

ADVISORY COMMITTEE ON EVIDENCE RULES

Minutes of the Meeting of January 9 and 10, 1995

Coronado, California

The Advisory Committee on the Federal Rules of Evidence met at the Hotel del Coronado in Coronado, California on January 9 and 10, 1995.

The following members of the Committee were present:

Circuit Judge Ralph K. Winter, Jr., Chairman  
Circuit Judge Jerry E. Smith  
District Judge Fern M. Smith  
District Judge Milton I. Shadur  
Federal Claims Judge James T. Turner  
Dean James K. Robinson  
Professor Kenneth S. Broun  
Gregory P. Joseph, Esq.  
John M. Kobayashi, Esq.  
Frederic F. Kay, Esq.  
Mary F. Harkenrider, Esq., and Roger Pauley, Esq. Department  
of Justice  
District Judge David S. Doty  
Professor Margaret A. Berger, Reporter

Chief Justice Covington received word of her appointment to the Committee too late for her to make arrangements to attend.

Also present were:

Honorable Alicemarie H. Stotler, Chair, Standing Committee on  
Rules of Practice and Procedure  
Professor Daniel R. Coquillette, Reporter, Standing Committee  
on Rules of Practice and Procedure  
Circuit Judge C. Arlen Beam  
William B. Eldridge, Esq. Federal Judicial Center  
Peter G. McCabe, Esq., Secretary  
John K. Rabiej, Esq., Administrative Office  
Mark D. Shapiro, Esq., Administrative Office

Judge Winter called the meeting to order at 8:30 a.m. on January 9. He announced that the Committee would be meeting next on May 4-6 in New York. He then set forth the agenda for the present meeting: the Committee would discuss some provisions in the Contract with America, the desirability of a rape-counselor privilege for the federal courts, an amendment to Rule 408 proposed by John Kobayashi, and then turn to a consideration of Articles 8, 9 and 10 of the Federal Rules of Evidence.

Contract with America. The Committee first considered a proposed amendment to Rule 702 that would impose a new test for

expertise based on "scientific knowledge." Judge Winter reminded the Committee that at its last meeting it had unanimously agreed that it would be counterproductive to amend the expert witness rules until the courts had an opportunity to respond to the Supreme Court's 1993 opinion in Daubert v. Merrell Dow Pharmaceuticals, Inc. Mr. Joseph reported that although the drafters of the proposed amendment had stated that their objective was to codify Daubert, the Litigation Section of the American Bar Association did not agree with this description. The proposed amendment specifically applies only to "scientific knowledge" although some courts apply Daubert to other types of expert proof; imposes separate requirements of validity and reliability which the Daubert court explicitly refused to do; and provides for a new balancing test in which the usual Rule 403 burden is reversed. Members of the Committee also noted that there is no need to codify a Supreme Court opinion.

The next provision to which the Committee turned was an additional amendment to Rule 702 that would exclude the testimony of an expert who is to be paid on a contingent fee basis. Judge Winter stated that while the gist of this proposal is generally consistent with the thrust of DR 71, the manner in which this new section is framed may lead to unanticipated consequences that require further study. Furthermore, there is a difference in providing for the inadmissibility of evidence instead of handling the problem through a disciplinary rule. Members expressed concern about the applicability of the proposed rule in cases in which the opponent of the expert can show that the party for whom the expert would testify has no money absent a recovery, and about the possibility that the proposed rule might repeal sub silentio the numerous statutory provisions that shift the fees of experts for prevailing parties to the loser. It was also pointed out that the mode of the expert's payment can now be explored before the jury, and that an exclusionary rule is not needed. Committee members agreed that contracts with experts providing for payment on a contingent fee basis are highly undesirable and should be usable for impeachment and disciplinary action. They would have no problem with a rule that excludes expert testimony in this narrow situation where the expert's contingent fee is contractual.

Rape counselor privilege. Mary Harkenrider explained that the main thrust of the provision in the Crime Bill (Pub. L. 103-322 (1994)) was directed at the states. Section 40153(a) requires the Attorney General to develop model legislation. Subsection (c) was added for the sake of completeness; it requires the Judicial Conference to submit a report to Congress with regard to the need for inserting such a privilege in the Federal Rules of Evidence. While the Attorney General's report is due within a year (September 1995), no time limit was imposed with regard to the federal report and recommendations.

Members of the subcommittee that had been created at the previous meeting of this committee made a number of additional comments. Ms. Harkenrider reported that the Attorney General's office was just beginning the process of model legislation for the states. Judge Fern Smith reported that although a rape counselor privilege providing for an in camera proceeding and a balancing test has been in effect in California since 1980, she had been able to find only two reported cases. Professor Broun reported that most states provide for in camera review in cases in which particularized need is shown, and that a few state court opinions seem to indicate that the privilege is treated as absolute.

Judge Winter inquired about how such a privilege would operate in criminal and civil proceedings, and whether a rape counselor privilege is really the only detailed privilege that ought to exist in federal courts? Other questions were raised about the interrelationship with hearsay rules, such as Rule 803(3), and an expert's testimony about a victim's rape trauma syndrome.

Ms. Harkenrider agreed to keep track of the state model legislation. A draft and commentary will be prepared by the reporter for the May meeting that will address the alternatives of an absolute or qualified privilege or no privilege, provide definitions, and consider whether the privilege should extend to communications with psychiatrists, psychologists, social workers or others.

Report on Committee's Recommendations to the Standing Committee. Rules 413-415. Judge Winter reported that Rules 413-415 were transmitted to the Standing Committee. In accordance with the Evidence Committee's views at its October meeting, the Standing Committee was advised that this Committee would prefer congressional annulment of the rules. In the event, however, that Congress disagrees, the Evidence Committee requested of the Standing Committee that it ask the Judicial Conference to recommend to Congress this Committee's rewriting of Rules 404 and 405. This revision incorporates the substance of Rules 413-415, but avoids the troubling problems identified in the Evidence Committee's accompanying comment.

Rules 103(e) and 407. Judge Winter further advised the Committee that our proposed revisions of Rules 103(e) and 407 had been sent to the Standing Committee with the request that they be approved for public comment.

Rules 406, 605, 606. The Standing Committee was advised that the Evidence Committee had tentatively determined at this time not to amend Rules 406, 605 and 606. The Standing Committee was asked to make this information public as it had done with other evidence rules that the Committee had declined to amend, and to request that any dissenting views be sent to the Evidence Committee.

Review of Agenda. At this time, the Evidence Committee is still considering the following rules in articles it has already reviewed: Rule 104, Rules 404, 405, 407 and 408. The Rules Enabling Act requires that amendments to privilege rules contained in Article 5 must be made by Congress so that the Committee will consider possible changes in Article 5 (other than the rape counselor privilege) only after it finishes reviewing all the other articles in the Federal Rules. The Committee had concluded at its previous meeting that in light of the recency of Daubert v. Merrell Dow Pharmaceuticals, Inc., Article VII should not be amended until the courts have an opportunity to react to the Supreme Court's opinion. Articles 8 through 11 have not yet been reviewed by the Committee.

Article 8. The Committee agreed not to undertake a wholesale overhaul of the hearsay rules as any such action would require a massive reeducation of the Bar. Instead, the Committee decided to focus on discrete problems that have emerged.

Agency admissions. The Committee discussed whether either Rule 104 or Rule 801(d)(2) should be amended to state that the foundational requirements essential to the admissibility of a coconspirator's statement may not be established solely by the statement itself. The Supreme Court's decision in Bourjaily v. United States, 483 U.S. 171 (1987) held that the statement could be considered in conjunction with independent evidence, and reserved decision on whether the statement alone would suffice. The Committee debated at length whether it would be desirable to require independent evidence only (the pre-Bourjaily rule), or whether the statement itself could be used as partial corroboration. The Committee asked the reporter to prepare a draft that would permit the statement to be considered in conjunction with independent proof.

The reporter was also asked to consider extending this corroboration approach to proving authority, and scope of agency or employment with regard to authorized and vicarious admissions.

The Hillmon doctrine. The Committee asked the reporter to draft language that would restrict use of the hearsay exception when a statement of intent is being offered to prove the conduct of someone other than the declarant. It was suggested that language from some of the better cases might be helpful.

Rule 803(4). The reporter agreed to review critical commentary and report to the Committee whether possible amendments to Rule 803(4) should be explored.

Hearsay evidence in the jury room. The Committee discussed at length the special provisions in Rules 803(5) and 803(18) that govern which evidence is allowed into the jury room. The Committee considered whether these rules make sense, and whether they are consistent with other rules that impose no such requirement even

though the evidence admitted may have a similar impact on the jury (e.g. governmental investigative reports admitted pursuant to Rule 803(8)(C)). A majority of the Committee ultimately voted not to amend the existing rules.

Rule 803(8). Members of the Committee commented that the difference in wording between subdivisions (B) and (C) was unintended and that subdivision (B) should be amended. The rule was not intended to keep accused from offering business records of matters observed, and the government should not be prevented from offering records about routine matters. The Committee agreed that governmental findings should be admissible as held by the Supreme Court in Beach Aircraft v. Rainey.

The overlap between Rule 803(5), 803(6) and 803(8). The Committee asked the Reporter to clarify at the next meeting the extent to which circuits admit evidence against an accused pursuant to Rules 803(5) or (6) that is barred by the specific provisions in Rule 803(8)(B),(C). The Committee wished to know if there was a split in the circuits. Judge Shadur was also concerned with possible motivational problems in §1983 cases in which law enforcement personnel have been charged.

Application to misdemeanors. Jim Robinson suggested that an exception should be carved out of Rule 801(d)(1)(A) for statements made in connection with pleas in misdemeanor cases. He promised to furnish information regarding such a provision in the Michigan Rules of Evidence.

Roger Pauley suggested amending the Rule 803(22) limitation to "a crime punishable by death or imprisonment in excess of one year" to six months because the present rationale does not make sense. Reducing the time limit would allow evidence of all convictions to be used as to which the right to counsel had attached. The Committee decided to consider this further at the May meeting.

Residual exceptions. The Committee agreed that the residual exceptions in Rules 803 and 804 should not be amended.

Rule 804(a). The Committee asked the reporter to consider whether a "due diligence" requirement ought to be inserted into subdivision (a)(5) that would require the proponent of the evidence to show more than an attempt "by process or other reasonable means" to obtain the presence of the declarant at trial.

The Committee also wished consideration of whether the present language in the last sentence of subdivision (a) should be amended to cover issues raised by opinions such as United States v. Mastrangelo, 722 F.2d 13 (2d Cir. 1983) when the defendant has prevented the declarant from testifying.

Rule 804 issues. The Committee wished additional information about how the "predecessor in interest" provision in subdivision (b)(1) is being interpreted, and whether there are problems because the corroboration requirement with regard to exculpatory declarations against penal interest in subdivision (b)(3) is not explicitly required for inculpatory statements. The reporter was asked to distribute cases to the Committee.

Rule 805. The Committee wished to know whether there are aberrant cases that refuse to apply the rule regarding hearsay within hearsay when one part of a combined statement is exempted from the hearsay rule pursuant to Rule 801(d).

Articles 9 and 10. It was suggested that the two articles should be read in tandem to see whether public records are treated consistently. One suggestion was that the article 10 definition of writings, which includes data compilations, ought to be extended to Rule 901(7) which deals with the authentication of "writings" that are required by law to be recorded or filed but does not refer to data compilations. Roger Pauley also suggested that the provisions of 18 U.S.C. §3505 ought to be incorporated into Rule 902. These matters will be reviewed at the May meeting.

William Eldridge offered to have the Federal Judicial Center review the adequacy of the terminology used in Article 10 with regard to new forms of data.

The Committee also wished to consider further at the May meeting whether Rule 1006 ought to be amended to deal with two issues: 1) explicitly stating that a Rule 1006 summary is admissible to the same extent as the underlying writings, recordings and photographs that are being summarized; and 2) discussing when and whether the summary goes to the jury.