Advisory Committee on Evidence Rules

Minutes of the Meeting of April 17th, 2000

Chicago, Illinois.

The Advisory Committee on the Federal Rules of Evidence met on April 17th in Room 2544 of the Federal Courthouse in Chicago, Illinois.

The following members of the Committee were present:

Hon. Milton I. Shadur, Chair
Hon. Jerry E. Smith
Hon. David C. Norton
Hon. Jeffrey Amestoy
Laird Kirkpatrick, Esq.
Frederic F. Kay, Esq.
John M. Kobayashi, Esq.
David S. Maring, Esq.
Professor Daniel J. Capra, Reporter

Also present were:

Hon. Frank W. Bullock, Jr., Liaison to the Standing Committee on Rules of Practice and Procedure
Hon. Richard Kyle, Liaison to the Civil Rules Committee
Professor Kenneth Broun, Consultant to the Subcommittee on Privileges
Roger Pauley, Esq., Justice Department
Peter G. McCabe, Esq., Secretary, Standing Committee on Rules of Practice and Procedure
John K. Rabiej, Esq., Chief, Rules Committee Support Office
Jennifer Evans Marsh, Esq., Federal Judicial Center
Professor Leo Whinery, Reporter, Uniform Rules of Evidence Drafting Committee

Opening Business

Judge Shadur opened the meeting by asking for approval of the minutes of the October, 1999 Evidence Rules Committee meeting. The minutes were unanimously approved. Judge Shadur informed the Committee that the Supreme Court has approved all of the Committee's proposed amendments to the Evidence Rules--Rules 103, 404(a), 701, 702, 703, 803(6) and 902.

Judge Shadur then asked John Rabiej to report on a proposal to encourage all courts to place local rules on the internet. Mr. Rabiej noted that concern has been expressed by some courts that if local rules are placed on one internet web site, it will make it easy to compare the rules, to the embarrassment of some of the courts. He noted that the current proposal simply encourages that the district courts place local rules on the internet--the proposal does not purport to mandate anything. The Evidence Rules Committee approved the proposal in principle. Committee members expressed concern, however, that a listing of a particular rule as "effective" on a certain date might be misleading if the date was simply the date on which the rule was last reviewed for publication on the web site. The Committee suggested that the web site specify an "as of" date, indicating when the rules were last reviewed, together with an effective date indicating when the rule first became effective. A Committee member expressed his opinion that standing orders should be placed on the internet as well. Mr. Rabiej informed the Committee that such a proposal is currently under consideration.

Judge Shadur then reported on the Standing Committee's January meeting. The Evidence Rules Committee did not propose any action items at that meeting. Judge Shadur noted, however, that the Evidence Rules Committee does have input into two ongoing Standing Committee projects. One is the proposal of a Civil Rule concerning financial disclosure. Materials on this matter were included in the agenda book. The proposal currently before the Standing Committee is patterned on Appellate Rule 26.1. Judge Shadur noted that the Evidence Rules Committee does not have primary responsibility for rulemaking on financial disclosure, but that the Evidence Rules Committee will be kept apprised of developments. A second Standing Committee project involves the ongoing study of possible Federal Rules of Attorney Conduct. The Standing Committee's subcommittee on attorney conduct held an invitational conference, including members from bar associations, academia, and disciplinary counsel. The current draft model, requiring dynamic conformity with state rules of professional responsibility, has been revised in light of comments made at the February meeting. The Standing Committee plans to hold another invitational conference this Summer, in an effort to determine whether there is really a problem that is worth addressing through a federal rule of attorney conduct. Judge Shadur noted that no action is required from the Evidence Rules Committee at this point.

Consideration of Evidence Rules

Judge Shadur noted that the Evidence Rules Committee is not contemplating formal recommendation of any rule changes to the Standing Committee at this time. At the October, 1999 meeting, several issues were raised concerning possible rule changes, and the Reporter was directed to prepare a memorandum on each of these issues. The Reporter also prepared a memorandum in response to a request by Judge Grady to consider a proposed amendment to Evidence Rule 803(18). The issue for the Committee was whether any of the proposed rule changes are worth considering for further investigation, with a view to a possible proposal to the Standing Committee at its January, 2001 meeting.

Rule 902

The suggestion that Rule 902 might be amended involved two different matters: 1) A proposal from the Department of Justice to consider amending Rule 902(2) to provide for self-authentication of public documents by way of certification, i.e., providing an alternative to the requirement of a seal; and 2) a proposal to consider amending Rule 902(6) to provide for self-authentication of regular online reports. Committee members noted that it was important to proceed with caution before deciding to amend a rule as to which another amendment is currently pending before Congress.

Sealing Requirement

The question raised by the Committee was whether the sealing requirement is creating a substantial problem in practice, rendering it necessary to provide for an alternative form of self-authentication of public documents. Mr. Pauley stated that there is anecdotal evidence of difficulty in getting states to provide a sealed document. This is because many states no longer mandate the sealing of their public documents. Committee members expressed concern that an amendment would be proposed on the basis of some anecdotal evidence. Mr. Pauley stated that a survey of United States Attorneys would be conducted to try to find out whether the sealing requirement is imposing substantial problems for government attorneys. He agreed to report back to the Committee at the October meeting. The Committee agreed that it would consider a proposed amendment to the sealing requirement if a substantial problem exists in practice. But Committee members noted that the hardships of the sealing requirement are to a large extent alleviated by the current Rule 902(2), which provides for self-authentication of unsealed documents if an official affixes a seal to a certification that the document is genuine. The Rule 902(2) sealing requirement does not mandate a government seal; a notary seal or the like is sufficient. The Committee agreed that if the Rule is to be amended, the reference in Rule 902(1) to the Panama Canal Zone and the Trust Territory of the Pacific Islands should be deleted as those references are no longer relevant.

Online Materials

As to a proposed amendment to Rule 902(6), Committee members expressed the view that online materials might be more easily forged than hardcopy. Therefore it did not make sense at this point to provide for self-authentication of online materials. The consequence of not including online materials under Rule 902 is simply that they must be authenticated under the circumstances, as provided in Rule 901. The question is: which party should have the burden on the question of authenticity? Given the fact that technological advances have increased the risk of forgery, the Committee determined that it was generally appropriate to leave the burden of showing authenticity to the proponent of the evidence. Close questions should be called in favor of an actual showing of authenticity under Rule 901, rather than providing for self-authentication under Rule 902. Thus the Committee concluded that it was not appropriate at this time to amend Rule 902(6).

One Committee member argued that the risk of forging any document or picture has increased due to technological advances. He suggested that the Evidence Rules should be amended to protect against this heightened risk. Committee members agreed that the potential for forgery has increased, and that this increased potential counsels against increasing the scope of the Rule 902 grounds for self-authentication. Committee members, however, generally rejected the proposition that concern over the increasing potential for forgery should lead to any amendment of an Evidence Rule. The problem of forgery can be handled adequately by the principles of Rule 901--the possibility that a computerized document or picture might be forged is simply a factor that a court takes into account in determining whether the evidence is what the proponent says it is under Rule 901.

In sum, the Committee resolved not to proceed with an amendment to Rule 902(6). It reserved the question whether to proceed with an amendment to Rule 902(2), making Committee consideration dependent on a showing by the Department of Justice that the current Rule is posing a substantial problem in practice for United States Attorneys.

Rule 608(b)

At the October, 1999 meeting of the Evidence Rules Committee, the Reporter had been directed to prepare a report on whether the extrinsic evidence limitation of Rule 608(b) should be amended. The problem perceived is that as written, Rule 608(b) prohibits extrinsic evidence when used to impeach a witness' "credibility". Read literally, this would mean that extrinsic evidence could never be offered to prove any aspect of a witness' credibility. But the Supreme Court has made clear in *United States v. Abel* that the term "credibility" really means "character for truthfulness." So if the proponent is using the extrinsic evidence for impeachment on any ground other than an attack on character (specifically, to show bias, prior inconsistent statement, contradiction, or lack of capacity), the extrinsic evidence limitation of Rule 608(b) is not

applicable. The Reporter was directed to provide a background memorandum on whether the use of the overbroad term "credibility" in Rule 608(b) has created a problem for the courts.

The first question for the Committee was whether the fundamental approach that was intended to be embodied in the Federal Rules (as indicated by *Abel*) is indeed the correct approach to the admissibility of extrinsic evidence offered for impeachment. That approach distinguishes a character attack (as to which extrinsic evidence is absolutely inadmissible) from all other forms of impeachment (as to which extrinsic evidence can be admitted subject to Rule 403). Why distinguish an attack on the witness' character from other forms of attack? The Committee unanimously agreed that the basic approach of the Federal Rules–the distinction between an attack on the witness' character and other forms of impeachment–is correct and should not be changed. An attack on a witness' character for truthfulness can be overbroad and extraneous to the issues in the case; extrinsic proof of bad acts will almost always result in a waste of time and confusion of the jury on a collateral matter. It makes sense, therefore, to employ a categorical rule of exclusion of extrinsic evidence when offered to attack a witness' character for truthfulness. Extrinsic evidence of other forms of impeachment might well be more central to the issues in the case (e.g., contradiction of a material fact, or an inconsistency in a prior statement that is material to the witness' testimony), and so it makes sense to take a case by case approach under Rule 403.

The next question for the Committee was whether Rule 608(b) should be amended to accord with what the Rule is supposed to mean--i.e., that extrinsic evidence is absolutely prohibited when offered to prove a witness' character for truthfulness, and that Rule 403 governs use of extrinsic evidence for all other forms of impeachment. The Committee noted that many of the reported appellate cases apply the Rule correctly, even though the Rule uses the overbroad term "credibility". The fact remains, however, that court opinions can be found that misapply the Rule by invoking it to preclude extrinsic evidence offered for non-character forms of impeachment. Committee members also expressed concern that litigants are misapplying the Rule at the trial level, and that many litigants do not proffer extrinsic evidence for non-character impeachment because they think that the Rule on its face prohibits it. A motion was made to recommend some kind of an amendment to Rule 608(b) to carry out the original purpose of the rule, i.e., that the limitation on extrinsic evidence applies only to an attack on the witness' character for truthfulness, and that admissibility of extrinsic evidence for other forms of impeachment is governed by Rule 403. That motion passed unanimously.

The question then shifted to how the Rule should be amended to best accomplish its original purpose. The Committee considered three alternatives. One alternative would simply substitute the term "character for truthfulness" for the word "credibility" in Rule 608(b); the Committee Note to this alternative would specify that the use of extrinsic evidence to prove prior inconsistent statement, bias, contradiction and lack of capacity is governed by Rules 402 and 403. The second alternative would substitute "character for truthfulness" for "credibility" and would also add a new subdivision specifying that subject to Rule 403, extrinsic evidence could be used to prove prior inconsistent statement, bias, contradiction or lack of capacity. The third

alternative would combine either of the first two alternatives with a provision that where extrinsic evidence is prohibited, it cannot be referred to directly or indirectly. This proposed language is intended to prevent an abusive practice by which parties seek to smuggle in extrinsic evidence by referring to consequences suffered by the witness for his alleged misconduct (e.g., that the witness had been suspended or disciplined for the underlying misconduct).

Some Committee members were favorably disposed to the alternative that would specifically mention the other forms of impeachment in the text of the Rule. But most Committee members expressed reservations about this proposal. These members were concerned that by specifically mentioning the basic forms of impeachment, the drafters might inadvertently leave out other forms of impeachment, creating confusion for courts and litigants. These members believed that the better approach was to mention the standard non-character forms of impeachment in the Committee Note, and to specify that the admissibility of extrinsic evidence for these forms of impeachment is governed by Rules 402 and 403, not by Rule 608(b). All Committee members believed that if Rule 608(b) is going to be amended, it would be good policy to specify that extrinsic evidence cannot be used, either directly or indirectly, when offered to impeach the witness' character. Permitting the cross-examiner to refer to the consequences of a witness' misconduct, such as suspension, results in an impermissible end-run around the extrinsic evidence limitation, and also brings inadmissible hearsay before the factfinder.

A vote was taken on which alternative to propose for further consideration at the October, 2000 meeting. Alternative 3 (substituting the phrase "character for truthfulness" for the word "credibility"; specifying in the Committee Note that extrinsic evidence offered for non-character impeachment is governed by Rules 402 and 403; and providing that extrinsic evidence cannot be referred to when the impeachment is for character) was approved by a 5 to 3 vote (the three "nays" favoring the more detailed alternative including the other forms of impeachment in the text of the Rule). The Reporter was directed to prepare a draft proposed amendment to Rule 608(b) and draft committee note, taking the approach tentatively agreed to by the Committee.

Rule 803(18)

The Committee considered a proposal by District Judge Grady of the Northern District of Illinois, to delete or amend the last sentence of Evidence Rule 803(18) to permit the jury to take a learned treatise into the jury room. Judge Shadur noted that the current Rule states that a learned treatise can be read into evidence but cannot be admitted as an exhibit. Judge Shadur stated that one of the reasons often mentioned for preventing learned treatises from being admitted as an exhibit is that the jury might rummage through the treatise in the jury room, without proper guidance. He and other Committee members noted, however, that any risk of rummaging could be alleviated by redacting those portions of the treatise that have not been admitted. One Committee member pointed out that the point of any amendment would be to permit the jury to review the learned treatise in the jury room. However, it would be

inappropriate for an Evidence Rule to specify how a piece of evidence should be handled in the jury room, since that is a question of trial practice, not admissibility.

Judge Shadur and other members pointed out that the most important reason for the second sentence of the Rule is that learned treatises may be given undue weight if they are admitted as trial exhibits. For example, the jury is not ordinarily permitted to bring the transcript of an expert's testimony into the jury room, since the testimony is not an exhibit. Since learned treatises essentially operate as expert testimony, it would be inappropriate for the jury to be allowed to bring a treatise into the jury room–the treatise might receive more weight than the equivalent expert witness testimony. It might even occur that a learned treatise offered to impeach an expert witness would receive greater attention from the jury than the expert's testimony itself. An even greater danger might be posed by allowing learned treatises to be considered by the jury without the benefit of contemporaneous explanation by an expert.

Judge Shadur asked whether any Committee member was prepared to offer a motion to propose an amendment to Rule 803(18) that would permit learned treatises to be submitted to the jury. No such motion was made.

The Committee then considered whether Rule 803(18) should be amended to specify that the hearsay exception covers authoritative materials in non-book form. The Reporter informed the Committee that the Second Circuit recently encountered the problem of a videotape offered as a "learned treatise". The opponent of the evidence argued that the tape could not be admitted because Rule 803(18) specifies only hardcopy published material for admissibility. The Second Circuit held that the tape was admissible under Rule 803(18) even though the text of the Rule did not so specify.

Committee members recognized that the Rule as written does not cover learned treatises in non-book form. However, the Committee determined that the courts are not having a problem with the textual limitations in the Rule--as indicated by the Second Circuit opinion. The Committee unanimously agreed that it was unnecessary to propose an amendment to Rule 803(18) at this time.

Rule 804(b)(3)

Rule 804(b)(3) provides a hearsay exception for declarations against penal interest. In criminal cases, the Rule as written states that an accused must provide corroborating circumstances clearly indicating the trustworthiness of the statement. This requirement does not, by the terms of the Rule, apply to government-proffered declarations against penal interest. Nor does the corroborating circumstances requirement apply on its face in civil cases. At the October,

1999 Evidence Rules Committee meeting, the Reporter had been directed to prepare a memorandum on whether Rule 804(b)(3) should be amended to extend the corroborating circumstances requirement to government-proffered hearsay and to civil cases.

Judge Shadur noted that the one-way corroboration requirement resulted from misconceptions in Congress about the scope of Rule 804(b)(3). Members of Congress apparently believed that inculpatory declarations against penal interest could not be admitted against criminal defendants due to the rule of *Bruton v. United States*. Therefore the corroboration requirement was written to apply only against accused-proffered hearsay. But it is clear that government-proffered declarations against penal interest can be and are often admitted against criminal defendants. Thus the one-way corroboration requirement was not justified at its inception; and as commentators and courts have noted, there is no justification for the one-way corroboration requirement today. Committee members recognized that most courts in fact apply the corroborating circumstances requirement to government-proffered declarations against penal interest (contrary to the text of the Rule). But some do not, and it is possible that criminal defense counsel do not demand corroboration of government-proffered statements because a look at the text of the Rule indicates that the requirement is inapplicable.

Judge Shadur polled the Committee on whether it would be appropriate to amend Rule 804(b)(3) to provide for two-way corroboration in criminal cases. The Committee unanimously agreed in principle that it is appropriate and necessary to prepare a proposal to amend Rule 804(b)(3) to require the prosecution to provide corroborating circumstances as a condition to admitting inculpatory declarations against penal interest.

Another question posed by the Reporter was whether the Rule should be amended to lower the threshold of corroborating circumstances required to support admissibility under Rule 804(b)(3). The Rule currently requires a showing that corroborating circumstances "clearly" indicate the trustworthiness of the statement. Some judges and commentators have argued that this standard is too stringent. One possibility is to delete the word "clearly" from the Rule. Committee members noted, however, that deletion of the word "clearly", in light of the extensive case law on the subject, might send out the wrong signal and would be disruptive to the courts. Deletion of "clearly" might also lead to unreliable hearsay being admitted against criminal defendants and other litigants. The Committee resolved unanimously to retain the word "clearly" in Rule 804(b)(3)

The Committee next considered whether the corroborating circumstances requirement should be extended to civil cases. Committee members noted that the question of application to civil cases would have to be addressed in any proposed amendment. That is, the corroborating circumstances requirement would have to be either specifically applied to or specifically excepted from civil cases. The Committee could find no justification for excepting civil cases from the corroborating circumstances requirement. To the contrary, Committee members recognized that it would make sense to have a unitary approach for all declarations against penal interest.

The next issue considered by the Committee was whether the factors pertinent to the corroborating circumstances requirement should be explicated in the text of the Rule. The Committee resolved that any such explication would be problematic because it would create a risk that some pertinent factors might not be included. On the other hand, the Committee recognized that courts are in dispute over the meaning of "corroborating circumstances." For example, some courts have held that in determining whether corroborating circumstances exist, the court must take into account whether the witness who relates the declaration against penal interest in court is reliable; other courts have held that the reliability of the witness is irrelevant to whether the declarant's statement is supported by corroborating circumstances. In light of the conflicts in the case law, the Committee resolved that it would be helpful for any amendment to Rule 804(b)(3) to set forth a non-exclusive list of factors that are pertinent to the determination of corroborating circumstances. The Committee agreed, however, that such a list would be better placed in the Committee Note than in the text of the Rule.

The Committee tentatively agreed to propose an amendment to Rule 804(b)(3) that would apply the corroborating circumstances requirement to all proffered declarations against penal interest, together with a Committee Note that would provide a non-exclusive list of factors that courts should take into account in determining whether the corroborating circumstances requirement is met. The Reporter was directed to prepare a proposed amendment for consideration at the next Committee meeting.

Privileges

Judge Smith, the Chair of the Subcommittee on Privileges, reported on a meeting of the Subcommittee and sought input from the Committee. The Subcommittee has prepared a preliminary draft of three 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 governing waiver; and 3) a rule covering the lawyer-client privilege. Judge Smith emphasized that the privileges project is a long-term project and that no decision to propose new privilege rules has yet been made. He noted that the Subcommittee had incorporated most of the suggested changes of the Style Subcommittee of the Standing Committee.

Committee members reviewed the Subcommittee drafts, and discussion covered the following points:

1. The draft provides that privileges are granted only by the Constitution, statute, or Supreme Court-initiated Rule. A Committee member pointed out that certain federal regulations exempt some government agents from pretrial discovery in criminal cases. Committee members responded that any such privilege really results from a judicial construction of Criminal Rule 16–therefore the proposal would not change the law with respect to protection of these

government agents. Committee members suggested that this problem be mentioned in a Committee Note should an amendment ever be proposed.

2. The draft catchall provision states (as does current Rule 501) that the "State" law of privilege controls where the rule of decision is based on state law. Committee members questioned whether the language would cover the law of the District of Columbia, Puerto Rico, etc. A suggestion was made that the word "jurisdiction" be substituted for the word "State." But this could mean that foreign privilege law would apply whenever foreign law supplied the rule of decision. Some Committee members thought that a federal court should have the option, at least in some cases, to apply federal privilege law even where foreign law supplies the substantive rules of decision. Another problem is that Evidence Rules 302 and 601 also refer to "State law", so any attempt to take a different approach in the privilege rules might be confusing. The Subcommittee agreed to do further research on this subject and to report back to the Committee at the next meeting.

3. One Committee member suggested that privileges in federal court should always be controlled by federal law. That is the position to which Congress took exception when privilege rules were proposed by the original Advisory Committee on Evidence Rules. Committee members generally opposed the view that the federal rules of privilege should apply even in diversity cases. They noted *Erie* and forum-shopping concerns, and were reluctant to change well-established law.

4. The catch-all provision in the Subcommittee draft proposed that "new" privileges could be established, subject to a balancing of public and private benefits and the cost of the loss of probative evidence. A Committee member raised the possibility that if privilege rules were proposed, Congress might accept some privileges and not others. This could leave privileges well-established in the common law, and yet not "new". The Committee resolved that the catch-all provision should encompass privileges established under the common law that might not be adopted in any codification of the privilege rules. The Subcommittee agreed to reconsider whether the balancing test set forth in the draft was broad enough to accomodate "public" privileges (e.g., the state secrets privilege) as well as private ones.

5. Judge Smith informed the Committee that the Subcommittee had chosen the term "lawyer-client" privilege, rather than "attorney-client" privilege, because "lawyer-client" was chosen both by the original Advisory Committee and by the drafters of the new Uniform Rules. Questions were raised about the scope of the term "client" in the draft–specifically whether the definition was broad enough to cover all potential clients. The Subcommittee agreed to study this question and report back to the Committee.

6. Questions were also raised about the definition of "lawyer" in the draft, specifically whether it was broad enough to cover people in foreign countries who perform legal services, such as notaries. The Subcommittee agreed to research this question and report back to the Committee.

7. The Committee discussed whether the draft's definition of "privileged persons" might lead to unwarranted protection of communications between two clients where a lawyer was not present. Federal courts have rejected the privilege in such circumstances. The Subcommittee agreed to consider this question further and to report back to the Committee.

8. The question was raised whether the crime-fraud exception to the lawyer-client privilege should be expanded to preclude the privilege when the client is communicating to the lawyer for the purpose of committing tortious conduct. The Committee believed that this would make the exception too broad, and that there was insufficient support for this expansion in the case law.

9. The draft rule on lawyer-client privilege contains an exception for cases in which it is necessary for the lawyer to defend herself by using privileged communications (most commonly in malpractice cases). The consultant to the Privileges Subcommittee observed that this exception may not be broad enough to cover in-house lawyers who are fired for whistleblowing and who sue for retaliatory discharge. He stated that he would research this question and report back to the Committee.

10. The Committee unanimously agreed that the "fiduciary" exception to the lawyer-client privilege, established in *Garner v. Wolfinbarger*, should be retained in any proposed codification of the privilege.

11. The draft rule on waiver contains a provision permitting a party who receives inadvertently privileged information to use the fruits of that information. The justification for the provision is that otherwise the party receiving the inadvertently disclosed information would be placed in the unfair position of having to establish that other information was not derived in any way from the privileged material. Committee members pointed out, however, that the proper solution to this possible unfairness is to shift the burden to the party who disclosed the privileged information, to show that other information was in fact derived from the material inadvertently disclosed. The Subcommittee agreed to draft a burden-shifting provision and present it for the Committee's consideration at the next meeting.

Case Law Divergence Report

At the direction of the Committee, the Reporter prepared a report designed to highlight for lawyers and judges the existence of case law that diverges from the text of the Federal Rules of Evidence. Judge Shadur noted that the report is basically in final draft form. The suggestion was made that the report could be published by the Federal Judicial Center and placed on the Federal Judicial Center website. The Committee agreed that publication by the FJC would be a wise and useful option. Judge Shadur noted that other possible means of distributing the report

will be looked into as well.

The Committee discussed what the goal of the report should be. Should it simply be a "red flag" report, alerting lawyers and judges to the fact that some case law diverges from the text of a rule, and encouraging further research on the matter? Or should the report be a complete compendium of all the case law, equivalent to a treatise, on every rule in which some case has diverged from the text? A strong majority of the Committee was of the view that the report should be a "red flag" report. While the Committee could perform a valuable service by drawing attention to case law divergence from the text of the Rules, it was not in the business of treatise-writing. The Committee agreed that the report should emphasize that it is operating only as a triggering mechanism–highlighting the fact that some case law diverges from certain specific rules, and emphasizing that the report does not purport to provide a thorough description of all of the reported cases discussing a particular Evidence Rule.

It will of course be made clear that the report is not an official Committee Note. The report is to be published by the Reporter at the direction of the Committee. It is not an official Committee report.

After discussion, the Reporter was directed to add some law review citations to the report where appropriate, and to address the fact that the rule of *Luce v. United States* is not covered by the text of Evidence Rule 103.

At the end of the discussion, the Committee unanimously agreed that the report, with some modifications, would provide an important service to lawyers, and that the Committee should ask the Standing Committee for its views as to appropriate publication of the report.

New Matters

Pending DNA Legislation–John Rabiej informed the Committee that a bill is pending in Congress that authorizes a court to order DNA testing on evidence in certain circumstances where a defendant claims that he was wrongly convicted. The bill was presented for information purposes only, as it has no direct bearing on the Federal Rules of Evidence.

Committee Business

Judge Shadur noted that the terms of Committee members Judge Smith and John Kobayashi are ending this year. On behalf of the Committee, he thanked them both for their excellent and dedicated service. He expressed the hope that Judge Smith might be able to continue to serve as the Chair of the Subcommittee on Privileges.

Next Meeting

The next meeting of the Evidence Rules Committee is scheduled for October 30th, 2000, in Washington, D.C..

The meeting was adjourned at 2:45 p.m., Monday, April 17th

Respectfully submitted,

Daniel J. Capra
Reed Professor of Law