# Advisory Committee on Evidence Rules

Minutes of the Meeting of October 18, 2002

Seattle, Washington

The Advisory Committee on the Federal Rules of Evidence (the "Committee") met on October 18, 2002, at the Madison Renaissance Hotel in Seattle, Washington.

*The following members of the Committee were present:*

Hon. Jerry E. Smith, Chair
Hon. Robert L. Hinkle
Hon. Jeffrey L. Amestoy
Patricia Lee Refo, Esq.
Thomas W. Hillier, Esq.
Christopher A. Wray, Esq.

*Also present were:*

Hon. David C. Norton, former member of the Evidence Rules Committee
Hon. Christopher M. Klein, Liaison from the Bankruptcy Rules Committee
Hon. Richard H. Kyle, Liaison from the Civil Rules Committee
Peter G. McCabe, Esq., Secretary, Standing Committee on Rules of Practice and Procedure
John K. Rabiej, Esq., Chief, Rules Committee Support Office
James Ishida, Esq., Rules Committee Support Office
Jennifer Marsh, Esq., Federal Judicial Center
Professor Daniel J. Capra, Reporter to the Evidence Rules Committee
Professor Kenneth S. Broun, Consultant to the Evidence Rules Committee

## Opening Business

The meeting began at 7:30 a.m. Judge Smith, the newly appointed Chair of the Committee, welcomed the members. He asked for approval of the draft minutes of the April 2002 Committee meeting. The minutes were approved unanimously.

Judge Smith expressed his regret that Judge Shadur, the former Chair of the Committee, could not make it to the meeting. He noted that the Committee looked forward to having Judge Shadur attend the Spring 2003 meeting of the Committee.

The Reporter gave a short report on the June 2002 Standing Committee meeting, at which that committee approved the proposed amendment to Evidence Rule 608(b) and referred it to the Judicial Conference. Subsequently, the Judicial Conference approved the proposed amendment and referred it to the Supreme Court. Barring any unforeseen developments, the amendment will become effective December 1, 2003.

The proposed amendment to Rule 804(b)(3) had been substantially revised by the Committee at its April 2002 meeting, and as revised was submitted to the Standing Committee with the recommendation that it be released for a new round of public comment. The Standing Committee unanimously approved the proposal. The Reporter noted that, so far, there have been no public comments submitted on the proposed amendment; a public hearing on the proposal is scheduled for January 27, 2003.

Judge Smith asked Committee members whether, upon review of the proposed amendment to Rule 804(b)(3), any member had found substantial problems with the proposed change in the text or with the Committee Note. No Committee member had any problem with the proposal.

## Long-Range Planning SS Consideration of Possible Amendments to Certain Evidence Rules

At its April 2001 meeting, the Committee directed the Reporter to review scholarship, caselaw, and other bodies of evidence law to determine whether there are any evidence rules that might be in need of amendment. At the April 2002 meeting, the Committee reviewed a number of potential changes and directed the Reporter to prepare a report on a number of different rules, so that the Committee could take an in-depth look at whether these rules require amendment. The Committee's decision to investigate these rules further was not intended to indicate that the Committee had actually agreed to propose any amendments. Rather, the Committee determined that with respect to these rules, a more extensive investigation and consideration is warranted.

At the October 2002 meeting, the Committee began to consider the Reporter's memoranda on some of the rules that have been found worthy of in-depth consideration. The Committee agreed that the problematic rules should be considered over the course of four Committee meetings, and that if any rules are found in need of amendment, the amendment proposals would be delayed in order to package them as a single set of amendments to the Evidence Rules. This would mean that the package of amendments, if any, would go to the Standing Committee at its June 2004 meeting, with a recommendation that the proposals (again, if any) be released for public comment.

With that timeline in mind, the Committee considered reports on five possibly problematic Evidence Rules at its Fall 2002 meeting. The goal of the Committee was not to vote definitively on whether to propose an amendment to any of those rules, but, rather, to determine whether to proceed

further with the rules as part of a possible package of amendments. Thus, a "no" vote from the Committee would mean that no action would be taken to propose an amendment. A "yes" vote would mean only that the Committee was interested in further inquiry into a possible amendment and would consider possible language for an amendment at a later date.

## 1. Rule 106

The Reporter's memorandum on Rule 106, the rule of completeness, indicated that courts and commentators are in dispute over two important questions about the scope of the rule. One question is whether the rule operates as an independent rule of admissibilitySSadmitting completing evidence even if it would otherwise be excluded as hearsay or under some other rule of exclusion. This is called a "trumping" function. The other major question is whether the rule should permit completing evidence of oral statements and actions as well as the written statements currently covered by the rule. The Reporter prepared model drafts that would cover these points.

Discussion indicated that most Committee members were skeptical about including a trumping function in Rule 106. The Justice Department representative argued that if a trumping function were included in the rule, this would give parties an incentive to argue that evidence is necessary for completeness purposes, even though it is not really necessary to clarify a misleading impression. The Justice Department representative also pointed out that a number of exclusionary rules, such as Rules 403 and 412, should never be trumped by Rule 106.

Another Committee member questioned whether it was necessary, as a practical matter, to amend Rule 106 to include a trumping function. He noted that if admission of evidence indeed were necessary to correct a misleading impression, a trial judge would find a way to admit it even without Rule 106SSfor example, the trial court could hold that the proponent of misleading evidence opened the door, or waived the right to complain about completing evidence. Thus, the trial judge will reach a fair result without a change to Rule 106. Other members noted that the concept of "opening the door" is a principle that runs through many evidentiary doctrines, including admission of hearsay and evidence that is otherwise prejudicial. It might be considered misleading to codify an "open the door" principle with respect to completing evidence only, while failing to treat the use of that concept in other situations.

One member in favor of a proposed change to Rule 106 argued that in criminal cases, the government often proffers selected parts of a statement, and it is only fair to allow defendants to admit other portions that are necessary to place the initially admitted parts in context. If the rule were to include a trumping function, it is more likely that defendants will receive a fair ruling on completing evidence.

Members of the Committee also expressed skepticism about amending Rule 106 to cover oral as well as written statements. This could lead to attempts of an opponent to disrupt the proponent's

order of proof by contending that the proponent's witness testified to a misleading portion of an oral statement; disputes will often arise about what the oral statement actually was. There often will have to be a sidebar hearing to determine who said what.

Committee members also noted that many courts have used Rule 611(a) to admit completing evidence of an oral statementSSfrom this they concluded that there was no reason to amend Rule 106 to cover the presentation of completing oral statements. The change would be one of form only, not of substance.

The Committee took a tentative vote on whether to continue work on a possible amendment to Rule 106. Two members of the Committee voted against continuing work on Rule 106. All members of the Committee voted against any amendment to Rule 106 that would cover oral statements. A majority of the Committee, however, agreed to consider further an amendment to Rule 106 that would provide some form of trumping function in the rule.

## 2. Rule 404(a)

The Reporter's memorandum on Rule 404(a) indicated that there is a split among the circuits as to whether character evidence can be used circumstantially in a civil case. A typical situation in which the question is presented is where an official is sued for assault in a 42 U.S.C. § 1983 case. Can the defendant introduce evidence of his own peaceful character to show that he acted peacefully on the time in question? Can the defendant introduce evidence of the plaintiff's aggressive character to show that the plaintiff was the aggressor at the time in question? Conversely, can the plaintiff introduce evidence of his own peaceful character and/or the defendant's violent temperament to prove how the parties acted?

Most courts have held that character evidence is not admissible to prove conduct in a civil case. Those courts rely on the language of the rule, which permits circumstantial use of character evidence only with respect to the "accused" and the "victim." Those courts reason that the term "accused" is a term of art applied to criminal cases only. Moreover, the Advisory Committee Note to Rule 404(a) says that the rule rejects the circumstantial use of character evidence in a civil case. But two circuits, the Fifth and the Tenth, hold that character evidence can be offered circumstantially where the defendant in a civil case is accused of conduct that is tantamount to a crime.

The Committee considered which view among the circuits is better policy. It concluded unanimously that as a policy matter, character evidence should not be admitted to prove conduct in a civil case. The circumstantial use of character evidence is fraught with peril in *any* case, because it could lead to a trial of personality and could cause the jury to decide the case on improper grounds. But the risks of character evidence historically have been considered worth the costs where a criminal defendant seeks to show his good character or the pertinent bad character of the victim. This so-called "rule of mercy" is thought necessary to provide a counterweight to the resources of the

government, and is a recognition of the possibility that the accused, whose liberty is at stake, may have little to defend with other than his good name. None of these considerations is operative in civil litigation. In civil cases, the substantial problems raised by character evidence were considered by the Committee to outweigh the dubious benefit that character evidence might provide.

The question, then, for the Committee was whether it is necessary to propose an amendment to Rule 404(a) explicitly to prohibit the circumstantial use of character evidence in a civil case. The Committee tentatively agreed to work on a proposed amendment to Rule 404(a) to achieve the desired policy. Members noted that the circuits are split on the question, and this causes both disruption and disuniform results, especially in civil rights cases. Such cases arise relatively frequently in the federal courts, so an amendment to the rule would have a helpful impact on a fairly large number of cases.

Committee members noted that if Rule 404(a) is to be amended, the amendment should include a reference in the text that evidence of a victim's character, otherwise admissible under the rule, nonetheless could be excluded under Rule 412 in cases involving sexual assault. Although the need for such clarification does not justify an amendment on its own, the Committee determined that clarifying language would be useful as part of a larger amendment.

The Reporter was instructed to prepare a proposed amendment and supporting memorandum for the Committee to consider as part of the Committee's long-range planning.

## 3. Rule 408

The Reporter's memorandum on Rule 408 noted that the courts are divided on three important questions concerning the scope of the rule:

1) Some courts hold that evidence of compromise is admissible against the settling party in subsequent criminal litigation, relying on a policy argument that the interest in admitting relevant evidence in a criminal case outweighs the interest in encouraging settlement. Other courts hold that compromise evidence is excluded in subsequent criminal litigation, noting that there is nothing in the language of Rule 408 that would permit the use of evidence of civil compromise to prove criminal liability.

2) Some courts hold that statements in compromise can be admitted to impeach by way of contradiction or prior inconsistent statement. Other courts disagree, noting that the only use for impeachment specified in the Rule is impeachment for bias, and noting further that if statements in compromise could be admitted for contradiction or prior inconsistent statement, this would chill settlement negotiations, in violation of the policy behind the rule.

3) Some courts hold that offers in compromise can be admitted in favor of the party who made the offer; these courts reason that the policy of the rule, to encourage settlements, is not at stake where the party who makes the statement or offer is the one who wants to admit it at trial. Other courts hold that settlement statements and offers are never admissible to prove the validity or the amount of the claim, regardless of who offers the evidence. These courts reason that the text of the rule does not provide an exception based on identity of the proffering party, and that admitting compromise evidence would raise the risk that lawyers would have to testify about the settlement negotiations, thus risking disqualification.

The Committee began its discussion on whether Rule 408 should be amended to clarify whether that compromise evidence is admissible in criminal cases. The Justice Department representative noted that the Department had not yet come to a conclusion on whether, as a matter of policy, such evidence should be admissible in criminal cases. On the one hand, if compromise evidence is excluded from criminal cases, it eliminate a disincentive that a party otherwise would have to settle with the government in related civil matters; and it will make it more likely that victims of wrongdoing will receive compensation from wrongdoers in a timely fashion. On the other hand, if compromise evidence is admitted in criminal cases, it might make it more likely that a meritorious criminal prosecution will be successful. The Justice Department representative asked that ultimate consideration of a proposed amendment to Rule 408 be deferred until the Department can formulate a position on the matter. The Reporter responded that any consideration of an amendment to Rule 408 was tentative at this stageSSthe only question for the Committee at this point was whether the rule should be considered a candidate for an amendment as part of long-range planning.

Other Committee members stated that policy arguments weigh strongly in favor of excluding evidence of a civil compromise in a later criminal case. If such evidence is admissible in a criminal case, it significantly diminishes the incentive to settle civil litigation. Moreover, excluding compromise evidence in criminal cases would not result in the loss of evidence in such casesSSwithout a rule protecting compromise evidence, there is likely to be no settlement that could ever be admitted in a criminal case. In other words, the only evidence "lost" is that generated by the rule protecting compromise evidence.

Committee members argued that it is necessary to amend Rule 408 to provide specifically that evidence of a civil compromise is inadmissible in subsequent criminal litigation. Under the caselaw interpreting the current rule, such evidence is admissible in some circuits and not in others. This is a poor state of affairs, because there may be no way, at the time of a civil settlement, to predict where a criminal litigation might be brought; moreover it is unfair to have such powerful evidence admissible against some defendants and not others. Finally, the possibility that a civil settlement will be admissible in a criminal case presents a trap for the unwary. Rule 408, by its terms, does not specify that civil settlements are admissible in criminal litigation, so a lawyer and client may enter into civil settlement negotiations under the mistaken impression that such negotiations and settlement never could be used against the client.

The Committee then discussed whether the rule should permit impeachment by way of prior inconsistent statement and contradiction. Committee members agreed that the rule should not permit such broad impeachment, because to do so would unduly prohibit settlement. Parties justifiably would be concerned that something said in settlement negotiations later could be found inconsistent with some statement or position taken at trial; it is virtually impossible to be absolutely consistent throughout the settlement process and trial. The Committee resolved that if Rule 408 is to be amended, it should include a provision specifically stating that compromise evidence cannot be offered to impeach by way of prior inconsistent statement or contradiction. The Reporter noted that such a provision exists in several states.

The Committee then turned to whether compromise evidence should be admissible in favor of the party who made the statement or offer of settlement. The Committee determined that such evidence should not be admissible. If a party were to reveal its own statement or offer, this would itself reveal the fact that the adversary entered into settlement negotiations; such evidence is entitled to protection on its own. Thus, it would not be fair to hold that the protections of Rule 408 can be waived unilaterally, because the rule, by definition, protects both parties from having the fact of negotiation disclosed to the jury. Moreover, a party that admits its own offer or statement in compromise would open the door to evidence of counter-offers, responses to offers and counter-offers, and the likeSSall with the possibility that lawyers will have to be disqualified because of the need to testify about the tenor and import of the settlement negotiations. The Committee concluded that allowing a party to admit its own settlement statements and offers would open up a "can of worms" and could not be justified by any corresponding benefit. The Committee resolved that any amendment to Rule 408 that might be proposed as part of long-range planning should include a provision specifically stating that compromise evidence is excluded even if proffered by the party that made the statement or offer in compromise. Such a provision is necessary, because the circuits are divided on the point, and differing results on the question are not justifiable.

The Committee next considered whether Rule 408 is a rule of privilege; if it is a privilege, any amendment would have to be enacted directly by Congress. If an amendment to Rule 408 went through the ordinary rulemaking process, the question of whether it is a privilege would be resolved definitively only if a court were to render an opinion on the subject. The Committee resolved, however, that the weight of the argument strongly favors the conclusion that Rule 408 is not a privilege. The arguments against a privilege include: a) Rule 408 was placed in Article 4 of the Federal Rules, not in the body of privileges originally proposed as Article 5; b) at least some courts have held that the protections of Rule 408 are not waivable, in contrast to privileges which are waivable; c) privileges ordinarily protect some important confidential relationshipSSRule 408 does not; and d) other policy-based rules of exclusion have been amended through the rulemaking process, specifically Rule 407 and the restylized Criminal Rule 11(e)(6), which was substantively identical to Evidence Rule 410. Thus, the Committee preliminarily determined that if an amendment to Rule 408 were to be proposed, it could proceed through the ordinary rulemaking process.

Finally, the Committee reviewed the caselaw holding that Rule 408 protects against admission of statements made by the government during plea negotiations in a *criminal* case. Rule 410

applies to plea negotiations, but it does not by its terms protect statements and offers made by the government: It provides that statements and offers in plea negotiations are not admissible "against the defendant." The inapplicability of Rule 410 to government statements and offers in plea negotiations has led some courts to hold that such evidence is excluded under Rule 408. The Committee noted, however, that Rule 408, by its terms, does not apply to negotiations in criminal casesSSRule 408 refers to efforts to compromise a "claim," as distinct from criminal charges.

As a policy matter, the Committee determined that government statements and offers in plea negotiations should be excluded from a criminal trial, in the same way that a defendant's statements are excluded. A mutual rule of exclusion would encourage a free flow of discussion that is necessary to efficient guilty plea negotiations; there is no good reason to protect only the statements of a defendant in a guilty plea negotiation. The Committee also determined, however, that if an amendment is required to protect government statements and offers in guilty plea negotiations, that amendment should be placed in Rule 410, not Rule 408, which, by its terms, covers statements and offers of compromise made in the course of attempting to settle a *civil* claim. Rule 410, which governs efforts to settle criminal charges, is the appropriate place for any amendment that would exclude statements and offers in guilty plea negotiations.

At the end of its discussion, the Committee directed the Reporter to prepare the following for the Committee's consideration at the next meeting: 1) a draft of an amendment to Rule 408 that would provide that compromise evidence is inadmissible in a criminal case; 2) a draft of an amendment that would provide, in contrast, that such evidence is admissible in a criminal case; 3) provisions in both model drafts of Rule 408 that would provide that compromise evidence may not be used for impeachment by prior inconsistent statement or contradiction; 4) provisions in both model drafts that would provide that compromise evidence is not admissible, even if proffered by the party who made the statement or offer in compromise; and 5) a draft of an amendment to Rule 410 that would exclude statements and offers made by the government during guilty plea negotiations.

## 4. Rule 412

The Reporter's memorandum on Rule 412 raised two possible problems for the Committee's consideration. One possible problem is that the Rule has three stylistic anomalies: 1) The rule seems to provide that evidence rules other than Rule 412 can operate to exclude evidence offered by a criminal defendant, even though the Constitution would require it to be admitted; 2) when referring to the victim, the rule uses the qualifying term "alleged" in every place but oneSSthis seems merely to have been an oversight; and 3) the notice requirement is drafted in terms that might raise a question whether notice can be submitted and served electronically in those courts permitting electronic case filing.

The Committee reviewed these stylistic problems and concluded unanimously that they do not, together or cumulatively, require an amendment to the rule. No part of the problematic language has actually created a problem in the cases. The Committee resolved that the benefit of any purely stylistic change is never sufficient in itself to justify the cost of amending an evidence rule. Committee members agreed that stylistic changes to an evidence rule would not be proposed unless a particular rule needed to be amended on other, substantive grounds.

The second possible problem addressed in the Reporter's memorandum on Rule 412 is that there has been some confusion in the courts about whether evidence of a victim's prior false claims of rape are covered by the rule. If such claims are covered, then they would rarely be admissible under Rule 412SSin a criminal case, they would be admissible only if constitutionally required, and caselaw indicates that the constitution would mandate admissibility only if the false claim were probative of the victim's bias or motive. In contrast, if false claims are not covered by Rule 412, they could be admissible to prove the victim's character for untruthfulness under Rule 608(b).

After discussion, the Committee determined not to proceed further with any amendment to Rule 412. The admissibility of false claims under Rule 412 has created some confusion in the courts, but there is not a substantial body of caselaw on the subject, and the courts still seem to be working out the problem. The problem does not seem substantial enough to justify the costs of amendment–especially an amendment to a rule grounded in sensitive and complicated policy concerns. Moreover, there are many difficult questions about proof of false claimsSSsuch as when is a claim considered "false" and when is a false claim probative of biasSSthat are probably better left to caselaw development than to rulemaking. Finally, members noted that Congress directly enacted the amendment to Rule 412 in 1994, and apparently deliberately chose not to address the question of false claims; this counsels against rulemaking on the subject.

## 5. Rule 803(4)

At its last meeting, the Committee directed Professor Ken Broun, a consultant to the Committee, to prepare a report on whether Rule 803(4) should be amended. The rule currently sets forth a hearsay exception for statements made for purposes of medical treatment or diagnosis. The rule specifically provides that statements made to doctors for purposes of litigation are within the exceptionSSbecause the doctor in preparing testimony would be diagnosing the patient's condition.

Professor Broun reported that the original rationale for including, within the exception, statements made for purposes of litigation was that the doctor would ordinarily use such statements as part of a basis for forming an expert opinion, and the statements therefore would be heard by the jury anyway. Professor Broun noted, however, that this rationale has been undermined by the 2000 amendment to Rule 703, under which hearsay used as the basis for expert opinion cannot be disclosed to the jury unless its probative value substantially outweighs its prejudicial effect. Professor Broun also noted that a few courts had held, in criminal cases, that a statement to a doctor solely in

anticipation of litigation was not reliable enough to satisfy the accused's right to confrontation. Professor Broun presented four alternative models that might be used to amend Rule 803(4) to prevent the admission of statements made for purposes of litigation under that rule.

After an extensive discussion, the Committee decided not to pursue an amendment to Rule 803(4). The following points were made by various Committee members during the course of discussion:

1. It will be difficult in many cases to determine the motivation of the patient who speaks to a doctor, especially after an accident or injury. Is the patient seeking treatment, or an expert witness, or both? The current rule avoids this difficult line-drawing.

2. If the rule were amended to exclude only those statements made *solely* for litigation purposes, it would have very little effect. Competent counsel would make sure that consultations with doctors for litigation purposes would have some treatment motivation. Moreover, statements of the patient's current physical condition (e.g., "my neck hurts") will still be admissible under Rule 803(3) even if made to a doctor for purposes of litigation. Thus, the exception as amended would exclude only those statements where counsel has done nothing to work around the rule. The costs of an amendment do not justify a rule that will apply so infrequently.

3. There will still be some situations in which a doctor, testifying as an expert, will be able to disclose hearsay when used as the basis for an expert opinion. Rule 703 does not prohibit such disclosure; it simply makes it more difficult. Thus, the original rationale for admitting statements under Rule 803(4)SSthat the jury would hear the statements anyway and would not differentiate between statements offered for truth and statements offered as the basis for an expert opinionSShas been undermined somewhat, but it is still applicable.

4. A rule change that would exclude statements made by an injured plaintiff to medical experts would encounter substantial opposition from the plaintiffs' bar.

5. To the extent the amendment would be intended to deal with statements made by victims of child abuse for purposes of litigation, this is an enormously complicated question that is better left to caselaw development.

## 6. Other Rules for Future Consideration

As part of long-range planning, the Reporter prepared a short memorandum on other rules that might be raising problems. The Committee reviewed the rules highlighted by the Reporter, to determine whether to direct the Reporter to prepare a full memorandum on any of those rules.

**After discussion, the Committee requested the Reporter to prepare a memorandum on the problems raised by the following two rules:**

1. **Rule 806**: The rule provides that if a hearsay statement is admitted under a hearsay exception or exemption, the opponent may impeach the hearsay declarant to the same extent as if the declarant were testifying in court. The courts are in dispute, however, about whether a hearsay declarant's character for truthfulness may be impeached with prior bad acts under Rule 806. If the declarant were to testify at trial, he could be asked about pertinent bad acts, but no evidence of those acts could be proffered--Rule 608(b) prohibits extrinsic evidence of bad acts offered to impeach the witness's character for truthfulness. For hearsay declarants, however, the only way to impeach with bad acts is to proffer extrinsic evidence, because the witness is not on the stand to be asked about the acts. Rule 806 does not explicitly say that extrinsic evidence of bad acts is allowed. As a result, some courts prohibit bad acts impeachment of hearsay declarants, and some permit it.

The Committee recognized that impeachment of hearsay declarants often can be critically important, and to preclude extrinsic evidence of bad acts would mean that a hearsay declarant could not be impeached for untruthful character. This could lead to abuse--a party who wished to avoid impeachment of a witness through bad acts might engineer a hearsay statement to substitute for in-court testimony. The Committee agreed to consider whether Rule 806 should be amended specifically to provide that a hearsay declarant may be impeached through extrinsic evidence of bad acts where the acts are otherwise admissible under Rule 403.

2. **Rule 901:** The Reporter noted that some commentators have suggested that the use of digital photography poses special concerns for establishing and challenging authenticity. Digital photographs can be altered fairly easily, and such alteration might be difficult to detect. The Committee discussed, on a preliminary basis, whether it would be useful to amend Rule 901, or to propose a new evidence rule for Article 9, to provide special rules for authenticating digital photography--such as requiring evidence of a digital "fingerprint."

Committee members were skeptical that such a rule would be necessary. The general feeling was that Rule 901 was flexible enough to allow the judge to exercise discretion to assure that digital photographs are authentic and have not been altered. The Reporter noted, however, that it might be worthwhile for the Committee to allow the Reporter to conduct further research on the problem and to provide a background memorandum to the Committee, especially given the Standing Committee's interest in assuring that the rules are updated when necessary to accommodate technological changes. The Committee directed the Reporter to prepare a background memorandum on the use of digital photographs as evidence, to be considered at a future meeting.

**The Committee decided not to proceed with any further investigation as to the following Rules:**

1. *Rule 804(a)(5)*SSThe Rule establishes a "deposition preference" for hearsay exceptions premised on unavailability. Occasionally this preference has led to anomalous resultsSShearsay statements otherwise admissible under Rule 804(b)(3) have been excluded when the declarant has given a deposition on the subject, and the asserted ground of unavailability is absence. The Committee determined that, although the rule has created problems and anomalous results from time to time, those cases are relatively infrequent. The problems are not so serious or prevalent to justify the costs of an amendment.

2. *Rule 804(b)(1)*SSThe Rule provides that in a civil case, prior testimony may be admitted against a party who had a similar motive to develop the testimony at the time it was given, or whose "predecessor in interest" had such a motive. The courts have divided over whether the term "predecessor in interest" is broad enough to cover parties in prior litigation with no legal relationship to the party against whom the testimony is now offered, but whose development of that testimony was as effective as the current party could have done.

Committee members noted that any dispute among the courts is one of form rather than substance. Even those courts that refuse to interpret the term "predecessor in interest" expansively will find a way to admit testimony from a prior litigation where the party who developed the testimony did as good a job as the party against whom the testimony is admitted could have expected to do; thus, courts that have refused to admit such testimony under Rule 804(b)(1) have admitted it anyway under the residual exception. Consequently, the Committee decided not to proceed further with an amendment to Rule 804(b)(1).

3. *Rule 807*SSThe Reporter noted that two possible problems have arisen in the application of the residual exception. First, there is some dispute about the breadth of the exception, specifically whether statements that "nearly miss" the other exceptions can qualify as residual hearsay. Second, the notice requirement of the residual exception is written in unbending, bright-line terms, but courts have applied it flexibly, excusing compliance for good cause or finding harmless error.

Committee members observed that the breadth of the residual exception presented a policy question that most courts had already worked through. Almost all courts apply the exception expansively; even assuming that the exception should be applied more narrowly as a matter of policy, there would be little that could be added to the rule that could guarantee that result. Application of the exception requires a case-by-case approach that depends on the circumstances and the discretion of the judgeSSsuch a flexible inquiry is difficult to constrain by textual language in an evidence rule.

As to notice, it was clear to the Committee that courts would apply the notice requirement flexibly, regardless of the language of the rule. Therefore, the only question is whether it would be worthwhile to amend the rule to "codify" the flexible approach already taken by the courts. The Committee agreed that changing the language of the text to codify the result already reached by the courts might be useful, but the benefits of such codification are outweighed by the costs of an amendment—including the risk of upsetting settled expectations and the risk that the amendment will be misinterpreted as broader than intended.

4. *Rule 902(1)*—Rule 902(1) provides for self-authentication of domestic public records under seal, including records of the Canal Zone. Because there is no longer a Canal Zone, it has been suggested that the rule be amended to delete the reference. The Committee decided not to proceed with such an amendment, however. Such an amendment would be the kind of stylistic, non-substantive change that the Committee has decided as a matter of policy is insufficient to justify on its own the substantial costs of amending an evidence rule. Moreover, it is possible that a public record from the former Canal Zone might still be used in litigation.

5. *Rule 902(2)*—The rule provides for self-authentication of public documents not under seal if a public officer having a seal certifies that the document was signed by a person in an official capacity and the signature is genuine. The former Justice Department representative on the Committee had suggested that the rule should be amended because many state officials who certify documents no longer use a seal. When that suggestion was made, the Committee decided that if the Department of Justice representative could determine that the rule was creating a problem for government lawyers in authenticating public records, the Committee would consider proposing an amendment to the rule to provide an alternative to the sealing requirement. To this date, no showing of a problem has been made. The current Justice Department representative informed the Committee that he would look into the matter to determine whether Department lawyers were having a problem with the sealing requirement. Any further consideration of an amendment to Rule 902(2) was tabled pending a report from the Department of Justice representative.

6. *Rule 902(6)*—Rule 902(6) provides that printed materials purporting to be newspapers or periodicals are self-authenticating. It has been suggested that this rule should be expanded to permit self-authentication of internet materials that serve the same function as printed newspapers or periodicals, such as the electronic version of the *New York Times* or *Slate Magazine*.

The Committee decided not to proceed with an amendment to Rule 902(6). All that is at stake is self-authentication; internet materials can still be authenticated by making the necessary showing of authenticity under Rule 901. Moreover, Committee members ex-

pressed concern that there might be legitimate questions of authenticity of material taken from the internet, as distinguished from printed newspapers that are obviously likely to be authentic. Internet material is more subject to alteration; this counsels caution before extending the rule of self-authentication that currently applies to printed materials only.

7. *Rule 1006*SSThis Rule provides for the admissibility of summaries of evidence that is too voluminous to be formally admitted at trial. The Reporter noted that there has been some confusion in distinguishing between summaries admissible under Rule 1006 and summaries of evidence already admitted at trial. These latter summaries are often called pedagogical summaries, and they are designed to make the evidence already admitted more understandable to the factfinder. Pedagogical summaries are not governed by Rule 1006. It has been argued that Rule 1006 should be amended to clarify that it does not apply to summaries of evidence admitted at trial.

The Committee decided not to proceed with an amendment to Rule 1006, on the ground that any confusion among litigants has been handled adequately by the courts, and has not created a problem that has affected the results in the cases. Thus, any problem is one of form rather than substance and does not justify the substantial costs of an amendment to an evidence rule.

# Privileges

The Subcommittee on Privileges has been working for more than a year on a draft of privileges. At the request of the Subcommittee, the Committee discussed what the goal of this privilege project should be. It has become increasingly apparent that the Committee would not propose a new set of privileges for enactment. Privilege rules must be enacted by Congress directly. Submitting a new set of privileges to Congress could result in problematic rules, given the likelihood that interest groups would seek to change or establish certain privileges to their benefit.

This does not mean, however, that the privilege project should be terminated. Committee members noted that from time to time, Congress has proposed rules of privilege; the Committee needs to be prepared to comment on such proposals, and the work of the Privileges Subcommittee will be helpful in responding to such Congressional ventures. It was also emphasized that the Committee could perform a valuable service to the bench and bar by giving guidance on what the federal common law of privilege currently provides. This could be accomplished by a publication outside the rulemaking process, such as has been previously done with respect to outdated Advisory Committee Notes and caselaw divergence from the Federal Rules of Evidence.

After discussion, the Committee agreed to continue with the privileges project, and determined that the goal of the project would be to provide, in the form of a draft rule and commentary, a "survey" of the existing federal common law of privilege. This essentially would be a descriptive, non-evaluative presentation of the existing federal law, not a "best principles" attempt to write how the rules of privilege "ought" to look. Rather, the survey would be intended to help courts and lawyers determine what the federal law of privilege actually is. The Committee determined that the survey will be structured as follows:

1. An introduction setting forth the purpose and plan of the project.

2. The project would be divided into sections, one for each privilege as well as a general section for a discussion of principles such as choice of law and invocation and waiver of a privilege.

3. The first section for each rule would be a draft "survey" rule that would set out the existing federal law of the particular privilege. Where there is a significant split of authority in the federal courts, the rule would include alternative clauses or provisions.

4. The second section for each rule would be a commentary on existing federal law. This section would provide case law support for each aspect of the survey rule and an explanation of the alternatives, as well as a description of any aberrational caselaw. This commentary section is intended to be detailed but not encyclopedic. It would include representative cases on key points rather than every case, and important law review articles on the privilege, but not every article.

5. The third section would be a discussion of reasonably anticipated choices that the federal courts, or Congress if it elected to codify privileges, might take into consideration. For example, it would include the possibility of different approaches to the attorney-client privilege in the corporate context and the possibility of a general physician-patient privilege. This section, like the project itself, will be descriptive rather than evaluative.

The Committee instructed the Subcommittee on Privileges to prepare a draft of one of the privileges as an example for the Committee to review at the next meeting. Professor Broun agreed to provide a draft of the survey rule on the psychotherapist-patient privilege, and the necessary commentary, for the Committee's consideration at the Spring 2003 meeting.

## Other Business

*Outgoing Committee Member, Judge Norton*

Judge Smith expressed the Committee's appreciation to Judge Norton for his stellar work as a member of the Committee. Judge Norton was presented with a plaque commemorating his contributions to the Committee.

*Liaisons to Other Rules Committees*

Judge Smith raised the possibility that members of the Committee could serve as liaisons to the other rules committees, particularly the Civil and Criminal Rules Committees. John Rabiej stated that he would inquire into that possibility and would report back to the Committee.

*Digital Evidence Project*

Jennifer Marsh, the representative of the Federal Judicial Center, informed Committee members that the ABA Section of Science and Technology Law has formed a task force and launched the "Digital Evidence Project." The goal of the project is to publish an authoritative treatise on all things law-and-computer-related, including the presentation of electronic evidence. She also noted that the Computer Forensics and Electronic Discovery (CFED) group, affiliated with University of California at San Diego, is also working on a project to write a supplement, future chapter, or stand-alone complement to the scientific evidence manual on computer forensics issues. The Federal Judicial Center is encouraging these two groups to work together to prepare a publication on law and technology issues. Ms. Marsh encouraged any member of the Committee who is interested to get involved in this project. The Reporter stated that he would contact the interested parties and monitor developments on behalf of the Committee.

## Next Meeting

The next meeting of the Committee is tentatively scheduled for April 25, 2003, in Washington, D.C.

The meeting was adjourned at 2:30 p.m., October 18.

Respectfully submitted,

Daniel J. Capra
Reed Professor of Law
Reporter