ADVISORY COMMITTEE ON EVIDENCE RULES

Minutes of the Meeting of November 12, 1996

San Francisco, California

The Advisory Committee on the Federal Rules of Evidence met on November 12, 1996 in the Park Hyatt Hotel in San Francisco, California.

The following members of the Committee were present:

Hon. Fern M. Smith, Chair

Hon. David C. Norton

Hon. Jerry E. Smith

Hon. James T. Turner

Professor Kenneth S. Broun

Frederic F. Kay, Esq.

Gregory P. Joseph, Esq.

John M. Kobayashi, Esq.

Roger Pauley, Esq.

Dean James K. Robinson

Professor Daniel J. Capra, Reporter

Hon. Milton I. Shadur, Hon. Ann K. Covington, and Mary F. Harkenrider, Esq., were unable to attend.

Also present were:

Hon. David S. Doty, Liaison to the Civil Rules Committee

Hon. David D. Dowd, Liaison to the Criminal Rules Committee

Hon. 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

Peter G. McCabe, Secretary, Committee on Rules of Practice and Procedure

Professor Rob Aronson, Uniform Rules of Evidence Committee

Joe Cecil, Esq., Federal Judicial Center

John K. Rabiej, Esq., Chief, Rules Committee Support Office

Opening Business

Judge Smith called the meeting to order at 8:30 a.m. She acknowledged with gratitude the services of the previous Chair, Judge Ralph Winter, and the previous Reporter, Professor Margaret Berger. The minutes of the meeting of April 22, 1996 were then approved by the Committee.

Judge Smith brought the Committee up to date on the status of the amendments proposed by the Committee. The Judicial Conference has approved, and passed on to the Supreme Court, the following: the proposed amendments to Rules 407 and 801; new Rule 804(b)(6); and the movement of the residual exceptions to a single Rule 807.

Self-Evaluation Report

The Judicial Conference has directed that each of its committees prepare a self-evaluation report. At the Committee meeting, the Chair described the form provided by the Judicial Conference and proposed answers to the questions on the form. After discussion, the following responses were agreed to by the Committee:

1. The Committee should continue to exist, given the constant state of change in the law of evidence, and the continuing need for a deliberative body of experts to respond to new developments.

2. The Committee has the appropriate amount of work.

3. The size of the Committee is appropriate.

4. The Committee membership is representative.

5. The work of the Committee is consistent with its jurisdictional statement.

6. The Committee's jurisdiction overlaps, to some extent, the jurisdiction of the Civil and Criminal Rules Committees, as well as that of the Committee on Court Administration. However, the Evidence Rules Committee is necessary because the Federal Rules of Evidence are trans-substantive, and there is no other committee with the jurisdiction to consider the impact of proposed amendments to the Evidence Rules on all types of federal litigation. Judge Stotler, elaborating on this point, noted that the Judicial Conference had considered the possibility, before the Evidence Rules Committee was reconstituted, of forming a committee with members from the Civil Rules Committee and the Criminal Rules Committee.

This proposal was rejected in favor of a free-standing Evidence Rules Committee.

7. There are no areas within the jurisdiction of other committees that would be better placed with the Evidence Rules Committee.

8. The Committee meets twice per year, 50% of the time in Washington, D.C.

9. The Committee has no suggested changes for its own structure or for the Judicial Conference committee structure in general.

Rape Counselor Privilege

Congress, in 42 U.S.C.§ 13942(c) (1996), directed that the Judicial Conference report on whether the Federal Rules of Evidence should be amended to include a privilege for confidential communications from sexual assault victims to their counselors. The Evidence Rules Committee directed the Reporter to prepare a proposed statement of the Committee on this issue. After some discussion, the Committee voted unanimously to adopt the statement, which would recommend to the Standing Committee that the Federal Rules of Evidence not be amended to include such a privilege. The Committee concluded that it would be anomalous to have the rape counselor privilege as the only codified privilege in the Federal Rules of Evidence. Nor would such a codification be necessary, since the Supreme Court, in *Jaffee v. Redmond,* recently established a privilege for statements to psychotherapists and licensed social workers; and it is probable that a rape counselor privilege comes within the *Jaffee* rule. The Chair expressed concern that the *Jaffee* protection might not extend to social workers and other therapists who are unlicensed, but opined that we should wait to see how the *Jaffee* rule develops before proposing any amendments. All Committee members agreed with this assessment. The Committee also agreed that it was unnecessary to address the constitutional issues that might arise in a criminal case when confidential statements of a prosecution witness are shielded by a rape counselor privilege; nothing the Committee could propose would change or resolve this constitutional question.

Uniform Rules of Evidence

Professor Rob Aronson, a member of the Committee on the Uniform Rules of Evidence, brought the Committee up to date on recent proposals for amending the Uniform Rules. The Uniform Rules Committee has reviewed all the articles up to Article 8. Professor Aronson described the following proposals:

1. *Rule 103*--The Rule would provide that a pretrial objection must be renewed, unless the court states on the record that a ruling is final.

2. *Article 3*--The Uniform Rules Committee proposed no change. The concern was that other uniform laws use the term "presumption" in various substantive ways. Professor Aronson noted that it would be useful to have a single rule governing the use of presumptions, but that much of the law of presumptions is based on policy beyond evidence. The Uniform Rules reporter has been instructed to try to draft an all-encompassing rule, but Professor Aronson is not optimistic about its passage.

3. *Rule 404*--Changes were made in this Rule in response to Federal Rules 413-15. The Reporter to the Uniform Rules Committee has been instructed to draft a "lustful disposition" rule of admissibility, such as exists in many states--permitting evidence of prior unlawful sexual conduct directed toward the same victim. Professor Aronson noted that there is overwhelming support in the Uniform Rules Committee for restricting Rule 404b. The Uniform Rules Committee proposal includes an in camera hearing requirement, as well as a requirement of advance notice (with a good cause exception); it requires clear and convincing proof that the opponent committed the bad act before it can be admitted; and it requires that the probative value of the bad act for its not-for-character purpose must substantially outweigh its prejudicial effect. The Chair asked whether there has been any negative reaction from trial judges as to the proposed in camera requirements. Professor Aronson said that trial judges had been positive about these requirements and that his sense was that trial judges wanted direction in handling evidence of uncharged misconduct.

4. *Rule 407*--The proposed amended Uniform Rule would apply specifically to product liability cases. No change has been made to the "after the event" language of the rule, but a comment will say that the relevant event is the time of sale rather than the time of injury.

5. *Rule 408*--This Rule would be modified to make it clear that it would include statements made during the course of an alternative dispute resolution.

6. *Rule 412*--The proposal adds a legislative purpose section indicating that the purpose of the rule is to protect the privacy of rape victims. Prior sexual conduct of the victim would be admissible only to show source of injury, consent, bias, or the source of sexual knowledge in a case involving a child-victim. The proposed amendment would apply the rule in both civil and criminal cases.

7. *Privileges*--Unlike the Federal Rules, the Uniform Rules contain a detailed set of privileges. Two amendments to these rules are proposed. First, the psychotherapist-patient privilege would be expanded to cover statements made to licensed social workers. A licensing requirement was thought necessary because otherwise there would be no way to meaningfully limit the therapeutic privilege. Second, the procedural rules concerning invocation and waiver of privileges would be revised and expanded, consistently with the case and statutory law that has developed.

8. *Rule 609*--A requirement of pretrial notice, parallel to that in Rule 404(b), has been added. Also, when the criminal defendant is the witness, impeachment would not be permitted with non-crimen falsi crimes unless the probative value of the conviction substantially outweighs the prejudice to the defendant.

9. *Bias*--Uniform Rule 616 currently permits impeachment for bias, subject to the 403 test. The Uniform Rules Committee is recommending that this rule be deleted, due to concern that the rule, by negative implication, could have a confining influence on other methods of impeachment not mentioned in the Rules.

10. *Writings*--The Uniform Rules Committee would amend every rule in which the term "writing" is used. The term "writing" would be changed to "record", and the term "record" would then be defined as any means of preserving information, much like the definition in the Federal best evidence rule. This change was thought necessary to account for technological developments in preserving writings and records.

Developments in Technology

The proposed change in the term "writings" in the Uniform Rules engendered some discussion about technological advances and their impact on the Federal Rules of Evidence. Judge Stotler pointed out that the problem of electronic data cuts across all the rules, not only the Evidence Rules, as we move toward the "electronic courtroom." The Chair observed that the problems created by technological change are more problems of validity and reliability than definitional. The Chair announced that in response to the challenges created by new technology, Judge Stotler has formed a subcommittee, consisting of one member from each of the advisory committees, as well as the reporters from each advisory committee. The purpose of this subcommittee is to consider how best to respond to changes in data retrieval and presentation in the federal courts. Judge Turner has been appointed by the Chair and has agreed to serve on the technology subcommittee.

Grants of Certiorari

Roger Pauley suggested that one of the Reporter's duties should be to keep Committee members apprised of cases taken by the Supreme Court involving the interpretation of the Federal Rules of Evidence. A short discussion ensued about the current case in front of the Supreme Court, *United States v. Old Chief*, which presents the question whether the prosecution must accept a stipulation to a felony in a felon firearm possession prosecution; Roger Pauley noted that there is currently no provision in the Federal Rules which specifically discusses stipulations. The Reporter agreed to keep Committee members apprised of cert. grants involving the Federal Rules of Evidence.

Issues for the Committee to Pursue

The Chair then asked each member of the Committee whether there was any issue that he or she thought the Committee should pursue. Many issues were discussed.

The Committee agreed to take up the following issues at the next meeting:

1. *Rule 103(e)*: While the Committee's proposal to amend Rule 103 was withdrawn, the Committee unanimously voted to revisit the question of amending the rule to provide instruction to litigants as to when an in limine motion must be renewed at trial. Judge Turner noted that the conflict in the circuits on this question has not gone away. Judge Turner, Greg Joseph and the Reporter were instructed to work on a draft which would provide a neutral solution for the problem, i.e., a solution which would not opt for excusing a trial objection in all cases or for requiring it in all cases, which would provide concrete guidance to litigants, and which would not unduly burden trial judges. Judge Doty noted that the Civil Rules Committee was opposed to the original proposal of the Evidence Rules Committee, which would have required the renewal of an objection unless the "context" instructed otherwise**.** The Civil Rules Committee thought that wording too ambiguous. It was further suggested in discussion that the Uniform Rules provision should be considered to see if it would be helpful.

2. *Rules 404(b) and 609*--The Committee generally agreed that it would be useful to provide for a more structured procedure for trial courts to follow in considering the admissibility of evidence of uncharged misconduct and prior convictions. The Reporter was instructed to review how other jurisdictions are

dealing with these matters--including the Uniform Rules and the Michigan Rules of Evidence. The Reporter was also instructed to consider whether a common notice provision could be applied to both rules. The Reporter will review the extant alternatives and set forth options for the Committee at the next meeting.

3. *Rule 615*--The Reporter informed the Committee that the "Victim of Crime Bill of Rights," 42 U.S.C. 10606, passed in 1990, places some limits on Rule 615. Subsection (b) of the statute sets forth seven rights of victims of crimes. Although the statute is not a model of clarity, paragraph (4) of subsection (b) sets forth the right "to be present at all public court proceedings related to the offense, unless the court determines that testimony by the victim would be materially affected if the victim heard other testimony at trial." It appears that Congress intended to create a limited exception to Rule 615. This exception, which is narrowly tailored to take account of the interests of crime victims and is more recently enacted than the Rule, would take precedence over Rule 615. The relationship between Rule 615 and the Victim of Crime Bill of Rights is currently being tested in the Oklahoma City bombing trial. The Reporter stated that he would report more fully on this issue at the next meeting.

4. *Rule 703*--The Reporter was directed to prepare a report on whether Rule 703, which permits an expert to rely on inadmissible evidence, has been used, as a practical matter, as a means of improperly evading the hearsay rule. The Reporter agreed to survey the law and practice under Rule 703 and report back to the Committee at the next meeting.

5. *Rule 706*--Judge Stotler and Joe Cecil informed the Committee that funding had been approved for Judge Pointer's plan to appoint expert witnesses in the breast implant litigation, but that Judge Jones' request for similar funding had been denied. This raised the question of the adequacy of the funding mechanism provided by Rule 706 for court-appointed experts in civil cases. Rule 706 provides that the parties shall pay for court-appointed experts in civil cases, but Judges Pointer and Jones argue that this provision is unfair when the expert's testimony will be used in many subsequent trials. It has been argued that Rule 706 is not even applicable when the court-appointed expert's testimony is used in more than one trial. Another important question is whether Rule 706 has any applicability where the expert is retained by the court for technical assistance, rather than to testify as a witness.

The Committee instructed the Reporter to work with Joe Cecil to develop a proposal for the Committee to consider whether Rule 706 should be amended to accomodate some of the concerns expressed by the judges involved in the breast implant litigation, especially the question of funding by the government.

6. *Self-authenticating Business Records*--The Committee voted to consider whether Rule 803(6) should be amended to dispense with the requirement of a qualified witness. The Reporter will survey the law of other jurisdictions and prepare a report on the advisability of such an amendment for the next meeting.

7. *Obsolete or Inaccurate Rules and Notes*--Several Committee members observed that the original Advisory Committee notes are incorrect in some respects. For example, the Note to Rule 104 contains a "not", which creates the opposite impression from what the Advisory Committee intended. The Note to Rule 301 has little or nothing to do with the Rule ultimately adopted. John Rabiej agreed to contact West to determine whether editor's notes could be used to alert the reader to some of these obvious errors.

More broadly, several Committee members observed that the Committee could do a service by updating

the original Advisory Committee notes to account not only for discrepancies but for subsequent case developments. As Judge Jerry Smith noted, practitioners rely on the Advisory Committee comments more than they rely on treatises, etc. Some doubt was expressed, however, as to whether the Advisory Committee notes could be updated outside of any process of amending or re-enacting the Rules. Professor Coquillette agreed to pass along the suggestion that the Evidence Rules should be re-enacted so that the Advisory Committee notes could be updated. Another possible solution discussed was to add a new note after the old note, rather than to amend the original note. Questions were raised about whether changes to the notes, independent of any amendment process, would require the three-year process attendant to amending the Rules themselves.

The Reporter was directed to go through the Rules and the Advisory Committee comments to determine where the Rules or the comments are obsolete, contradictory, or clearly wrong. The Reporter will report back on this matter at the next meeting. Special consideration will be given to the Notes prepared by the Federal Judicial Center, which are included in some published versions of the Federal Rules and which point out where the Advisory Committee Notes are inaccurate or outmoded.

Professor Coquillette informed the Committee that the reporters of all of the committees are going to get together in January to look at anachronisms and inconsistencies throughout the rules and committee notes. One topic of discussion will be the proper procedure for amending the committee notes where appropriate. The Reporter will report back on the results of the reporters' meeting at the next Committee meeting.

8. *Circuit Splits*--John Kobayashi suggested that it would be a useful long-term project for the Committee to investigate evidentiary issues on which the circuit courts are split. The Reporter agreed to prepare a memorandum on circuit splits for the next meeting.

9. *Statutes Bearing on Admissibility of Evidence*--The Committee agreed with Dean Robinson's suggestion that the Committee would perform a valuable service by incorporating by reference, in the Federal Rules, all of the many specific statutory provisions outside the Rules which regulate the admissibility of evidence proffered in federal court. The Reporter agreed to conduct a survey of all provisions outside the Rules which affect admissibility, and to report back to the Committee before the next meeting.

10. *Automation*--John Kobayashi suggested, as a long-term project, that the Committee investigate whether the Evidence Rules should be amended to accomodate changes in automation. The issues are not limited solely to a definition of what constitutes a writing. For example, another issue is: how does one authenticate an electronically produced document? How do the litigants and the court deal with materials presented in interactive form? It was also noted that it would be helpful for trial counsel to have some certainty as to what the judges will do with modern visual evidence--when and whether the judge will reach a determination. Mr. Kobayashi agreed to prepare a memorandum on these issues for the next meeting.

The following issues were discussed, and the Committee decided not to proceed on them at this time:

1. *Rule 201:* Rule 201(g) makes no reference to whether a criminal defendant should or must be permitted a conclusive fact against the government. Also, the Rule in general makes no attempt to delineate the distinction between legislative and adjudicative fact. The Committee decided, however, that the Rule was not presenting a problem for courts or counsel.

2. *Rule 301*--Professor Broun noted that Rule 301 applies to evidentiary presumptions but doesn't apply to substantive presumptions, and that it could be useful to develop a definitional hierarchy as to what effect a given presumption would have. The Committee was of the opinion that this would be a massive project with uncertain results. It was noted that the Uniform Rules Committee is investigating whether a rule of evidence can be fashioned to provide a definitional context for all presumptions. The Committee decided to review the Uniform Rules proposal on presumptions when it is completed, and to determine at that point whether such a project should be undertaken.

3. *Rule 404b*--Frederic Kay suggested that Rule 404(b) should be amended along the lines of the Uniform Rules proposal, so that uncharged misconduct could not be admitted unless the probative value substantially outweighs the prejudicial effect. While there was much sympathy for this position, the Committee unanimously agreed that the proposal would be rejected by Congress, and therefore decided not to pursue the suggestion at this time.

4. *Privileges*--The Chair noted that the Committee had never considered in detail whether to codify the federal law of privileges. Greg Joseph remarked that codification would be a problematic effort because, under the Enabling Act, any evidentiary rule on privilege must be affirmatively adopted by Congress. The Chair observed that in light of the Committee's recommendation against an amendment for the rape counselor privilege, it might be anomalous at this point to propose any amendment to the Rules with regard to privileges. Judge Stotler pointed out that questions about the scope of a privilege do create problems for the courts. For example, there is an issue of whether the state or federal law of privilege applies in actions brought under the Federal Tort Claims Act. The Committee decided not to attempt to codify the federal law of privileges at this time.

5. *Rule 611*(b)--Dean Robinson suggested that the Committee might consider whether the Rule should be amended so that the scope of cross-examination would not be limited by the subject matter of the direct. But the Committee decided not to proceed on this matter at this time.

6. *Admissibility of Videotaped Expert Testimony*--Dean Robinson suggested that the Committee might explore whether the Evidence Rules should be amended to provide for admissibility of videotaped expert testimony. Greg Joseph noted that a rule had been proposed to this effect by the Civil Rules Committee, but that the proposal had been withdrawn. John Kobayashi suggested that experts could be saved the inconvenience of testifying at trial through the method of videoconferencing, but questions were raised as to whether the trial judge would have jurisdiction over the witness in such circumstances. It was pointed out that Judge Pointer's plan in the breast implant litigation is for the videotaped testimony of the experts appointed by the court to be admissible in all breast implant trials. It was ultimately concluded that the Committee would continue to monitor the phenomenon of videotaped expert testimony, but that no action should be taken at this time.

7. *Rule 803(8)(B)*--The Rule does not on its face permit a law enforcement report favorable to the

criminal defendant to be admitted against the government. It was pointed out, however, that the courts had construed the rule to permit such reports to be admitted in favor of a criminal defendant, so the rule as applied was not posing any problems.

8. *Rule 806*--No mention is made in the Rule as to whether extrinsic evidence, which would be excluded under Rule 608(b) if offered against a testifying witness, would be admitted to impeach the character for veracity of a hearsay declarant. The Committee agreed, however, that this anomaly was not creating a problem in the courts.

9. *Residual Exception*--At the last meeting, the Reporter was asked to prepare reports on two aspects of the residual exception: 1. Whether there are conflicts in the cases regarding the notice requirement; and 2. Whether the residual exception has been improperly expanded to admit evidence of dubious reliability. The Reporter prepared a report on each of these issues, and sent them in advance of the meeting to the Committee members.

At the meeting, the Reporter summarized the conclusions of these reports. First, as to the notice requirement, there is some disagreement among the courts as to whether the requirement can be excused for good cause. Also, there is some dispute about whether the proponent must provide notice of a specific intent to invoke the residual exception. Finally, the Reporter pointed out that no consistent approach is taken to the notice requirements found scattered throughout the Evidence Rules.

As to the trustworthiness requirement, the Reporter noted that the disputed question of law was whether "near misses" (hearsay which misses one of the admissibility requirements of one of the categorical exceptions) can qualify as residual hearsay. Most courts have held that the term "not specifically covered" in the residual exception means "not admissible under" one of the other exceptions; thus most courts find near misses to potentially qualify as residual hearsay. As to whether evidence of dubious reliability is being admitted under the residual exception, the Reporter observed that this is largely a subjective question, dependent on one's view of the hearsay rule and its exceptions.

The Committee discussed the issues presented by the Reporter's memoranda. Judge Jerry Smith stated that the current residual exception is a useful tool for trial judges, since the other exceptions are not always well-conceived, and are sometimes underinclusive. John Kobayashi contended that it would be useful to impose a specific number of days before trial as a date for the pre-trial notice requirement. Roger Pauley argued that there was no reason to conform the notice requirements found throughout the Evidence Rules, contending that each Rule has a reason for a different approach as to notice.

Professor Broun stated his impression that the residual exception is being overused, and that it would be useful to give guidance, either by a more specific and stricter definition of trustworthiness, or by a specific exclusion of "near miss" hearsay. But he acknowledged that the question of overuse is to a large extent a normative question on which people can differ. The Chair expressed the opinion that the role of the Committee is not to reduce the discretion of trial judges, but to determine whether rules are unnecessarily ambiguous, incorrect, or are the subject of conflicting opinions among the circuits. Under this standard, there appeared to be no need at this time to amend the residual exception.

A vote was taken and two Committee members were in favor of proceeding and the rest of the members were opposed to proceeding on any amendment to the residual exception at this time.

10. *Sentencing Proceedings*--Some interest was expressed in extending the Federal Rules of Evidence to

sentencing proceedings, given the fact that Guidelines proceedings are so fact-driven. However, there was a general concern that the issue created policy conflicts beyond the scope of the Committee's jurisdiction--given the existence of a statute and a Sentencing Guideline which specifically provide for flexible admissibility, and given the historically broad discretion of the court to consider all information presented at the sentencing hearing. Therefore, the Committee decided not to proceed on this matter at this time.

Criminal Forfeiture

Roger Pauley reported to the Committee, for information purposes only, on a Justice Department proposal to make criminal forfeiture part of the ancillary proceedings to a criminal trial, rather than a question for the jury. At this time, this proposal has no immediate impact on the Evidence Rules. Judge Stotler expressed the hope that eventually the patchwork of forfeiture provisions will be made into an integrated whole; but she noted that there are no current proposals to change the Federal Rules of Evidence in any way that would bear upon forfeiture proceedings.

Liaison Reports

Judge Doty, the liaison to the Civil Rules Committee, reported on the discussion within that Committee of the proposed and withdrawn amendment to Federal Rule of Evidence 103. That Committee concluded that the Evidence Committee's former proposal would have created more problems than it solves.

Judge Dowd, the liaison to the Criminal Rules Committee, reported that the Committee was working on integrating forfeiture provisions. Also, the Committee is considering how Rule 11 guilty pleas were working in light of the Sentencing Guidelines. The Committee is trying to fashion a fair, streamlined procedure to permit defendants and lawyers to determine exactly how Guidelines will affect a plea. The Committee is also concerned about the growing insistence by the government that a defendant waive the right to appeal and to bring a collateral attack as a condition to entering into a plea; the Committee is considering whether to amend Rule 11 to prevent this kind of waiver. The Committee is also considering how to treat alternate jurors once the jury has retired. Judge Dowd noted that none of the described developments has any immediate impact on matters within the jurisdiction of the Evidence Rules Committee.

Restylized Appellate Rules

Judge Stotler reported that the Appellate Rules have been restyled, so that they are more concise, consistent and clear. She noted that commentary on the changes has been very positive. Those Committee members familiar with the changes unanimously expressed the opinion that the modifications in style are a great improvement. Judge Stotler noted that there is no immediate plan to restyle the Federal Rules of Evidence.

Evidence Project

The Chair informed the Committee that she had been contacted by Professor Rice of American University Law School, concerning a project that he has sponsored. This project proposes a total overhaul of the Federal Rules of Evidence. After discussion, the Committee determined that while it would monitor the progress of this project, it found no need for a full-scale revision of the Evidence Rules.

Next Meeting

The Chair announced that the next meeting of the Committee would take place on April 14th and 15th in Washington, D.C.

Respectfully submitted,

Daniel J. Capra

Reed Professor of Law

Reporter