Advisory Committee on Evidence Rules

Minutes of the Meeting of October 5, 2012

Charleston, South Carolina

The Judicial Conference Advisory Committee on the Federal Rules of Evidence (the "Committee") met on October 5, 2012, at the Charleston School of Law, in Charleston, South Carolina.

The following members of the Committee were present:

Hon. Sidney A. Fitzwater, Chair
Hon. Brent R. Appel
Hon. Anita B. Brody
Hon. William Sessions
Hon. John A. Woodcock, Jr.
Paul Shechtman, Esq.
Elizabeth J. Shapiro, Esq., Department of Justice

Also present were:

William T. Hangley, Esq., departing member of the Committee
Marjorie A. Meyers, Esq., departing member of the Committee
Hon. Richard Wesley, Liaison from the Standing Committee
Hon. Paul Diamond, Liaison from the Civil Rules Committee
Hon. John F. Keenan, Liaison from the Criminal Rules Committee
Professor Daniel J. Capra, Reporter to the Committee
Professor Kenneth S. Broun, Consultant to the Committee
Timothy Reagan, Esq., Federal Judicial Center
Peter McCabe, Esq., Secretary to the Standing Committee
Jonathan Rose, Chief, Rules Committee Support Office
Benjamin Robinson, Esq., Rules Committee Support Office

Julie Albert, Fordham Law School
Alfred W. Cortese, Jr., Esq., Lawyers for Civil Justice
Alexander R. Dahl, Esq. Lawyers for Civil Justice
Professor Ann Murphy, Gonzaga University School of Law
Professor Liesa Richter, University of Oklahoma College of Law
Hon. Lee H. Rosenthal, Former Chair of the Standing Committee
Dan Smith, Esq., Department of Justice
John Vail, Esq., Center for Constitutional Litigation, P.C.

I. Opening Business

Welcoming Remarks and Departing Members

Judge Fitzwater, the Chair of the Committee, greeted the members and thanked Dean Andrew Abrams and the Charleston School of Law for hosting the Committee. Dean Abrams welcomed the members and observers, and expressed his thanks for holding the committee meeting at the law school. He highlighted the school's commitment to developing practical lawyering skills and the significant pro bono contributions of his students.

Judge Fitzwater recognized several current and departing members of the Committee. He congratulated Paul Schectman on his recent election to the American Law Institute. He welcomed former Committee member Judge Joseph F. Anderson, Jr., who traveled from Columbia, South Carolina to observe the meeting. Judge Fitzwater thanked Judge Anderson for his many contributions to the restyling effort, and Judge Anderson in turn thanked the Committee members for their service and applauded the success of the restyled rules.

Judge Fitzwater recognized the distinguished service of two departing members, William T. Hangley and Marjorie Myers. He highlighted their significant contributions to the Committee stretching back before his tenure as Chair. Mr. Hangley brought the perspective of an experienced trial attorney to the complex process of evidence rulemaking, which proved especially critical during the restyling process. He also solicited helpful input from the American Bar Association's Section of Litigation and the American College of Trial Lawyers. Ms. Myers proved to be a superb advocate for the federal defenders, but she always sought the best result, not simply what would be most advantageous to her clients. Judge Fitzwater noted that Ms. Myers worked especially well with her counterpart from the Department of Justice. Members added their sincere thanks for the hard work performed by and friendships forged with Mr. Hangley and Ms. Myers. Their service to the committee and practical insights will be sorely missed.

Mr. Rose reported on the status of the Committee's vacancies and pending appointments. He noted that the Chief Justice is expected to select replacements for Mr. Hangley and Ms. Myers imminently.

Public Hearings

Judge Fitzwater noted that the Committee has scheduled two public hearings for members of the public who wish to present testimony on the proposed amendments to Rules 801 and 803. The first is scheduled in conjunction with the Standing Committee's semi-annual meeting, on January 4, 2013, in Boston, Massachusetts. A second public hearing is scheduled for January 22, 2012, in Washington D.C. Judge Fitzwater stated that there was strong support for publication at the Standing Committee. Mr. Robinson reported that no comments had yet been received by the Administrative Office.

Approval of Minutes

The minutes of the Spring 2012 Committee meeting were approved.

Rule 502 Symposium

Judge Fitzwater commented on the Rule 502 Symposium that took place on the morning before the meeting. He remarked that the symposium far exceeded his expectations and raised a number of important suggestions for promoting the use of Rule 502 to reduce discovery costs. He noted that a transcript of the proceedings — as well as a number of articles from Symposium participants — will be published in the Fordham Law Review.

Judge Fitzwater invited those present to share their observations about the symposium. The members all agreed that the presentation was excellent. A judge member strongly suggested that Rule 502 be referenced in the Federal Rules of Civil Procedure so that parties at the outset of the proceedings are aware of its importance in reducing the costs of preproduction privilege review. Another member added that the work ahead is largely in the hands of the Advisory Committee on Civil Rules, and that the Committee should monitor the progress of that committee. A third member expressed concerns about the perceived approach of a "tipping point" if the costs of reviewing and producing electronically stored information continue to eclipse the amounts in controversy.

The members discussed whether to undertake work to develop a model Rule 502 order. A judge member recommended pursuing a model order that could be broadly publicized, prior to the proliferation of local rules or standing orders that may fail to incorporate important concepts examined during the symposium. The reporter stated that several symposium participants had agreed to work together further to develop a model order, which will be published in the symposium edition of the Fordham Law Review. The reporter noted several potential obstacles the Committee could encounter if it sought to take the lead in drafting and "issuing" a model order. The Reporter suggested, and the members generally agreed, that the better way for the Committee to draw attention to the benefits of Rule 502 may be to send a letter from the Committee to each chief judge highlighting the rule, the symposium, and the model order. Judge Fitzwater recommended that such a letter be discussed at the Standing Committee meeting.

A judge member suggested, and the full committee agreed, that in addition to any letter writing initiative, the Federal Judicial Center should be strongly encouraged to develop judicial education and training materials addressing Rule 502. One member observed that newly-appointed judges with primarily criminal practice backgrounds might have little or no knowledge of Rule 502, and all members agreed that it would be worthwhile to develop specific materials for the orientation seminar for newly-appointed federal judges. Another member remarked that a program of orientation on Rule 502 will be just as useful to sitting judges.

The Committee briefly discussed the application of Rule 502 in the criminal law setting. A member noted that there are important Sixth Amendment issues yet to be resolved before the courts

of appeals. Another member stated that subdivision (d) of Rule 502 will have limited use in criminal proceedings, but the Committee should be aware of the possibility of "intentional inadvertent disclosures" by defense counsel in criminal cases, notwithstanding the obvious ethical implications. The member noted that if unscrupulous defense counsel believed the fruits of her intentional inadvertent disclosure could be placed out of reach of prosecutors, there may be a strong temptation to intentionally produce privileged material and then demand use fruits protection from the court (through a *Kastigar* hearing or otherwise). The members agreed that little if anything could be done in the text of the rule to eliminate the possibility of such strategic behavior.

Mr. Rose observed that the reporter handled with ease the difficult task of moderating a panel of such high-caliber judges, practitioners, and academics, and suggested that the continued use of such symposia as introductory events to committee meetings would continue to enhance the public perception of the rulemaking process and increase participation from the bench, bar, and public. The members joined Judge Fitzwater's sincere thanks to the Reporter and the symposium participants for a well-executed program.

June Meeting of the Standing Committee

Judge Fitzwater reported on the June meeting of the Standing Committee. He summarized the Committee's report and his presentation to the Standing Committee including the Committee's proposals: 1) to refer an amendment to Rule 803(10) to the Judicial Conference; and 2) to release proposed amendments to Rules 801(d)(1)(B) and Rules 803(6)-(8) for public comment. The Standing Committee unanimously approved all of the Committee's proposals.

II. Proposed Amendment to Rule 803(10)

The Committee briefly discussed the proposed amendment to Rule 803(10). That amendment adds a notice-and-demand procedure to the Rule in cases where the government is offering a certificate against a defendant in a criminal case. Such certificates are in almost all cases "testimonial" and so introducing them against an accused will violate the Confrontation Clause under the Supreme Court's opinion in *Melendez-Diaz v. Massachusetts*. Under the notice-and-demand procedure, the person who prepared the certificate need not be produced to testify if the government provides timely notice of intent to proffer the certificate and the defendant fails to timely demand production of the witness. In *Melendez-Diaz*, the Court declared that the use of a notice-and-demand procedure (and the defendant's failure to demand production under that procedure) would cure an otherwise unconstitutional use of testimonial certificates.

The Advisory Committee's proposed amendment was approved by the Judicial Conference on the consent calendar at its September 2012 session. The Supreme Court will have until May 1, 2013, to review the proposed amendment. Unless Congress takes action to modify, defer, or reject the proposed amendment, it would become effective on December 1, 2013.

III. Proposed Amendment to Rule 801(d)(1)(B)

At the Spring 2012 meeting the Committee voted to recommend that a proposed amendment to Evidence Rule 801(d)(1)(B) — the hearsay exemption for certain prior consistent statements — be released for public comment. Under the proposal, Rule 801(d)(1)(B) would be amended to provide that prior consistent statements are admissible under the hearsay exemption whenever they would otherwise be admissible to rehabilitate the witness's credibility. The justification for the amendment is that there is no meaningful distinction between substantive and rehabilitative use of prior consistent statements.

Under the current rule, some prior consistent statements offered to rehabilitate a witness's credibility — specifically those that rebut a charge of recent fabrication or improper influence or motive — are also admissible substantively. In contrast, other rehabilitative statements — such as those that explain a prior inconsistency or rebut a charge of faulty recollection — are not admissible under the hearsay exemption but only for rehabilitation. There are two basic practical problems in the distinction between substantive and credibility use as applied to prior consistent statements. First, the necessary jury instruction is almost impossible for jurors to follow. The prior consistent statement is of little or no use for credibility unless the jury believes it to be true. Second, and for similar reasons, the distinction between substantive and impeachment use of prior consistent statements has little, if any, practical effect. The proponent has already presented the witness's trial testimony, so the prior consistent statement ordinarily adds no real substantive effect to the proponent's case.

As of the date of the fall meeting, no formal public comment had been received on the proposed amendment. But the Reporter noted that a professor had raised a concern that the proposed amendment might "overrule" the Supreme Court's decision in *Tome v. United States*, because it might be read to allow the admission of prior consistent statements for substantive effect even though those statements were made *after* a witness's motive to falsify arose. The Reporter reiterated that the point of the amendment was *not* to admit more prior consistent statements. The only point was to provide the same (substantive effect) treatment for all the statements currently admitted as prior consistent statements. The Reporter recognized that *if* a court found that a prior consistent statement made after the motive to falsify arose would actually be properly admitted to rehabilitate the witness's credibility, then under the amendment that statement would also be admitted as substantive evidence. But the Reporter noted that 1) such an event was extremely unlikely; and 2) in the narrow band of cases in which it could even possibly occur, it would in any case, under the logic of the amendment, be appropriate to treat such a statement as substantively admissible. That is because under the proposed amendment, all prior consistent statements that are admissible for rehabilitation are also admissible substantively.

The Committee concluded that prior consistent statements made after a motive to falsify might be admitted as substantive evidence, but that such an admission would not reflect any alteration to the present scope of admissibility (instead clarifying how admissible evidence may be used). The Committee's consultant on privileges noted that *Tome v. United States* was not a

constitutional case, and that any variance between the proposed amendment to Rule 801(d)(1)(b) and the Court's holding would not run afoul of transubstantive rulemaking concerns.

The Reporter suggested that the draft committee note accompanying the proposed rule be revised to eliminate the citation to a relevant law review article. He noted the Standing Committee's preference to avoid legal citations in committee notes. The members acknowledged the helpful input of Frank W. Bullock, Jr., the author of the article and former member of the Standing Committee, who first suggested that the Committee pursue the amendment. The members agreed to discuss further refinements to the proposed amendment at the Committee's Spring 2013 meeting, after the close of the public comment period.

IV. Possible Amendment to Rules 803(6)-(8)

The Committee briefly discussed the proposed amendments to Rules 803(6)-(8), the hearsay exceptions for business records, absence of business records, and public records. Those exceptions in original form set forth admissibility requirements and then provided that a record meeting those requirements was admissible despite the fact it is hearsay "unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness." The rules do not specifically state which party has the burden of showing trustworthiness or untrustworthiness. The amendments clarify that the opponent has the burden of showing that the proffered record is untrustworthy. The reasons for the amendment are: 1) to resolve a conflict in the case law by providing a uniform rule; 2) to clarify a possible ambiguity in the rule as it was originally adopted and as restyled; and 3) to provide a result that makes the most sense, as imposing a burden of proving trustworthiness on the proponent is unjustified given that the proponent must establish that all the other admissibility requirements of these rules are met — requirements that tend to guarantee trustworthiness in the first place.

The Committee discussed the slight differences among the committee notes for Rules 803(6)-(8). A member suggested that the Committee consider deleting the second paragraph (i.e. "The opponent, in meeting its burden . . .") of the note accompanying Rule 803(8) as redundant of the note set out for Rule 803(6). The Reporter opposed deleting the second paragraph from the note for Rule 803(8). He described the practical differences between the three rules and detailed why a tailored note for each was preferable. He noted that when enacted, the Rules and Committee notes will be read and applied separately, not together, and so there was no risk of redundancy. He also noted that it was important to state that an opponent, in meeting its burden of showing untrustworthiness, need not produce evidence — that sometimes argument is sufficient. And deleting such an important provision from the note to Rule 803(8) but retaining it in Rule 803(6) could mislead lawyers and courts to think that the opponent *does* have to provide evidence to show that a record offered under Rule 803(8) is untrustworthy. The Committee's consultant on privileges echoed the need for a more thorough note for each rule. Judge Fitzwater asked the Committee to revisit the issue, if necessary, at its Spring 2013 meeting, following the close of the public comment period.

V. *Crawford* Developments — Presentation on *Williams v. Illinois*

The Reporter provided the Committee with a case digest of all federal circuit cases discussing *Crawford v. Washington* and its progeny. The digest was grouped by subject matter. The goal of the digest is to allow the Committee to keep apprised of developments in the law of confrontation as they might affect the constitutionality of the Federal Rules hearsay exceptions.

The *Crawford* digest this time around provided a special focus on the Supreme Court's Confrontation Clause case from last term — *Williams v. Illinois* — and its impact on the Federal Rules of Evidence. Paul Shechtman, Ken Broun and the Reporter engaged in a roundtable discussion on the meaning of *Williams* — a case that was decided 4-1-4 with the deciding vote by Justice Thomas based on an analysis with which all other members of the Court disagreed. The speakers all concluded — as did the Committee — that the result of *Williams* is so murky that it will take the courts some time to figure out its impact on the relationship between the Confrontation Clause and the Federal Rules of Evidence. Accordingly, the Committee determined that it would be inappropriate at this time to propose any amendments designed to prevent one or more of the Federal Rules from being applied in violation of the Confrontation Clause.

The Committee resolved to continue monitoring developments on the relationship between the Federal Rules of Evidence and the accused's right to confrontation.

VII. Symposium on Technology and the Federal Rules of Evidence

The Evidence Rules Committee is sponsoring a symposium on whether the Evidence Rules should be amended to accommodate technological advances in the presentation of evidence. This Symposium is intended to follow the same process as the previous symposia on the Restyling and Rule 502. The Committee will invite outstanding members of the bench, bar and legal academia to make presentations, and the proceedings will be published in a law review. This symposium will take place on the morning before the Fall 2013 meeting of the Committee.

The Reporter invited suggestions from the members for symposium panelists. Members identified a handful of judges and law professors, but resolved to continue the search for potential panelists leading up to the symposium.

VIII. Privilege Project

Professor Broun, the Committee's consultant on privileges, presented his analysis of the journalist's privilege. This presentation is part of Professor Broun's continuing work to develop an article on the federal common law of privileges. Professor Broun's work, when it is published, will

neither represent the work of the Committee nor suggest explicit nor implicit approval by the Standing Committee or the Advisory Committee.

Professor Broun asked for Committee input on whether attempting to write the text of a journalist privilege under federal law was a worthwhile effort, in light of the conflict in the cases and lack of consensus as to whether such a privilege even exists. The DOJ representative expressed a preference not to develop a survey rule because the Justice Department does not believe there is a journalist's privilege rooted in the First Amendment. A member observed that defining who is a journalist will prove to be a significant drafting obstacle given the use of blogs, just as attempts to define who is a media defendant for purposes of libel law has created a morass of conflicting case law.

Committee members expressed gratitude to Professor Broun for keeping the Committee apprised of developments in the area of privileges, but did not request that he perform further research or drafting regarding the journalist's privilege.

IX. Next Meeting

The Spring 2013 meeting of the Committee is scheduled for Friday, May 3, in Miami, Florida.

Respectfully submitted,

Benjamin Robinson
Daniel J. Capra