Advisory Committee on Evidence Rules

Minutes of the Meeting of April 19, 2002

Washington, D.C.

The Advisory Committee on the Federal Rules of Evidence met on April 19, 2002 at the Thurgood Marshall Federal Judiciary Building in Washington, D.C.

The following members of the Committee were present:

Hon. Milton I. Shadur, Chair
Hon. Ronald L. Buckwalter
Hon. David C. Norton
Thomas W. Hillier, Esq.
David S. Maring, Esq.
Christopher A. Wray, Esq.

Also present were:

Hon. Frank W. Bullock, Jr., Liaison to the Standing Committee on Rules of Practice and Procedure
Hon. David G. Trager, Liaison to the Criminal Rules Committee
Professor Daniel R. Coquillette, Reporter to the Standing Committee on Rules of Practice and Procedure
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
Daniel J. Capra, Reporter to the Evidence Rules Committee
Professor Kenneth S. Broun, Consultant to the Evidence Rules Committee
Roger Pauley, Esq., Former Committee Member
Christopher F. Jennings, Esq., Law Clerk to Hon. Anthony J. Scirica
Professor Leo Whinery, Reporter, Uniform Rules of Evidence Drafting Committee

Opening Business

Judge Shadur opened the meeting by welcoming Christopher Wray, the new Department of Justice representative on the Committee. Judge Shadur then asked for approval of the minutes of the April 2001 Evidence Rules Committee meeting. The minutes were unanimously approved.

Judge Shadur reported on the January 2002 meeting of the Standing Committee. The Evidence Rules Committee's report to the Standing Committee was brief, consisting of a report on the two pending amendments to the Evidence Rules and an update on the long-term project on privileges. Judge Shadur noted that the most important matters currently before the Standing Committee include potential amendments to Civil Rule 23, consideration of possible Federal Rules on attorney conduct, issues raised by electronic case filing and the problems created by the proliferation of local rules.

Committee Consideration of Proposed Amendments Released For Public Comment

1. Rule 608

The proposed amendment to Evidence Rule 608(b) would clarify the scope of the Rule's prohibition on extrinsic evidence. That prohibition would apply only when the extrinsic evidence is offered to prove the character for truthfulness of a witness. Extrinsic evidence offered for other impeachment purposes–such as for bias, capacity, contradiction or prior inconsistent statement–would be governed by Rules 402 and 403. The original Advisory Committee Note makes clear that Rule 608(b)'s exclusion of extrinsic evidence is applicable only if the opponent's goal is to attack the witness' character for veracity. Other forms of impeachment are not intended to be covered by the absolute exclusion on extrinsic proof in Rule 608(b).

The problem giving rise to the need for amendment is that the text of the Rule by its terms prohibits extrinsic evidence whenever offered to address the witness' "credibility." This could be read to bar extrinsic evidence for bias, competency, contradiction and prior inconsistent statement impeachment since they too bear upon "credibility."

Most courts do read Rule 608(b) the way it was intended – to apply only where the extrinsic evidence is offered to prove the witness' character for truthfulness. But there are many decisions applying the Rule more broadly to mean what it appears to say – that extrinsic evidence is completely prohibited whenever offered on any aspect of the witness' credibility.

Judge Shadur noted that the comments on the proposed amendment uniformly praised the Advisory Committee's deletion of the overbroad term "credibility" and agreed that the Rule should be restored to its original intent–prohibiting extrinsic evidence only when it is offered to prove a witness' character for truthfulness, and leaving all other uses of extrinsic evidence to be regulated by Rules 402 and 403.

One comment suggested, however, that the Committee also use the occasion of the proposed amendment to address other provisions in the Evidence Rules in which the term "credibility" is used when the proper reference is to "character for truthfulness." The comment refers to four additional places in the Evidence Rules in which "credibility" is arguably an overbroad reference to "character for truthfulness." They are:

1. In the final sentence of Rule 608(b), which currently provides:

> The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness' privilege against self-incrimination when examined with respect to matters which relate only to *credibility*.

2. In Rule 608(a), which currently provides:

> The *credibility* of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations:(1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

3. In Rule 609(a) , which provides:

> (a) General rule.—For the purpose of attacking the *credibility* of a witness, (1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and (2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.

4. In Rule 610, which provides:

> Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness' *credibility* is impaired or enhanced.

The Committee first considered whether to propose a change to the last sentence of Rule 608(b) in accordance with the public comment. The sense of the Committee was that such a change was a matter of form and not substance, because the provision is rarely applied, and when it is, the courts have had no problem in limiting its protections to matters that are probative of the witness' character for truthfulness. The Committee noted, however, that while an amendment to the second sentence of Rule 608(b) would not be warranted on its own, it made sense to make a change together with the parallel change to the first sentence of Rule 608(b). The change to both sentences would provide for consistent use of terminology throughout Rule 608(b). A motion was made and seconded to propose that the term "credibility" be replaced with the term "character for truthfulness" in the last sentence of Rule 608(b). That motion was unanimously approved.

The Committee next considered the proposal in the public comment to amend Rule 608(a) to replace "credibility" with "character for truthfulness." The Committee found this question more complex than the previous proposal to change the last sentence of Rule 608(b). Rule 608(a)(1) already states that evidence offered under the subdivision must be limited to that probative of "character for truthfulness or untruthfulness." Thus, the broader reference to "credibility" in subdivision (a) is already limited by language in the Rule. Accordingly, the reference to "credibility" is doing no harm. Nor has it been subject to any misinterpretation by the bench or bar. Moreover, because the limitation to character impeachment already exists in Rule 608(a), an amendment to the term "credibility" would require a more extensive reworking than simply replacing one term with another. For all these reasons, Committee members expressed the sense that the costs of amending the provision far outweighed the benefits. A motion to retain Rule 608(a) as it currently reads was made, seconded and unanimously approved.

The Committee then took up the suggestion that Rules 609 and 610 should be amended to substitute "character for truthfulness" for the existing term "credibility." The question for the Committee, at the moment, was not whether amendments to those two Rules would make sense, but whether they were so important that the existing proposal to amend Rule 608(b) should be delayed until corresponding amendments to Rules 609 and 610 could be sent out for public comment.

One member of the Committee was in favor of holding off the amendment to Rule 608(b) until corresponding amendments to Rules 609 and 610 were processed. He suggested that amendments should not be made on a piecemeal basis. But the other members of the Committee disagreed. One member pointed out that the Committee had just decided not to propose an amendment to replace the term "credibility" in Rule 608(a), so the notion of a uniform "credibility" package had already been rejected. Other members noted that the need to amend Rule 609 was not established. Unlike Rule 608(b), Rule 609 has not been misinterpreted by the courts. As to Rule 610, the question of amendment raised public policy questions that do not exist under Rule 608(b). It

might be appropriate public policy to prohibit impeachment of witnesses due to their religious conviction even though the impeachment attack was not limited to the witness' character. In other words, simply replacing "credibility" with "character for truthfulness" in Rule 610 may result in bad public policy.

The majority of the Committee ultimately determined that any amendment to Rules 609 or 610 should be considered independently, and on its own merits, rather than as a package with Rule 608(b). Because each Rule presented different questions and different advantages and disadvantages, the majority believed that it made no sense to defer the well-received amendment to Rule 608(b) for a number of years. A motion that the proposed amendment to Rule 608(b) not be deferred was approved, with one dissent.

The Committee next turned to the proposed Committee Note to the amendment to Rule 608(b). The Reporter noted that the Note would have to be changed slightly from that issued for public comment, because the proposed text had been revised to add a change to the last sentence of Rule 608(b). A paragraph was added to the Committee Note that referred to the change to the last sentence of Rule 608(b) as one made for purposes of consistent terminology. A further short paragraph was added to clarify that the change to Rule 608(b) should not raise a negative inference about the retention of the term "credibility" in other Rules.

Finally, the Committee considered a possible objection to certain paragraphs of the Committee Note that were intended to educate the bench and bar about issues that have arisen under Rule 608(b). The Committee unanimously believed that Committee Notes are an important source of education about how an amended Rule is to be applied, and accordingly voted unanimously to retain those parts of the proposed Committee Note.

Recommendation:

A motion was made and seconded to recommend to the Standing Committee that the proposed amendment to Rule 608(b) and the accompanying Committee Note, each as modified following publication, be approved and forwarded to the Judicial Conference. The motion was passed by a unanimous vote.

A copy of the proposed amendment to Rule 608(b), together with the proposed Committee Note, is attached to these minutes.

2. Rule 804(b)(3)

In its current form Rule 804(b)(3) requires an accused to provide corroborating circumstances clearly indicating the trustworthiness of a declaration against penal interest; but by its terms the Rule imposes no similar requirement on the prosecution. Nor does the Rule require a showing of corroborating circumstances in civil cases.

At its last meeting the Evidence Rules Committee proposed an amendment to Rule 804(b)(3) that would require every proponent of a declaration against penal interest to establish corroborating circumstances clearly indicating the trustworthiness of the statement. This proposal was approved by the Standing Committee to be released for public comment. The most important goal of the proposed amendment was to provide equal treatment to the accused and the prosecution in a criminal case.

Judge Shadur noted that most of the public comment on the proposed amendment was positive. The Department of Justice, however, expressed substantial objections to the proposal, as did some academics. A major criticism of the proposal was that extending the corroborating circumstances requirement to government-proffered statements would create a problematic interface with the government's independent obligation to satisfy the Confrontation Clause in criminal cases. The existing Rule's requirement of "corroborating circumstances" has never been clearly defined. The term "corroborating circumstances" is not used in any other Evidence Rule, and the Advisory Committee Note makes no attempt to define the term.

Most courts have held that "corroborating circumstances" can be shown by reference to independent corroborating evidence indicating that the declarant's statement is true. But this definition of corroborating circumstances–including a component of corroborating evidence–is problematic if applied to government-proffered hearsay statements because of the Supreme Court's decision in *Lilly v. Virginia*, 527 U.S. 116 (1999). In *Lilly* the Court declared that the hearsay exception for declarations against penal interest is not "firmly rooted" and therefore the Confrontation Clause is not satisfied simply because a hearsay statement fits within that exception. Therefore, to admit a declaration against penal interest consistently with the Confrontation Clause after *Lilly*, the government is required to show that the statement carries "particularized guarantees of trustworthiness" that indicate it is reliable. And the Court in *Lilly* held that this showing of "particularized guarantees of trustworthiness" cannot be met by a showing of independent corroborating evidence. Rather, the statement must be shown reliable due to the circumstances under which it is made.

The Committee engaged in a lengthy discussion of the merits of the proposed amendment in light of the objections posed by the Department of Justice and other public commentators. Some Committee members noted that the public comment by and large was in favor of establishing symmetry in Rule 804(b)(3). But after substantial consideration, the Committee resolved that the "symmetry" model was not as simple as it appeared. If "corroborating circumstances" requires or permits a showing of corroborating evidence, then the amendment would impose an evidentiary

requirement that is different from, and probably more stringent than, the significant evidentiary requirement of reliability currently imposed by the Confrontation Clause after *Lilly*. Moreover, the true impact of the amendment could not even be assessed as applied to prosecution-generated evidence, given the lack of unanimity about the meaning of "corroborating circumstances." Members stated that it was problematic to propose an amendment without being sure of how it would apply or how it would relate to existing evidentiary and constitutional requirements. This was especially so given the reservations about the amendment expressed by several members of the Standing Committee when the amendment was released for public comment.

Another Committee member expressed the view that symmetry in the Rule was unwarranted because inculpatory statements against penal interest are often made under different circumstances than exculpatory statements. As Congress recognized, exculpatory statements are potentially unreliable because a declarant may simply be trying to get the defendant off from charges by confessing to the crime himself, perhaps secure in the knowledge that he will not himself be convicted because the evidence does not point to him. This member stated that in contrast, statements that inculpate the defendant do not raise the same questions of unreliability, especially after the Supreme Court's decision in *Williamson v. United States* – which provides that statements made in custody are inadmissible to the extent they directly implicate the defendant – and especially in light of the government's obligation to satisfy the reliability requirements of the Confrontation Clause.

On the other hand, several Committee members noted the problem of the current state of Rule 804(b)(3) after *Lilly*. As Rule 804(b)(3) currently reads, a hearsay statement offered by the government could satisfy the Rule and yet would not satisfy the Constitution. This is because after *Lilly*, Rule 804(b)(3) is not a firmly-rooted hearsay exception, so the mere fact that a statement falls within the exception does not satisfy the Confrontation Clause. *Lilly* holds that a statement offered under a hearsay exception that is not firmly-rooted will satisfy the Confrontation Clause only when it bears "particularized guarantees of trustworthiness." And the *Lilly* Court held that this standard of "particularized guarantees" would not be satisfied simply because the statement was disserving to the declarant's penal interest. The government must show circumstantial guarantees of trustworthiness beyond the fact that the statement is disserving. Yet Rule 804(b)(3) as written requires only that the prosecution show that the statement is disserving to the declarant's penal interest. It does not impose any additional evidentiary requirement. Thus, after *Lilly*, Rule 804(b)(3) as written is not consistent with constitutional standards. This has led at least one court to hold that a disserving statement offered against an accused was properly admitted under Rule 804(b)(3) and yet violated the accused's right to confrontation. *United States v. Westmoreland*, 240 F.3d 618 (7th Cir. 2001).

Committee members noted the anomaly of an Evidence Rule that is unconstitutional as applied. Other Evidence Rules are written to avoid a conflict with constitutional principles. Examples include Rule 412, which contains a provision that prohibits its application when to do so would violate the constitutional rights of the accused; Rule 803(8)(B) and (C), which prohibit the admission of police reports when to do so would violate the accused's right to confrontation; and

Rule 201(g), which prohibits conclusive presumptions in criminal cases out of concern for the accused's constitutional right to jury trial. To the Committee's knowledge, no other hearsay exception has the potential of being applied in such a way that a statement could fit within the exception and yet would violate the accused's right to confrontation. Other hearsay exceptions, such as those for dying declarations, excited utterances and business records, have been found firmly-rooted.

The fact that Rule 804(b)(3) can be unconstitutional if applied literally has led a number of courts to extend the Rule's "corroborating circumstances" requirement to statements offered by the government–even though the Rule does not so provide. The problem with this extension, however, is that the "corroborating circumstances" requirement does not necessarily match the Constitution's requirement of "particularized guarantees of trustworthiness." Under the Confrontation Clause, "particularized guarantees of trustworthiness" must be found in the circumstances under which the statement is made–the existence of independent corroborating evidence is irrelevant. In contrast, most courts have construed "corroborating circumstances" to include the possibility of independent corroborating evidence.

Some Committee members noted another disadvantage of an Evidence Rule that does not comport with the Constitution–it poses a trap for the unwary. A defense counsel might be under the impression that the hearsay exceptions as written comport with the Constitution. Indeed. this is a justifiable assumption for all the categorical hearsay exceptions in the Federal Rules of Evidence, which generally have been found "firmly rooted"–except for Rule 804(b)(3). A minimally competent defense lawyer might object to a hearsay statement as inadmissible under Rule 804(b)(3), thinking that an additional, more specific objection on constitutional grounds would be unnecessary. In doing so, counsel will have inadvertently waived the additional reliability requirements of the Confrontation Clause. If the hearsay exception and the Confrontation Clause are congruent, then the risk of inadvertent waiver of the constitutional reliability requirements would be eliminated.

In light of this discussion, a Committee member suggested that the proposed amendment be reformulated to accomplish the following objectives.

1. Retain the corroborating circumstances requirement as applied to statements against penal interest offered by the accused.

2. Extend the corroborating circumstances requirement to declarations against penal interest offered in civil cases.

3. Require that statements against penal interest offered against the accused must be "supported by particularized guarantees of trustworthiness."

Judge Shadur noted that if this proposal were accepted by the Committee, it would have to be submitted for a new round of public comment. The proposed amendment released for public

comment was intended to provide symmetry and unitary treatment of declarations against penal interest–"corroborating circumstances" would be required for all such statements. The proposed reformulation would impose different admissibility requirements depending on the party proffering the declaration against penal interest. The prosecution would be required to show "particularized guarantees of trustworthiness" (i.e., the Confrontation Clause reliability standard), while all other parties would be required to show "corroborating circumstances," however that term is interpreted by the courts.

The Reporter drafted a reformulated proposed amendment to Rule 804(b)(3) in accordance with the Committee member's suggestion. That draft was reviewed by Professor Kimble, a member of the Standing Committee's Subcommittee on Style. Professor Kimble made several suggestions for stylistic changes to the proposed revised amendment to Rule 804(b)(3). Those stylistic changes were incorporated into the draft. The Reporter then drafted a revised Committee Note to respond to the changes that would be made to the proposed amendment as it was released for public comment. The Committee reviewed the draft Note and made suggestions that were incorporated into the draft.

At the end of the discussion, a motion was made and seconded to recommend that the amendment as originally released for public comment, together with a small stylistic change, be approved. This motion was defeated; two members voted in favor and three against.

Recommendation:

A motion was then made and seconded to propose a revised amendment to be released for public comment, in accordance with the revised draft prepared by the Committee with the assistance of the Reporter and Professor Kimble, and consistently with the discussion set forth above. This new proposal would read as follows:

> (b) Hearsay exceptions. – The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> * * *
>
> (3) Statement against interest. – A statement ~~which~~ that was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. But a ~~A~~ statement tending to expose the declarant to criminal liability ~~and offered to exculpate the accused~~ is ~~not~~ admissible ~~unless~~ under this subdivision in the following circumstances only: (A) if offered in a civil case or to exculpate an accused in a criminal case, it is supported by corroborating circumstances that clearly indicate ~~the~~ its trustworthiness, or ~~of the statement~~ (B) if offered to inculpate an accused, it is supported by particularized guarantees of trustworthiness.

The motion to propose the revised amendment to Rule 804(b)(3) for release for public comment was approved by all members of the Committee, including the Justice Department representative. The proposed Committee Note was also approved unanimously.

In the course of its discussion on the amendment to Rule 804(b)(3) proposed for public comment, and its reformulation of the proposal, the Evidence Rules Committee considered and rejected a number of other proposals for change suggested in the public comment. Those proposals included:

1. *Deleting the corroborating circumstances requirement.* Some public commentary suggested that the corroborating circumstances requirement should be deleted from the Rule entirely. The Committee unanimously rejected this proposal. Members reasoned that this solution would result in a substantial change to the case law and would be contrary to the legislative history of Rule 804(b)(3), in which Congress expressed strong concern about the reliability of against penal interest statements. The Committee found nothing to indicate that the reliability of against penal interest statements has increased over time in such a way as to justify dispensing with the corroborating circumstances requirement.

2. *Expanding the corroborating circumstances requirement to statements against pecuniary interest*. Two public comments suggested that Rule 804(b)(3)'s corroborating circumstances requirement should be extended to declarations against *pecuniary* interest. The Committee unanimously rejected this suggestion on two grounds. First, the Committee believed that declarations against pecuniary interest are as a class more reliable than declarations against penal interest. This is because declarations against pecuniary interest are often made by declarants who are reliable and credible, whereas declarations against penal interest are by definition made by those who have either violated a criminal law or have lied about doing so. Second, the Committee noted that the common law provided for admission of declarations against pecuniary interest without a showing of corroborating circumstances, and that the common-law rule had been considered and retained by the original Advisory Committee and Congress. The Committee saw nothing to indicate that the reliability of declarations against pecuniary interest had changed from the time that Rule 804(b)(3) was initially adopted.

3. Defining the corroborating circumstances requirement: As previously noted, there is a good deal of dispute about the meaning of the corroborating circumstances requirement in Rule 804(b)(3). One public comment suggested that the Committee amend the Rule to provide a textual definition of corroborating circumstances. The Committee considered and unanimously rejected this suggestion. Committee members noted that the factors supporting the reliability of a declaration against penal interest will vary with each case. In some cases corroborating evidence might be useful; in others the fact that the statement was spontaneous will be important; and in some cases a combination of independent evidence and reliable circumstances will be sufficient and appropriate.

Any textual change also might lead to an unwarranted change in the case law that had developed over the meaning of corroborating circumstances. The Committee noted that it had provided guidance to the bench and bar in the Committee Note to the proposed amendment, which sets out some of the factors that the courts have found relevant to a determination of corroborating circumstances.

A copy of the proposed revised amendment to Rule 804(b)(3), together with the proposed Committee Note, is attached to these minutes.

Privileges

Judge Shadur noted that the Subcommittee on Privileges is engaged in a long-term project to provide a draft of privilege rules that would codify the federal common law as developed under Evidence Rule 501. The Subcommittee has prepared a preliminary draft of seven privilege rules: 1) a catchall provision, providing that the state law of privilege applies in diversity cases and containing a provision to govern application of privileges not specifically established in the Rules; 2) a rule covering the attorney-client privilege; 3) a rule providing a privilege to a witness to refuse to give adverse testimony against a spouse in a criminal case; 4) a rule providing a privilege for interspousal confidential communications; 5) a rule providing a privilege for communications to physicians and mental health providers; 6) a rule covering the privilege for communications to clerics; and 7) a rule governing waiver.

At previous meetings the full Committee had reviewed five of the draft privilege rules. It had provided comments and suggestions that had been incorporated into the current working drafts. As of the April 2002 Committee meeting the full Committee had tentatively approved the draft rule on waiver and had agreed preliminarily to reject the privilege protecting a witness from giving adverse testimony against a spouse. The Committee had provided suggestions on the catch-all provision, the attorney-client privilege and the privilege for confidential spousal communications that were incorporated into the current working drafts of those privilege rules.

Judge Shadur noted that even if the Committee ultimately agrees with the Subcommittee drafts, it is not bound or required to propose a codification of the privileges. He also noted that even if no amendments are proposed, the Committee would perform a valuable service in preparing a "best principles" version of the federal law of privilege.

At the Committee meeting the Subcommittee sought commentary from the full Committee on two of the draft rules–the privilege for communications to physicians and mental health providers and the privilege for communications to clerics. Because the privilege project is at a very preliminary

stage, no final decisions were made on any of the drafts. What follows is a summary of the discussion on the two drafts that were reviewed by the Committee:

1. *The Physician-Mental Health Provider Privilege*

Professor Broun, the consultant to the Privileges Subcommittee, led the discussion on the draft of the privilege for communications to physicians and mental health providers. He noted that the Supreme Court in *Jaffee v. Redmond* established a privilege under federal common law for confidential communications to psychotherapists and other mental health providers. The Court in *Jaffee* left open whether a similar privilege would extend to communications to "general" physicians. Lower federal courts have rejected a more general doctor-patient privilege. The Subcommittee's draft of the privilege would protect confidential communications to physicians.

The Committee considered the merits of extending the *Jaffee* privilege to protect statements to general physicians. The DOJ representative argued that extending the privilege in this way would impair the government's ability to prosecute health fraud cases. Judge Shadur responded that the draft included a crime-fraud exception, and so in a health fraud case the government would be able to obtain communications to physicians that are in furtherance of health fraud. The DOJ representative countered that initial proof of crime or fraud sufficient to invoke the crime-fraud exception may be difficult to obtain, so in fact a physician-patient privilege would impair the government's objectives in health fraud cases.

The Reporter questioned whether a general physician-patient privilege was worth the cost of changing, rather than codifying, federal common law. The privilege would probably not apply in many cases, because in most situations a waiver would be found, for example where a party refers to his or her medical condition as part of a claim or defense. Nor would the privilege protect information about the patient's condition–it would protect only communications that could be separated from that condition. Professor Broun responded that even if the physician-patient privilege would rarely apply, the privilege is worth the effort because it would make a statement that the physician-patient relationship is an important relationship worthy of legal protection.

A tentative vote was taken on whether the draft should continue to include a privilege for communications to physicians. The Committee voted four to one in favor of retaining the physician-patient privilege in the draft.

The Committee then turned to whether the privilege should be limited to communications to "licensed" mental health providers. The Uniform Rules privilege protects communications to "authorized" providers, but the Privileges Subcommittee believed that the term "authorized" might be too broad, resulting in the shielding of communications to persons who might not be performing responsible therapeutic services. The Committee took a tentative vote and unanimously agreed that the term "licensed" should be included in the draft. It also instructed the Subcommittee to include language in the draft that would allow the privilege to apply when the communication is made to a person under the supervision of a licensed physician or mental health provider, e.g., an intern.

After further discussion, the Committee tentatively accepted the draft's language on the definition of "physician," on who may claim the privilege, and on the application of the privilege to hospitalization proceedings.

The Committee then considered the draft's definition of a crime-fraud exception and made two suggested changes. First, the Committee decided that the exception should be expanded to allow disclosure when the patient confers with the physician in an attempt to assist a third party in committing a fraud. This expansion would cover medical frauds where the payment is sought by someone other than the patient (e.g., a parent who filed the claim). Second, the Committee decided that the exception should be expanded to allow disclosure when the patient confers with the physician in an attempt to "escape detection" from a completed crime.

The Committee next considered the proper scope of the "dangerous patient" exception to the privilege for communication to physicians and other health providers. The dangerous patient exception can be attributed to a footnote in the *Jaffee* case, where the Court stated that "there are situations in which the privilege must give way, for example, if a serious threat of harm to the patient or to others can be averted only by means of a disclosure by the therapist." But despite this language, two lower court cases have distinguished between a duty to disclose in order to protect the patient or others (where the exception to the privilege would apply) and the disclosure of the threat in a court proceeding after the danger had past. The Committee, however, agreed with the thrust of the *Jaffee* opinion: that statements indicating an imminent threat to individuals did not warrant the protection of the privilege under any circumstances. The Committee therefore agreed that the privilege should not protect a communication "in which the patient has expressed an intent to engage in conduct likely to result in imminent death or serious bodily injury to the patient or another individual."

The Committee next considered whether an exception to the privilege should apply when disclosure is required by law. There was general agreement that the privilege would have to bow to disclosure required by federal law, but there was dispute about whether state law reporting obligations should trump the privilege. Some Committee members expressed concern that deference to state law reporting obligations would render the federal privilege subservient to state law. Members also noted that the existence of the federal privilege would not prevent the physician or mental health provider from complying with state reporting obligations. It would simply mean that the disclosed communications might still be privileged in a federal proceeding. The Committee ultimately determined that the working draft should not carve out an exception for communications that are required to be reported under state law.

Finally, the Committee instructed the Subcommittee to include a provision for an exception to the privilege where there is a dispute between the patient and the physician or mental health provider. This provision would parallel the exception for disputes between an attorney and client. The Committee agreed that language should be added to specify that if the dispute is over fees, the exception would permit disclosure of confidential communications only to the extent necessary to prove a fact at issue in the fee dispute.

2. Privilege For Communications To Clerics

Federal courts have recognized a common-law privilege for confidential communications to clerics, where the communications are made for the purpose of obtaining spiritual advice or consolation. The Privileges Subcommittee drafted a privilege that would codify this federal case law.

The Committee engaged in an extensive discussion on whether to proceed with this privilege. Committee members expressed significant concern that it would be difficult to define terms like "cleric," "religious" and "spiritual." The DOJ representative noted that many communications made by suspected terrorists could be protected by a privilege covering "religious" communications. Other members noted that, given the fluid nature of religious and spiritual activity in today's society, it would probably be better to leave the development of the cleric privilege to the case law. The Committee ultimately resolved to table the draft privilege for communications to clerics. The Committee also noted that if the privilege is to be considered at a later date, it would have to include at a minimum an exception for communications made in furtherance of crime or fraud. The Subcommittee was also directed to conduct further research to determine whether the term "cleric" could be defined in accordance with some standard found in other law, such as a federal statute.

Long-Term Projects

At the April 2001 Committee meeting the Reporter was directed to prepare a report setting forth the Evidence Rules that might be usefully considered on a long-term basis for possible amendment. The Committee was strongly of the view that amendments should not be proffered simply for the sake of change. On the other hand, the Committee recognized that valid arguments for necessary amendments must be seriously considered.

The Reporter submitted a report that set forth Rules that might be considered as part of a long-term project for proposed amendment. As directed by the Committee, the Reporter used three sources of information: 1. Legal scholarship suggesting change to one or more Evidence Rules; 2. The Uniform Rules project; and 3. Federal case law indicating either a conflict in the meaning of an Evidence Rule, or a divergence between the case law and the text of a Rule.

The Reporter led the Committee through the report, emphasizing that the issue for the Committee at this point was not whether an Evidence Rule should actually be amended. Rather, the question is whether there is a colorable case for an amendment that justifies directing the Reporter to provide a full report an a proposed amendment to the Committee at a subsequent meeting. Using that standard, the Committee considered the following Rules:

1. *Rule 104(b).* Some scholars have suggested that Rule 104(b)'s standard of proof for conditional relevance is misguided. They argue that the relevance of any piece of evidence is relative to all other evidence in the case, and therefore no distinction can be drawn between relevancy and conditional relevancy.

The Committee considered an amendment to Rule 104(b) proposed by an academic, but decided not to proceed. The Committee reasoned that any amendment to Rule 104(b) would upset settled expectations set by the Supreme Court's decision in *Huddleston v. United States.*

2. *Rule 104 new subdivision on privileges:* The Uniform Rules contain a new provision allocating the burden of proof in establishing privileges and exceptions to privileges, and setting forth the standards for holding an *in camera* hearing.

The Committee decided not to proceed with an amendment to Rule 104 that would set forth procedures for establishing privileges and their exceptions. Members noted that these procedural standards are already well-established in federal case law. If any such amendment were to be proposed, the Committee resolved that it should be made part of the long-term project on privileges.

3. *Rule 106:* Rule 106 sets forth a rule of completeness, providing that when a party introduces a writing or recorded statement, the adversary may "require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it." Rule 106 by its terms permits the adversary to introduce completing statements only where the proponent introduces a *written or recorded* statement. The language of the Rule does not on its face permit completing evidence when the proponent introduces an oral statement, such as a criminal defendant's oral confession. Some courts have found, however, that Rule 106, or at least the principle of completeness embodied therein, applies to require admission of omitted portions of an oral statement when necessary to correct a misimpression. Moreover, some courts have held that Rule 106 can operate as a de facto hearsay exception when the opponent opens the door by creating a misimpression by offering only part of a statement. In other words, completing evidence is found admissible under Rule 106 even if it would otherwise be hearsay.

The Committee directed the Reporter to prepare a full report on whether a possible amendment to Rule 106 is warranted by the conflict in the case law. Committee members noted that the Rule as written covers a "writing or recorded statement," and this terminology may be outdated given the use of email and other electronic transmissions.

4. *Rules 401, 402 and 403:* The Reporter noted that some commentators have suggested that the standards of admitting relevant evidence should be tightened. These commentators claim that a good deal of marginally relevant and time-consuming evidence is admitted under the liberal standards of Rules 401-403.

The Committee refused to proceed on any amendment to Rules 401-403. These are the most important rules of evidence; they are invoked thousands of times a year and are the subject of thousands of opinions. The Committee noted the risk that any change to Rules 401-403 will upset substantial, ingrained expectations and could result in the inadvertent overruling of a large number of opinions.

5. *Rule 404(a):* Rule 404(a) states that no party is permitted in the first instance to introduce character evidence to prove action in accordance with character, except for the "accused"--i.e., only the "accused" can open the door to circumstantial use of character evidence. Thus, the Rule seems explicit in prohibiting the circumstantial use of character evidence in civil cases. And the Advisory Committee Note confirms this exclusionary principle. Yet some courts have permitted civil defendants to use character evidence circumstantially "when the central issue in a civil case is by its nature criminal." This divergent case law could be addressed by an amendment to Rule 404(a) that would permit only an accused "in a criminal case" to offer character evidence in the first instance.

The Committee directed the Reporter to prepare a full report on whether a possible amendment to Rule 404(a) is justified by the divergent case law. Committee members noted that any change would be consistent with the original intent of the Rule.

6. *Rule 404(b):* The Uniform Rules now include substantial procedural protections limiting the admission of evidence of uncharged misconduct under Rule 404(b). Protections include a hearing requirement, a requirement of clear and convincing evidence that the uncharged misconduct actually occurred and a provision that the probative value of the uncharged misconduct must outweigh its prejudicial effect.

The Committee decided not to proceed with an amendment to Rule 404(b). The Uniform Rules proposal would substantially change the case law in all the Circuits. Committee members also noted that the proposal would meet substantial opposition from the Justice Department.

7. *Rule 405:* One scholar would amend Rule 405 to permit a homicide defendant to introduce evidence of specific bad acts of the victim when the accused claims self-defense. Currently, an accused can introduce character evidence in the form of reputation or opinion evidence only to prove that a decedent was the initial aggressor; an accused cannot use specific bad act evidence to prove a decedent's character (though the acts can be admitted to prove the defendant's state of mind if he heard about them beforehand).

The Committee decided not to proceed with an amendment to Rule 405. It found that the current Rule provided a proper balance between the defendant's interest in admitting probative evidence and the government's interest in excluding extraneous, possibly confusing and prejudicial evidence of the victim's conduct.

8. *Rule 408:* Rule 408 holds that evidence of a settlement or settlement negotiations is not admissible to prove the validity or amount of a claim. The Rule is not explicit on whether it covers evidence from a civil settlement that is offered in a subsequent criminal case. A number of cases have held that settlement evidence can be admitted in related criminal litigation. Some commentators have argued against such a result on the ground that it is bad policy–it will deter civil settlements if there is a risk of later criminal prosecution.

The Committee directed the Reporter to prepare a full report on a possible amendment to Rule 408 that would clarify whether civil compromise evidence is admissible in subsequent criminal litigation. The Committee found that the public policy questions are debatable enough to warrant further consideration.

9. *Rule 412:* Rule 412, the rape shield law, contains two possible anomalies. First, the Rule provides three exceptions, permitting evidence of the victim's sexual behavior to be admitted under certain limited conditions. One such exception is where its exclusion "would violate the constitutional rights of the defendant." Yet this language is qualified by preceding language stating that the exceptions apply if the evidence of sexual behavior is "otherwise admissible under these rules." As applied to the constitutional rights exception, the language could be read to mean that evidence, if *not* admissible under other rules, must be excluded *even if* its exclusion would violate the constitutional rights of the defendant. This anomaly could be corrected by a technical amendment to the Rule.

Another possible anomaly is that the Rule is inexplicit about whether it excludes evidence that the victim has made prior false claims of rape or has made claims of rape that are later withdrawn. Some courts hold that false claims of rape are "sexual behavior," while other courts disagree. Language could be added to the Rule to clarify whether evidence of false and withdrawn claims should be admitted or excluded.

The Committee directed the Reporter to prepare a full report on possible changes to Rule 412. The Committee found that one of the anomalies could be cured by a technical amendment. It also determined that the question of admissibility of false and withdrawn claims raises important public policy issues that warrant further consideration.

10. *Rules 413-415:* Rules 413-415 provide that evidence of prior sexual misconduct "is admissible" to prove a defendant's propensity to commit sex crimes. The major ambiguity in these Rules is whether evidence of a defendant's prior acts of sexual misconduct are subject to exclusion under Rule 403.

The Committee decided not to proceed with an amendment to Rules 413-415 that would specify that admissibility of a prior act of sexual misconduct is limited by Rule 403. The Committee noted that every case construing these Rules has held that Rule 403 is applicable, so there is no need to amend the Rules in light of this judicial unanimity.

11. *Rule 606(b):* Rule 606(b) generally excludes juror affidavits or testimony concerning jury deliberations. There has been some question in the courts about whether juror affidavit or testimony is admissible if it is offered to prove a clerical error, such as a mathematical miscalculation or checking the wrong box on the verdict form.

The Committee directed the Reporter to prepare a report on a possible amendment to Rule 606(b) that would clarify whether the Rule covers clerical errors. The Committee noted that it would be important, if the Rule were to be amended, to propose language that would clearly circumscribe the scope of any "clerical error" exception to the Rule.

12. *Rule 607:* Rule 607 states categorically that a party may impeach any witness it calls. On its face the Rule permits a party to call a witness solely for the purpose of "impeaching" the witness with evidence that would not otherwise be admissible, such as hearsay. Yet despite the affirmative and permissive language of the Rule, courts have held that a party cannot call a witness solely to impeach that witness, because to allow this practice would undermine the hearsay rule. Thus there is a divergence between the case law and the text of the Rule.

The Committee directed the Reporter to prepare a full report on whether a possible amendment to Rule 607 is justified by the divergent case law. The Committee noted that the divergence between the text and the case law created a possible trap for the unwary.

13. *Rule 609*: Rule 609(a)(2) provides that convictions involving "dishonesty or false statement" are automatically admissible to impeach a witness' character for truthfulness. The Rule does not define which crimes involve dishonesty or false statement, and there is dispute in the courts about two matters: whether theft and drug crimes involve dishonesty or false statement, and whether crimes must be admitted under Rule 609(a)(2) when they are committed by deceitful means. The Uniform Rules propose that only those crimes that contain an *element* of untruthfulness should be automatically admitted. This means that drug crimes and theft crimes would not be automatically admitted, because those crimes can be committed without having to lie. This also means that the proponent could not go behind the crime to the underlying facts, because the test would focus on the elements of the crime.

The Committee directed the Reporter to prepare a full report on the merits of the Uniform Rules version of Rule 609(a)(2). The Committee noted that the case law conflict on the meaning of Rule 609(a)(2) at least warranted further study.

14. *Rule 610:* A public commentator on the proposed amendment to Rule 608(b) suggests that the term "credibility" in Rule 610 should be replaced by "character for truthfulness." Such an amendment would provide that the Rule's limitation on using a witness' religious beliefs for impeachment would apply only if the goal of the impeachment is to attack the witness' character for

truthfulness.

The Committee decided not to proceed with any amendment to Rule 610 at this time. Members reasoned that the term "character for truthfulness" might be too narrow as applied to impeachment on the basis of religious beliefs. A policy argument could be made that a person's religious beliefs should be used, where probative, to impeach the witness' mental capacity as well as the witness' character for truthfulness. Moreover, as with the cleric's privilege, difficult questions arise as to what beliefs are "religious" and what are not. The Committee determined that any problems that might arise under the Rule are better left to case law development.

15. *Rule 611:* Several suggestions have been made in the academic literature for possible amendments to Rule 611. One suggestion is to impose a duty on judges to limit the length of cross-examinations where necessary to prevent the admission of marginally relevant evidence. Another is to clarify whether a party can ask leading questions when cross-examining a witness that the judge has identified as hostile to the adversary.

The Committee decided not to proceed with an amendment to Rule 611. The Committee found that the courts have had no problem in administering the Rule. The Rule already gives an appropriate measure of discretion to trial judges to limit both unduly lengthy cross-examination and unnecessary leading questions.

16. *Rule 613(b):* The Rule provides that a prior inconsistent statement can be admitted without giving the witness an opportunity to examine it in advance of admission. The witness simply must be given an opportunity at some point in the trial to explain or deny the statement. The Rule thus rejects the common-law rule under which the proponent was required to lay a foundation for the prior inconsistent statement at the time the witness testified. Despite the language of the Rule and Committee Note, however, some courts have reverted to the common-law rule.

The Committee directed the Reporter to prepare a report on the conflict in the case law in interpreting Rule 613(b), so that the Committee could determine whether an amendment to the Rule would be necessary.

17. *Rule 704(b):* Rule 704(b) would seem to prohibit all expert witnesses from testifying that a criminal defendant either did or did not have the requisite mental state to commit the crime charged. It states that "[n]o expert witness . . . may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto." But some courts have held (and others have implied) that the Rule is applicable only to mental health experts, and therefore does not prohibit intent-based testimony from such witnesses as law enforcement agents testifying about the narcotics trade.

The Committee directed the Reporter to prepare a report on Rule 704(b), so that the Committee might consider whether the Rule should be amended to restore its original focus, which was to limit the conclusory testimony of mental health experts in criminal cases.

18. *Rule 706:* Judge Gettleman sent a letter to the Committee suggesting that Rule 706, governing court appointment of expert witnesses, might be amended to make stylistic improvements and to eliminate the "show cause" language that is rarely observed in practice. The Reporter also noted that the ABA Litigation Section has adopted detailed civil trial practice standards providing guidance to trial courts considering appointment of expert witnesses.

The Committee directed the Reporter to prepare a report on Rule 706, covering the suggestions proposed by Judge Gettleman and analyzing the ABA civil trial practice standards to determine whether it might be useful to incorporate them in the text of the Rule.

19. *Rule 801(c):* Academic commentators have suggested that the definition of hearsay in Rule 801(c) should be clarified to provide that the "matter asserted" should include both implied and express assertions.

The Committee decided not to proceed with any amendment to Rule 801(c). The Committee found that the courts have not had a problem in applying the hearsay definition to implied assertions, and that a Rule as fundamental as the hearsay rule should not be amended except in extreme circumstances.

20. *Rule 801(d):* Rule 801(d) provides that certain prior statements of testifying witnesses, and admissions by party-opponents, are "not hearsay" even though these statements clearly fit the definition of hearsay in Rule 801(c). Academic commentators have argued that it is confusing to define a statement as "hearsay" in one subdivision and then declare that it is "not hearsay" in the next subdivision. These commentators suggest that statements covered by Rule 801(d) might better be termed "exemptions" from the hearsay rule, rather than "not hearsay."

The Committee decided not to proceed with an amendment to Rule 801(d) that would style these statements as "exemptions." While the current situation is perhaps not analytically ideal, it has worked well enough in practice. The Committee concluded that the benefits of an amendment in analytical clarity would be outweighed by the costs of upsetting settled practices and expectations under the current Rule.

21. *Rule 801(d)(1)(B):* Rule 801(d)(1)(B) provides that certain prior consistent statements of testifying witnesses may be admitted for their truth. Courts have held that prior consistent statements not falling within Rule 801(d)(1)(B) might still be admissible–not for their truth but to rehabilitate the witness. Judge Bullock has proposed that Rule 801(d)(1)(B) be amended to provide

that prior consistent statements are admissible for their truth whenever they would be admissible to rehabilitate the witness' credibility. The justification for the proposal is that there is no meaningful distinction between substantive and rehabilitative use of prior consistent statements, and any limiting instruction to use a prior consistent statement for rehabilitation and not for its truth is nonsensical to a jury.

The Committee directed the Reporter to prepare a report on Rule 801(d)(1)(B), to determine whether an amendment is necessary to eliminate any confusion that might be arising under the current Rule.

22. *Rule 803(3):* Rule 803(3) incorporates the famous *Hillmon* doctrine, providing that a statement reflecting the declarant's state of mind can be offered as probative of the declarant's subsequent conduct in accordance with that state of mind. The Rule is silent, however, on whether a declarant's statement of intent can be used to prove the subsequent conduct of someone other than the declarant. The original Advisory Committee Note refers to the Rule as allowing only "evidence of intention as tending to prove the act intended"– implying that the statement can be offered to prove how the declarant acted, but cannot be offered to prove the conduct of a third party. The legislative history is ambiguous. The case law is conflicted. Some courts have refused to admit a statement that the declarant intended to meet with a third party as proof that they actually did meet. Other courts hold such statements admissible if the proponent provides corroborating evidence that the meeting took place.

The Committee directed the Reporter to prepare a report on Rule 803(3), analyzing whether the conflict in the case law warrants a possible amendment to the Rule to clarify whether statements can be admitted to prove the conduct of someone other than the declarant.

23. *Rule 803(4):* Rule 803(4) exempts certain statements made to medical personnel from the hearsay rule. Statements made to doctors for purposes of litigation fall within the exception, because the Rule specifically states that it covers statements made "for purposes of medical *diagnosis* or treatment." The original Advisory Committee recognized that such statements might not be reliable due to a litigation motive, but relied on practical reasons for including statements to litigation doctors within the exception. One reason was that under Rule 703, the doctor would be able to rely on the patient's statements in forming an expert opinion, even though they were hearsay; because the hearsay statements would get before the jury anyway to illustrate the basis for the expert's opinion, the Advisory Committee figured it would not make much difference if they were also admitted substantively.

Professor Broun, a consultant to the Evidence Rules Committee, has suggested that the original Advisory Committee's reliance on Rule 703 is no longer justified now that Rule 703 was amended in 2000. Under the amendment, hearsay relied upon by an expert cannot be disclosed to the jury unless its probative value in illustrating the expert's basis substantially outweighs the risk

that the jury will use the hearsay for its truth. Therefore, it is far less likely than it once was that a litigation doctor would be able to disclose the plaintiff's hearsay statement to the jury in the guise of illustrating the basis for the expert's opinion. Professor Broun suggests that an amendment might be proposed to provide that Rule 803(4) does not cover statements made to medical personnel for purposes of litigation.

The Committee directed Professor Broun to prepare a report on Rule 803(4), so that the Committee could determine whether the Rule should be amended to eliminate its coverage of statements for purposes of litigation. Committee members observed that if such statements were to be eliminated from the hearsay exception, the best solution might be to add a sentence to the Rule specifically eliminating such statements, rather than to delete the term "diagnosis" from the Rule. A statement may be made for purposes of "diagnosis" as opposed to "treatment" and yet not be made for purposes of litigation.

24. *Rule 803(5):* Rule 803(5) provides a hearsay exception for past recollection recorded: a record "containing a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately" where the record is "shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly." The Rule does not explicitly provide for a situation in which a person makes a statement to another person who records the statement, and the recorded statement is not adopted by the person making the statement. Thus the Rule does not envision that a person with personal knowledge might make a statement recorded by another, with the record being made admissible by calling both the reporter and the recorder. Despite the language of the Rule, however, cases can be found that permit two-party vouching under Rule 803(5).

The Committee directed the Reporter to prepare a report on Rule 803(5), to determine whether the Rule should be amended to specifically permit a record to be admitted where both the person making the statement and the person recording it can vouch for the accuracy of their respective reports.

25. *Rule 803(6):* Rule 803(6) defines a business record as one "made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted activity." This language could be read as abrogating the common-law requirement that the person transmitting the information to the recorder must have a business duty to do so. It states only that the transmitting person must have "knowledge", not that the person must be reporting within the business structure. Yet despite the text, the courts have held that all those who report information included in a business record must be under a business duty to do so--or else the reliability problem created from the report by an outsider must be satisfied by some other circumstances. The Reporter informed the Committee that several States, e.g., Louisiana and Tennessee, have versions of Rule 803(6) that specifically provide criteria for admitting statements in business records where the recorder is relying on information submitted by another person and

does have personal knowledge of the accuracy of the information.

The Committee directed the Reporter to prepare a report on Rule 803(6), to determine whether the Rule should be amended to provide criteria to assure the reliability of statements transmitted to the person who prepared the business record.

26. *Rule 803(8):* Rule 803(8) provides a hearsay exception for public reports. Courts and commentators alike have noted that the Rule has several drafting problems. It is divided into three subdivisions, each defining admissible public reports, but the subdivisions are overlapping. Subdivisions (B) and (C) exclude law enforcement reports in criminal cases from the exception, but courts have held that these exclusions are not to be applied as broadly as they are written. The exceptions are intended to protect against the admission of unreliable public reports, but this concern might be better stated if the exception were written simply to admit a public report unless the court finds it to be untrustworthy under the circumstances. The Reporter informed the Committee that the Uniform Rules have departed from the Federal model, as have many States.

The Committee directed the Reporter to prepare a report on Rule 803(8), to determine whether the Rule should be amended to clarify that a public report is admissible unless the court finds it to be untrustworthy under the circumstances.

27. *Rule 803(18):* Rule 803(18) provides a hearsay exception for "statements contained in published treatises, periodicals, or pamphlets" if they are "established as a reliable authority" by the testimony or admission of an expert witness or by judicial notice. This "Learned Treatise" exception does not on its face permit evidence in electronic form, such as a film or video. But some courts have rejected a literal reading the Rule and have upheld the admission of electronic evidence under the learned treatise exception.

The Committee directed the Reporter to prepare a report on Rule 803(18), so that the Committee could determine whether an amendment should be proposed to cover the presentation of "learned treatise" evidence in electronic form.

28. *Other Rules:* Time did not permit the Committee to give preliminary consideration to other Rules identified by the Reporter as Rules that might be the subject of long-term consideration, on the basis of scholarly commentary, case law conflict or case law divergence from the text. The Committee therefore decided to defer preliminary consideration of the following Rules until the next meeting: Rules 804(a)(5), 804(b)(1), 806, 807, a possible "tender years" exception to the hearsay rule, and Rules 901(b), 902 and 1006.

Conclusion

Judge Shadur noted that his term as Chair of the Evidence Rules Committee expires in September 2002, and that Judge Norton's term on the Committee expires in September as well. Committee members and the Reporter expressed their deep gratitude to Judge Shadur for his stellar work as Committee Chair, and to Judge Norton for his important contributions to the Committee.

The meeting was adjourned at 5:00 p.m., Friday, April 19th.

The next meeting of the Evidence Rules Committee is scheduled for October 18, 2002 in Seattle.

Respectfully submitted,

Daniel J. Capra
Reed Professor of Law

Attachments:

1. Proposed amendment to Evidence Rules 608(b), with the recommendation that the proposal be approved by the Standing Committee and forwarded to the Judicial Conference

2. Proposed amendment to 804(b)(3), with the recommendation that the proposal be released for public comment.

Attachment 1

Proposed Amendment to Rule 608(b)

Committee Recommendation: That the Standing Committee Approve the Proposed Amendment and Forward the Proposed Amendment to the Judicial Conference.

Advisory Committee on Evidence Rules
Proposed Amendment: Rule 608

Rule 608. Evidence of Character and Conduct of Witness[*]

(a) Opinion and reputation evidence of character. — The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) Specific instances of conduct. — Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' ~~credibility~~ character for truthfulness, other than conviction of crime as provided in

[*] New matter is underlined and matter to be omitted is lined through.

rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness' privilege against self-incrimination when examined with respect to matters ~~which~~ that relate only to ~~credibility~~ character for truthfulness.

* * *

COMMITTEE NOTE

The Rule has been amended to clarify that the absolute prohibition on extrinsic evidence applies only when the sole reason for proffering that evidence is to attack or support the witness' character for truthfulness. *See United States v. Abel,* 469 U.S. 45 (1984); *United States v. Fusco,* 748 F.2d 996 (5th Cir. 1984) (Rule 608(b) limits the use of evidence "designed to show that the witness has done things, unrelated to the suit being tried, that make him more or less believable per se"); Ohio R.Evid. 608(b). On occasion the Rule's use of the overbroad term "credibility" has been read "to bar extrinsic evidence for bias, competency and contradiction

impeachment since they too deal with credibility." American Bar Association Section of Litigation, *Emerging Problems Under the Federal Rules of Evidence* at 161 (3d ed. 1998). The amendment conforms the language of the Rule to its original intent, which was to impose an absolute bar on extrinsic evidence only if the sole purpose for offering the evidence was to prove the witness' character for veracity. *See* Advisory Committee Note to Rule 608(b) (stating that the Rule is "[i]n conformity with Rule 405, which forecloses use of evidence of specific incidents as proof in chief of character unless character is in issue in the case . . .").

By limiting the application of the Rule to proof of a witness' character for truthfulness, the amendment leaves the admissibility of extrinsic evidence offered for other grounds of impeachment (such as contradiction, prior inconsistent statement, bias and mental capacity) to Rules 402 and 403. *See, e.g., United States v. Winchenbach,* 197 F.3d 548 (1st Cir. 1999) (admissibility of a prior inconsistent statement offered for impeachment is governed by Rules 402 and 403, not Rule 608(b)); *United States v. Tarantino,* 846 F.2d 1384 (D.C.Cir. 1988) (admissibility of extrinsic evidence offered to contradict a witness is governed by Rules 402 and 403); *United States v. Lindemann,* 85 F.3d 1232 (7th Cir. 1996) (admissibility of extrinsic evidence of bias is governed by Rules 402 and 403). Rules 402 and 403 displace the common-law rules prohibiting impeachment on "collateral" matters. *See* 4 Weinstein's Evidence § 607.06[3][b][ii] (2d ed. 2000) (advocating that courts substitute "the discretion approach of Rule 403 for the collateral test advocated by case law").

It should be noted that the extrinsic evidence prohibition of Rule 608(b) bars any reference to the consequences that a witness might have suffered as a result of an alleged bad act. For example, Rule 608(b) prohibits counsel from mentioning that a witness was suspended or disciplined for the conduct that is the subject of impeachment, when that conduct is offered only to prove the character of the witness. *See United States v. Davis,* 183 F.3d 231, 257 n.12 (3d Cir. 1999) (emphasizing that in attacking the defendant's character for truthfulness "the government cannot make reference to Davis's forty-four day suspension or that Internal Affairs found that he lied about" an incident because "[s]uch evidence would not only be hearsay to the extent it contains assertion of fact, it would be inadmissible extrinsic evidence under Rule 608(b)"). *See also* Stephen A. Saltzburg, *Impeaching the Witness: Prior Bad Acts and*

Extrinsic Evidence, 7 Crim. Just. 28, 31 (Winter 1993) ("counsel should not be permitted to circumvent the no-extrinsic-evidence provision by tucking a third person's opinion about prior acts into a question asked of the witness who has denied the act.").

For purposes of consistency the term "credibility" has been replaced by the term "character for truthfulness" in the last sentence of subdivision (b). The term "credibility" is also used in subdivision (a). But the Committee found it unnecessary to substitute "character for truthfulness" for "credibility" in Rule 608(a), because subdivision (a)(1) already serves to limit impeachment to proof of such character.

Rules 609(a) and 610 also use the term "credibility" when the intent of those Rules is to regulate impeachment of a witness' character for truthfulness. No inference should be derived from the fact that the Committee proposed an amendment to Rule 608(b) but not to Rules 609 and 610.

CHANGES MADE AFTER PUBLICATION AND COMMENTS

The last sentence of Rule 608(b) was changed to substitute the term "character for truthfulness" for the existing term "credibility." This change was made in accordance with public comment suggesting that it would be helpful to provide uniform terminology throughout Rule 608(b). A stylistic change was also made to the last sentence of Rule 608(b).

SUMMARY OF PUBLIC COMMENTS

Thomas J. Nolan, Esq. (01-EV-001) states that the proposed amendment to Rule 608(b) is "extremely important, should be adopted, and can and will significantly increase the administration of justice in the United States Courts."

Mikel L. Stout, Esq. (01-EV-002) approves of the proposed amendment.

The Committee on Civil Litigation of the United States District Court for the Eastern District of New York (01-EV-003) endorses the proposed change to Rule 608(b).

The Federal Magistrate Judges Association (01-EV-004) supports the proposed amendment and notes that it "is consistent with the drafters' original intent and Supreme Court authority."

Professor Lynn McLain (01-EV-005) supports the proposed amendment on the ground that if "clarifies the rule and removes an arguable, though unintended, conflict with cases permitting extrinsic proof of bias and of contradiction . . ."

Professor John C. O'Brien (01-EV-006) supports the proposed change to Rule 608(b). He states that some Evidence Rules use the term "credibility" to refer to "character for truthfulness" and that this usage "has created considerable confusion, particularly with respect to whether extrinsic evidence is precluded by Rule 608(b)." He contends that the problem of misuse of the term "credibility" is not limited to Rule 608(b) and that the Advisory Committee consider proposing similar amendments to replace the term "credibility" with the term "character for truthfulness in Rules 608(a), 609 and 610.

The Committee on the Federal Rules of Evidence of the American College of Trial Lawyers (01-EV-009) recommends the adoption of the proposed amendment to Rule 608(b), noting that it is "a modest and benign narrowing clarification of the existing rule." The Committee states that "the Advisory Committee is correct in suggesting that the proposed amendment brings the rule's language in line with its original intent and corrects a less precise locution that has led to unfortunate results in some cases."

The Federal Bar Association, Western Michigan Chapter (01-EV-012) supports the proposed amendment to Rule 608(b).

The State Bar of California's Committee on Federal Courts (01-EV-013) supports the proposed modification of Rule 608(b).

Professor James J. Duane (01-EV-014) recommends that the proposed change to Rule 608(b) should be made, "but only if the word 'credibility' is also replaced with 'character for truthfulness' throughout all of Rules 608, 609 and 610." He argues that the change proposed by the

Advisory Committee "would result in a situation whether the word 'credibility' would mean one thing in Rule 608(b), and something quite different in two other parts of the same Rule, as well as the two rules that follow it."

The Committee on the United States Courts of the State Bar of Michigan (01-EV-016) supports the proposed amendment to Rule 608(b).

The National Association of Criminal Defense Lawyers (01-EV-017) "fully supports the proposed amendment to Evidence Rule 608(b)." The Association notes that the proposed amendment "only makes more clear what the Rule already intends – that the prohibition against proving a specific instance of conduct by a witness with extrinsic evidence only applies where the specific instance of conduct is offered to attack or support the witness's character for truthfulness."

Attachment 2

Proposed Amendment to Rule 804(b)(3)

Committee Recommendation: That the Standing Committee Approve the Proposed Amendment for Release for Public Comment.

Advisory Committee on Evidence Rules
Proposed Amendment: Rule 804

Rule 804. Hearsay Exceptions; Declarant Unavailable[**]

* * *

(b) Hearsay exceptions. – The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

* * *

(3) Statement against interest. – A statement ~~which~~ <u>that</u> was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. <u>But a</u> ~~A~~ statement tending to expose the declarant to criminal liability ~~and offered to exculpate the accused~~ is ~~not~~ admissible ~~unless~~ <u>under this subdivision in the following circumstances only:</u>

[**] Matter to be added is underlined. Matter to be omitted is lined through.

(A) if offered in a civil case or to exculpate an accused in a criminal case, it is supported by corroborating circumstances that clearly indicate ~~the~~ its trustworthiness, or ~~of the statement~~

(B) if offered to inculpate an accused, it is supported by particularized guarantees of trustworthiness.

* * *

COMMITTEE NOTE

The Rule has been amended in two respects:

1) To require a showing of corroborating circumstances when a declaration against penal interest is offered in a civil case. *See, e.g., American Automotive Accessories, Inc. v. Fishman*, 175 F.3d 534, 541 (7th Cir. 1999) (requiring a showing of corroborating circumstances for a declaration against penal interest offered in a civil case).

2) To confirm the requirement that the prosecution provide a showing of "particularized guarantees of trustworthiness" when a declaration against penal interest is offered against an accused in a criminal case. This standard is intended to assure that the exception meets constitutional requirements, and to guard against the inadvertent waiver of constitutional protections. *See Lilly v. Virginia*, 527 U.S. 116, 134-138 (1999) (holding that the hearsay exception for declarations against penal interest is not "firmly-rooted"and requiring a finding that hearsay admitted under a non-firmly-rooted exception must bear "particularized guarantees of trustworthiness" to be admissible under the Confrontation Clause).

The "particularized guarantees" requirement assumes that the court has already found that the hearsay statement is genuinely disserving of the declarant's penal interest. *See Williamson v. United States*, 512 U.S. 594, 603 (1994) (statement must be "squarely self-inculpatory" to be admissible under Rule 804(b)(3)). "Particularized

guarantees" therefore must be independent from the fact that the statement tends to subject the declarant to criminal liability. The "against penal interest" factor should not be double-counted as a particularized guarantee. *See Lilly v. Virginia*, 527 U.S. at 138 (fact that statement may have been disserving to the declarant's interest does not establish particularized guarantees of trustworthiness because it "merely restates the fact that portions of his statements were technically against penal interest").

The amendment does not affect the existing requirement that the accused provide corroborating circumstances for exculpatory statements. The case law identifies some factors that may be useful to consider in determining whether corroborating circumstances clearly indicate the trustworthiness of the statement. Those factors include (*see, e.g.*, *United States v. Hall*, 165 F.3d 1095 (7th Cir. 1999)):

(1) the timing and circumstances under which the statement was made;

(2) the declarant's motive in making the statement and whether there was a reason for the declarant to lie;

(3) whether the declarant repeated the statement and did so consistently, even under different circumstances;

(4) the party or parties to whom the statement was made;

(5) the relationship between the declarant and the opponent of the evidence; and

(6) the nature and strength of independent evidence relevant to the conduct in question.

Other factors may be pertinent under the circumstances. The credibility of the witness who relates the statement in court is not, however, a proper factor for the court to consider in assessing corroborating circumstances. To base admission or exclusion of a hearsay statement on the credibility of the witness would usurp the jury's role in assessing the credibility of testifying witnesses.