think there is a risk of changing the rule by inserting the "relevant" qualifier. It could be read to mean that the specific conduct must be relevant to the case at hand. So if the rulemakers want to keep "relevant" in the new rule, perhaps it could read "...may also be proved by specific instances of the person's conduct, relevant to proving the character or trait."

In the new rule 412(a) and (b) the word "alleged" is removed, that previously qualified "victim." I was reading the entire rule and wrote out a long comment about how it needs to say "alleged victim" when i got to 412(d) which defines victim as including an alleged victim. I think this definition should go at the beginning of the rules with the rest of the definitions. That will make things clearer.

The restyling of rule 608 is particularly helpful

Removing the word "admissions" from the hearsay rules was also a very good decision. The committee's note explaining the confusion inherent in the word "admissions" is spot on. Thank you for your kind consideration.

Respectfully submitted,

Richard D. Friedman
Ralph W. Aigler Professor of Law
University of Michigan Law School
Ann Arbor, MI 48109
(734) 647-1078