ADVISORY COMMITTEE ON EVIDENCE RULES

Minutes of the Meeting of April 22, 1996

Washington, D.C.

The Advisory Committee on the Federal Rules of Evidence met on April 22, 1996 in the Thurgood Marshall Office Building in Washington, D.C.

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

Gregory P. Joseph, Esq.

John M. Kobayashi, Esq.

Frederic F. Kay, Esq.

Mary F. Harkenrider, Esq., and Roger Pauley, Esq., Department of Justice

Professor Margaret A. Berger, Reporter

Chief Judge Ann K. Covington and Professor Kenneth S. Broun were unable to attend.

Also present were:

District Judge David S. Doty, Liaison to the Civil Rules Committee

District Judge David D. Dowd, Jr., Liaison to the Criminal Rules Committee

District Judge 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, Uniform Rules of Evidence

Joe Cecil, Esq., Federal Judicial Center

Joseph Spaniol, Esq., John Rabiej, Esq., Paul Zingg, Esq., Administrative Office

Professor Stephen Saltzburg, ABA Litigation Section

Judge Winter called the meeting to order at 8:30 a.m.

Rules 413 - 415. Judge Winter reported to the committee that he had met with Senator Jon Kyl in order to discuss possible amendments to Rules 413-415. Congresswoman Molinari had also been invited but did not attend. At the meeting, Judge Winter suggested making the notice provisions in the new rules consistent with other evidence rules. Senator Kyl stated that there was no chance that Congress would back away from the policy of the rules, and that he hoped that the states would adopt similar rules. Senator Kyl also stated that the Committee's draft went beyond congressional policy, especially by including balancing factors. Judge Winter said the balancing factors could be abandoned and offered the services of the Committee to work out a compromise. Judge Winter has not, however, heard from Senator Kyl since the meeting. Judge Stotler commented that she saw nothing further for the Committee to do.

Rule 103. Judge Winter began the discussion by stating that he had lost confidence in the proposed amendment. Neither the commentators who favored it nor those who opposed it seemed to share his understanding that the proposal distinguished between in limine evidentiary rulings that might be affected by events at trial and those that could not. He also noted that virtually all commentators believed that in some circumstances an in limine ruling might not be final and might require renewal at trial. However, no new language clarifying the distinction was offered. As a result, he feared that the proposed alternative might lull some lawyers into thinking renewal was unnecessary. He stated that he believed that we should do nothing at the present time so as to allow caselaw to develop and revisit the issue sometime in the future.

The Reporter summarized the comments received: although the commentators uniformly were in favor of a rule, there was considerable controversy over which version of the rule to adopt, with the majority favoring the alternative to the proposed amendment.

The Committee debated the proposal at length. Members pointed out the increased use of in limine motions as a means of structuring a trial; questioned how the rule would operate when pretrial proceedings are handled by a magistrate judge and the interrelationship with Fed.R.Civ. P. 46; observed that judges differ tremendously in how much attention they give matters pretrial; debated the interaction of the rule with the Supreme Court's opinion in Luce v. United States that requires a defendant to take the stand in order to preserve an objection to an in limine motion; discussed whether civil and criminal cases ought to be governed by the same rule; and considered a variety of proposed formulations.

A straw vote revealed that 3 members of the committee were in favor of the proposed amendment that had gone out for public comment; 3 members were in favor of the alternative version, and 4 members preferred no rule. Although more members of the committee preferred having a rule to not having a rule, no clear majority emerged as to what should be done even after further discussion. Ultimately the Committee voted to defer acting on the rule by a vote of 7 to 2.

It was suggested that the Civil and Criminal Rules Committees might have some suggestions, or might be able to treat the subject matter of the proposal in their rules thereby eliminating some of the problems that had been raised, such as the interrelationship with the Luce decision and rulings by magistrate judges. Judge Doty, the liaison to the Civil Rules Committee doubted that the Civil Rules Committee

would have time to consider this issue at its next meeting. Judge Dowd, the liaison to the Criminal Rules Committee, said he would be happy to review the issue with his Committee.

Rule 407. The Reporter summarized the comments that had been received. The great majority favored extending the rule to products liability actions. Some commentators, however, proposed extending the rule in products liability actions so that the rule would operate to bar evidence of remedial measures taken after the sale of the product even if the changes occurred before the event causing injury or harm. Two commentators objected to the restyling of the second sentence, primarily on the ground that there was no need for the proposed change.

Mr. Joseph suggested that the words "injury or harm" should be substituted for the word "event" in line 3 in light of the proposed change in line 1 adding the words "injury or harm allegedly caused by an" before the word "event." This change would clarify that the rule does not apply to changes that are made before an injury or harm occurs. Members of the committee commented that such a rule was desirable even in products liability cases because the fear of punitive damages and the substantive law on failure to warn provide sufficient incentives to make changes before an injury or harm occurs even in the absence of an exclusionary rule. Dean Robinson had no objection to the proposed rule but commented that the consequence is that subsequent plaintiffs will not be able to introduce the same evidence as initial plaintiffs who will be free to show a change made after sale before any injury or harm occurred. The Committee voted to approve Mr. Joseph's suggested change and to send the rule on to the Standing Committee.

The Committee also discussed the desirability of retaining the proposed changes in the second sentence of Rule 407 which had been made solely to restylize the rule. In light of the present freeze on a comprehensive restylization of the rules of evidence, the Committee voted 6 to 3 to return to the present wording of the second sentence. In connection with the discussion of restyling, Judge Stotler asked the members of the Committee for comments on the comprehensive restylization of the appellate rules. She asked the Committee members to examine the proposed new appellate rules and to consider whether the restylization effort was worth it, if the rules were better and if not, why?

Rule 801. The Reporter summarized the received comments. The proposed changes were generally supported, although a number of commentators continued to press for the overturning of the Supreme Court's decision in Bourjaily v. United States that had held that the federal rules do not require independent evidence to establish foundational facts. A number of commentators had also suggested that the proposed change was unnecessary because it will have no impact. Finally, a few comments objected to extending the Bourjaily rule to other agency admissions, although there was disagreement about whether this extension would change present law undesirably, or was unnecessary because Bourjaily applies a fortiori.

The Committee again discussed whether it was worthwhile to make the proposed change in the rule. Professor Saltzburg pointed out that it was not correct to say that the contents of the statement "may" be considered, but rather that the contents of the statement "must" be considered. The Committee ultimately voted with one vote opposed to change the "may" to "shall." It made no other changes in the proposed language of the amendment.

Rule 804(b)(6). The Reporter related that the comments that were received generally approved of the proposed amendment in principle. A number of objections were voiced about the text of the proposal: 1. that "forfeiture" rather than "waiver" more appropriately captures the rationale underlying the rule; 2. that the word "acquiesce" is too vague; 3. that the rule should be rewritten so that it will apply only when the defendant's intent is to tamper with a witness; 4. that a higher "clear and convincing" standard should be substituted; 5. that the profferer must give advance notice of an intention to offer evidence pursuant to

this provision; 6. that the rule should be rewritten to indicate that it is usable against the prosecution as well.

The Committee agreed that "forfeiture" is a more appropriate term than "waiver" and voted to make that change in the rule and the accompanying note. The Committee also discussed at length alternative formulations for the concept of acquiescence such as "aiding and abetting" and "acceptance of benefits" but ultimately decided to retain "acquiesce."

The Committee thought it unnecessary to rewrite the rule to refer specifically to witness tampering because the proposed text states that the rule applies only in instances in which the party's objective was to "procure the unavailability of the declarant as a witness." The Committee agreed to change the word "who" in line 22 to "that" so as to indicate that forfeiture could be applied against the prosecution as well as an accused. The Reporter was directed to amend the proposed Committee Note accordingly.

The Committee discussed whether to retain the word "wrongdoing" or whether "misconduct" was a more appropriate terms since the absence of a declarant as a witness could be obtained by conduct that was not criminal. The Committee voted in favor of substituting the word "misconduct." (After the meeting, however, Judge Winter reminded the Committee that the term "wrongdoing" already appears in Rule 804 in connection with the definition of unavailability, and that it would be preferable not to introduce another concept into the rule. The Committee acquiesced in his suggestion. A member of the Committee requested that the Committee Note convey that "wrongdoing" does not necessarily involve criminal behavior.)

After considerable discussion, the Committee decided not to insert a notice provision into the proposed rule. The Committee also decided not to insert a reference to new subdivision (6) into Rule 804(a)(5). Such an amendment would have the effect of requiring the proponent to demonstrate that the declarant's testimony could not be obtained through other means, such as taking a deposition. Such a requirement has never been imposed in cases that have found a forfeiture when a party procures a declarant's absence.

Rules 807 and 806. In accordance with its previous decision to eliminate the proposed restylization of Rule 407, the Committee decided to eliminate those changes in Rule 807 that had been made solely as a matter of style. The Committee made three changes in punctuation suggested by Judge Shadur: to eliminate commas in lines 3 and 4, and to add a comma in line 13. The Committee also agreed to restore the text of Rule 806 to its current state with the exception of correcting a mistakenly placed comma in line 2 between "801(d)(2)" and "(C)."

Rules 803(24) and 804(b)(5). Instead of saying "[Abrogated]" after the subdivision number, it was agreed that "[Transferred to Rule 807]" was more appropriate.

Other Comments. The Committee then turned to additional suggestions, unrelated to the Committee's proposals, for amending the rules that had been submitted for public comment. Judge Edward Becker had recommended a study by the Committee of the standard for harmless error in the various circuits. Members of the Committee, however, were not inclined to undertake such a study. The Committee also did not wish to revisit the holding of Luce v. United States, 469 U.S. 38 (1984), or to further revise the wording of Rules 407 or 801(d)(E).

Rule 807. Judge Becker had also suggested redrafting the notice requirement for the residual exception because there is a circuit split on how rigidly the notice requirement is applied. Roger Pauley suggested looking at the caselaw to determine whether the circuits actually reach different results on the same facts or whether they simply differ in their verbalization of the rule. The Committee agreed that the Reporter should report back on this issue.

The Committee also agreed that the Reporter should look into the expanded use of the residual exception. Judge Shadur suggested that to get a true picture of how the residual exception is operating one would need to look at unreported cases. The Reporter will consult with the Federal Judicial Center about obtaining this information.

Finally, the Committee turned to suggestions it had received for amending rules not presently under consideration.

Rules 803(8)(C), 801(d)(1)(A) and 804(b)(1). John A. K. Grunert, Esq. of Boston, Mass. had suggesting amending Rule 803(8)(C) because practical obstacles make it impossible for an opponent to meet the burden of showing that a proffered official report is untrustworthy. He had suggested either shifting to the proponent the burden of proving trustworthiness, or providing that the report is not admissible upon a showing either that it is untrustworthy (as the present rule provides) or that the opponent "could not with due diligence obtain information reasonably necessary to evaluate its trustworthiness."

The Committee discussed this proposal in light of police accident reports and administrative reports from agencies such as the National Transportation Board and directed the Reporter to advise the Committee about the functioning of the trustworthiness requirement. A related question arose during the discussion as to how the courts are treating testimony given before administrative hearings pursuant to Rules 801(d)(1)(A) and 804(b)(1) and the Reporter was directed to report on this as well.

New Rule 804 Exception. The Committee had received a proposal for a new exception that would encompass "a statement made by the declarant which implicates the defendant in criminal behavior harmful to the declarant or in which the declarant apprehends such behavior by the defendant." The Reporter stated that a number of similar proposals would be made in forthcoming law review articles in the wake of the O.J. Simpson case. The Committee directed the Reporter to report on these developments.

The Applicability of Evidence Rules in Forfeiture Proceedings. The Committee discussed the present inapplicability of evidence rules to probable cause determinations in civil forfeiture hearings and ancillary hearings in criminal cases and whether the absence of any restrictions on the use of hearsay evidence was appropriate. The Reporter was asked to report back on fact patterns and judicial decisions in this area. The Committee does not, however, wish to consider the lack of evidence rules in bail hearings.

Foreign Business Records. Roger Pauley advised the Committee that the Department is putting together an omnibus bill that would cover the admissibility of foreign public records. A statute, 18 U.S.C. §3505, already covers foreign business records. Mr. Pauley suggested that it might be appropriate to incorporate provisions dealing with private and public foreign records into the Federal Rules of Evidence.

Before adjourning the meeting, Judge Winter advised the Committee that developments at the Standing Committee meeting or in Congress might necessitate a conference call, but that he saw no urgency to set a date for the next meeting of the Committee.

Respectfully submitted,

Margaret A. Berger

Professor of Law

Reporter