Advisory Committee on Evidence Rules

Minutes of the Meeting of November 16, 2007

Washington, D.C.

The Advisory Committee on the Federal Rules of Evidence (the "Committee") met on November 16, 2007 in Washington, D.C.

The following members of the Committee were present:

Hon. Robert L. Hinkle, Chair
Hon. Joseph F. Anderson, Jr.
Hon. Joan N. Ericksen.
Hon. Andrew D. Hurwitz
William T. Hangley, Esq.
Marjorie A. Meyers, Esq.,
Jonathan J. Wroblowski, Esq., Department of Justice

Also present were:

Hon. Jerry E. Smith, Former Chair of the Committee
Hon. Lee H. Rosenthal, Chair of the Committee on Rules of Practice and Procedure
Hon. Marilyn L. Huff, Liaison from the Committee on Rules of Practice and Procedure
Hon. Michael M. Baylson, Liaison from the Civil Rules Committee
Hon. John F. Keenan, Liaison from the Criminal Rules Committee
Hon. Kenneth J. Meyers, Liaison from the Bankruptcy Rules Committee
Elizabeth Shapiro, Esq., Department of Justice
Professor Daniel Coquillette, Reporter to the Committee on Rules of Practice and Procedure
John K. Rabiej, Esq., Chief, Rules Committee Support Office
James Ishida, Esq., Rules Committee Support Office
Peter McCabe, Esq., Secretary to the Standing Committee on Rules of Practice and Procedure.
Professor Daniel J. Capra, Reporter to the Evidence Rules Committee
Professor Kenneth S. Broun, Consultant to the Evidence Rules Committee
Professor R. Joseph Kimble, Consultant to the Style Subcommittee of the Committee on Rules of Practice and Procedure
Joseph E. Spaniol, Jr., Esq., Consultant to the Style Subcommittee of the Committee on Rules of Practice and Procedure
Timothy Reagan, Esq., Federal Judicial Center
Jeffrey Barr, Esq., Rules Committee Support Office
Timothy Dole, Esq., Rules Committee Support Office

Opening Business

Judge Hinkle welcomed the Committee and its new liaisons, and also noted that the Committee has a new member, Judge Anita Brody. Judge Hinkle asked for and received approval of the minutes of the Spring 2007 Committee meeting.

On behalf of the Committee, Judge Hinkle expressed deep appreciation to Judge Smith, the former Chair, for his exemplary leadership. He noted that under Judge Smith's tenure as Chair, the Committee prepared and obtained approval of important amendments to Rules 404, 408, 606 and 609; and that Judge Smith was instrumental in obtaining approval for Rule 502, which is currently being considered by Congress. Judge Rosenthal noted that Judge Smith's presentations to the Standing Committee were always well-received and appreciated. Judge Smith expressed his thanks and appreciation to the Committee and to the personnel in the Rules Committee Support Office for their stellar efforts.

Judge Hinkle then asked Judge Smith to report on the June meeting of the Standing Committee. Judge Smith reported that the Standing Committee had approved Rule 502, which provides important protection against waiver of attorney-client privilege and work product. Judge Rosenthal was then asked to report on the status of Rule 502 now that it has been referred to Congress. Judge Rosenthal stated that she and others had met with members and staff of the Judiciary Committees of both Houses of Congress; that the Committee members and staff appeared favorably disposed toward the Rule; and that the American Association for Justice (formerly ATLA) had withdrawn all of its objections to the rule, meaning that the proposal appears to be unopposed at this point.

Judge Hinkle next reported on the status of the Committee's report (as directed by Congress) on the "harm-to child" exception to the marital privileges. The Standing Committee and the Judicial Conference approved the report prepared by the Committee, which concluded that it was neither necessary nor desirable to amend the Federal Rules of Evidence to provide for an exception to the marital privileges in cases involving harm to a child. The Committee found that such an exception already existed under federal common law and that codification would raise difficult drafting questions on the scope of the exception.

Finally, Judge Hinkle noted that a Subcommittee of the Standing Committee is investigating whether rules are necessary to regulate the sealing of cases. The Subcommittee is chaired by Judge Hartz and comprised of a representative from each of the Advisory Committees. Judge Ericksen has agreed to serve as the representative from the Evidence Rules Committee.

Restyling Project

At the Spring 2007 meeting, the Committee voted unanimously to begin a project to restyle the Evidence Rules. At the Fall 2007 meeting, the Committee agreed upon a protocol and a

timetable for the restyling project. The Committee also reviewed — on a preliminary basis — some rules that had been restyled by Professor Kimble.

Steps in the Process

After substantial discussion, the Committee agreed that restyling would proceed in the following steps:

1. Professor Kimble prepares a draft of a restyled rule.

2. The Reporter reviews the draft and provides suggestions, specifically with an eye to whether any proposed change is substantive rather than procedural. But the suggestions can go further than just the substantive/procedural distinction.

3. Professor Kimble considers the Reporter's comments and revises the draft if he finds it necessary.

4. This second draft of the rule is sent by email to all members of the Committee for their initial review. Committee members will have a week to respond with any comments on the restyling draft; the focus will be on whether the draft has made substantive changes to the existing rule, but Committee members may also make style suggestions for Professor Kimble to consider.

5. Professor Kimble considers the comments of the whole Committee and makes necessary changes. This draft then goes to the Standing Committee's Subcommittee on Style. The Subcommittee reviews the entire draft, with a focus on the areas of disagreement between Professor Kimble and the Committee/Reporter. In previous projects, many disputes about the propriety of a proposed change were resolved at this step. On occasion, however, the Subcommittee on Style found it appropriate to refer the matter to the Advisory Committee for a final resolution.

6. The Style Subcommittee draft is then referred to the Evidence Rules Committee as a whole. The draft will contain footnotes of the issues unresolved up to this point in the process. Committee members review the draft in the following manner: a) focus first on the footnotes to determine whether the material footnoted raises a question of "substance" rather than "style"; b) then review the draft to determine whether any changes of substance have been overlooked; and c) finally, provide any important style suggestions. One Committee member will be designated to lead the discussion at the Committee meeting. At this stage, the Committee will also receive the views of a representative of the ABA, Professor Steve Saltzburg, as well as the views of its own consultant Professor Broun and the liaisons from other Committees. If, after discussion at the Committee meeting, a "significant minority" of the Evidence Rules Committee believes that a change is substantive, then the wording is not approved. In contrast, the Style Subcommittee of the Standing Committee has the final word on any style suggestions provided by the Advisory Committee.

7. After final determination by the Style Subcommittee of any remaining style questions raised by the Evidence Rules Committee, the restyled rules are then presented to the Standing Committee with the recommendation that they be approved for release for public comment.

The Committee agreed that the Evidence Rules will be split into three parts, and the process described above will therefore be done in three separate stages. The Committee agreed, however, that the entire package of restyled rules will be submitted for public comment at one time. Thus, when the first part of the Rules is approved by the Standing Committee for release for public comment, it will be held until the other parts are approved as well.

In approving the above process, the Committee considered whether subcommittees should be appointed to review assigned rules before review by the Committee as a whole. The Committee determined that subcommittees probably will not be necessary or useful; the Committee has relatively few members and so dividing into subcommittees may not be effective, and the number of rules to be restylized is significantly fewer than in the previous restyling projects in which subcommittees were used.

Working Principles

After discussion, the Committee agreed upon a number of important working principles for restyling the Evidence Rules.

Definition of "Substantive" — The basic rule for the restyling project is that the final word on questions of "style" are for Professor Kimble and the Style Subcommittee of the Standing Committee, while the Evidence Rule can veto a proposed change if it would be "substantive." It is thus critically important to define what makes a change substantive. The Committee agreed to the following working definition of a substantive change:

A change is "substantive" if:

1. Under the existing practice in any circuit, it could lead to a different result on a question of admissibility (e.g., a change that requires a court to provide either a less or more stringent standard in evaluating the admissibility of a certain piece of evidence); or

2. Under the existing practice in any circuit, it could lead to a change in the procedure by which an admissibility decision is made (e.g., a change in the time in which an objection must be made, or a change in whether a court must hold a hearing on an admissibility question); or

3. It changes the structure of a rule so as to alter the way in which courts and litigants have thought about, and argued about, questions of admissibility (e.g., merging Rules 104(a) and 104(b) into a single subdivision); or

4. It changes what Professor Kimble has referred to as a "sacred phrase" — "phrases that have become so familiar as to be fixed in cement." Examples in the Evidence Rules include "unfair prejudice" and "truth of the matter asserted."

With respect to the first factor — a change of result in any circuit is substantive — the Committee agreed upon three representative examples:

Example One: Rule 404(a) provides that an accused may introduce a "pertinent" character trait. That is the only place in the Evidence Rules in which the word "pertinent" is used. One of the goals of the restyling project is to use consistent terminology throughout the Rules. Professor Kimble raised the question of whether "pertinent" could be changed to "relevant." But investigation showed that the Second Circuit reads the word "pertinent" differently from "relevant." *See United States v. Han*, 230 F.3d 560, 564 (2d Cir. 2000) ("Federal R. Evid. 404(a)(1) applies a lower threshold of relevancy to character evidence than that applicable to other evidence."). Accordingly the change from "pertinent" to "relevant" would be substantive.

Example Two: The exception for past recollection recorded allows admission of a "memorandum or record" if certain admissibility requirements have been met. One of the reasons for restyling the Evidence Rules is to modernize this type of language to accommodate the use of electronic evidence. If Rule 803(5) is amended to cover a "memorandum or record, in any form", is that a substantive change? The answer would be no, because no court has excluded a record under Rule 803(5) on the ground that it is electronic. So the change would not affect the result on admissibility in any circuit.

Example Three: Rule 1101 provides that the Evidence Rules are applicable to " . . . the United States Claims Court . . ." The name of that court has been changed to the "United States Court of Federal Claims." Implementing that name change in the rule would clearly be one of style and not substance.

New Rule for Definitions — The Committee discussed whether to add a new rule covering definitions as part of restyling. The Criminal Rules Committee added a rule on definitions, but the Civil Rules Committee did not. Committee members were skeptical about a new rule on definitions. They pointed out that some of the Evidence Rules already provide a definition for some terms — most importantly Rule 801, which defines hearsay, and Rule 1001, which defines writings and recordings, original, duplicate, etc. Adding a definition section might require transferring those definitions to that new section, and this would be unduly disruptive. Nor would it be user-friendly, which is the basic reason for restyling. Other members noted the difficulty of determining which terms must be defined, and expressed concern that an attempt to define some of the important terms used in the Evidence Rules might result in substantive changes, as courts might not be in uniform agreement about the meaning of the term. At Professor Kimble's suggestion, however, the Committee decided to leave open the question of a new rule on definitions, in order to see how the style process plays out.

Substantive Issues That Arise During Restyling — Both the Civil and Criminal Rules Committees reported that restyling often uncovered substantive problems with a rule that justified an amendment. Some of these problems were minor and uncontroversial, others were more substantial. The Evidence Rules Committee engaged in a preliminary discussion of how to proceed when such substantive issues are raised during restyling. One possibility is to follow the protocol of the Civil Rules Committee, which proposed amendments on two tracks: Track A involved pure style changes and Track B involved minor noncontroversial substantive changes. [Major substantive changes were left for a later date.] The Committee agreed to return to the question of how to treat minor substantive changes as examples arise during the process.

Timeline

The Committee agreed on the following aspirational timeline for the restyling project:

December / January 2008 – Professors Capra and Kimble draft and comment on Group A Rules; email to Committee members for quick review, and Professor Kimble's consideration of Committee suggestions.

February 2008 – Standing Style Subcommittee reviews **Group A — Rules 101-415.**

April 2008 – Advisory Committee reviews Group A at Spring Committee Meeting.

June 2008 – Standing Committee reviews Group A for publication for comment (but the package is held until the whole is completed).

June 2008 – Professor Kimble completes restyling **Group B — Rules 501-706.**

July 2008 – Professor Capra edits Group B; email to Committee members for quick review, and Professor Kimble's consideration of Committee suggestions.
August 2008 – Standing Style Subcommittee reviews Group B

October 2008 – Advisory Committee reviews Group B at its Fall meeting.

December 2008 – Professor Kimble completes editing **Group C — Rules 801-1103**

January 2009 – Standing Committee reviews Group B for publication (but the package is held until the whole is completed).

January 2009 – Professor Capra edits Group C; email to Committee members for quick review, and Professor Kimble's consideration of Committee suggestions.

February 2009 – Standing Style Subcommittee reviews Group C

April 2009 – Advisory Committee reviews Group C at its Spring meeting.

June 2009 – Standing Committee reviews Group C for publication

August 2009 – Publication of entire set of restyled rules

January 2010 – Hearings

April 2010 – Advisory Committee approves restyled rules

June 2010 – Standing Committee approves rules

September 2010 – Judicial Conference approves rules

April 2011 – Supreme Court approves rules

December 1, 2011 – Rules take effect

Consideration of Individual Rules

For the Fall meeting, Professor Kimble provided a preliminary restyling of Evidence Rules 101-302, and also Rules 404 and 612. These rules were submitted as examples of restyling for the Committee's review and information, and provided helpful perspective on what restyled Evidence Rules might look like. Before the Committee meeting, Professor Kimble's drafts were reviewed by the Reporter, who provided comments that were largely incorporated into the drafts.

The draft restyled rules were reviewed by the Committee and discussed at the meeting. Suggestions were made for changes to most of the draft rules. Some suggestions were substantive; examples included: 1) do not change the phrase "sufficient to support a finding" (in Rule 104(b)) to "enough to support a finding" as the term is a "sacred phrase" commonly used by lawyers and judges; 2) the draft to Rule 103(e), which referred to an "appellate" court recognizing plain error, effectuated a substantive change because trial courts are currently allowed to take notice of their own plain errors. Some suggestions were stylistic; examples included: 1) changing the restyled term "judicially notice" to "take judicial notice"; and 2) deleting a reference to legislative facts in any restyled version of Rule 201. Professor Kimble and the Reporter promised to take these very helpful suggestions into consideration in preparing the next draft, which will be submitted to the Style Subcommittee of the Standing Committee in February 2008.

Possible Amendment to Evidence Rule 804(b)(3)

At its last meeting the Evidence Rules Committee voted to consider the possibility of an amendment to Evidence Rule 804(b)(3), the exception to the hearsay rule for declarations against interest. In its current form Rule 804(b)(3) requires an accused to provide corroborating

circumstances clearly indicating the trustworthiness of a declaration against penal interest for the hearsay to be admissible; but by its terms the Rule imposes no similar requirement on the prosecution. The Committee expressed interest in at least considering an amendment that would extend the corroborating circumstances requirement to all proffered declarations against penal interest.

The possible need for the amendment arose after the Supreme Court's decision in *Whorton v. Bockting*, which held that the Confrontation Clause provides no protection against unreliable hearsay if that hearsay is nontestimonial. If the prosecution has to show only that a declarant made a statement that tended to disserve his interest — i.e., all that is required under the terms of the existing rule — then it might well be that unreliable hearsay could be admitted against an accused. Another possible reason for the amendment is that the courts are in dispute about whether the government must provide corroborating circumstances under the existing rule; some courts read the rule as written and do not impose such a requirement, while others impose the requirement as a necessary guarantee of reliability, even though the rule does not explicitly require it. Finally, courts that do apply the corroborating circumstances requirement to government-offered declarations against interest differ on what "corroborating circumstances" mean. Some courts allow the government to present corroborative evidence that supports the accuracy of the declarant's statement, while other courts demand that the showing must be made exclusively through the circumstances under which the declarant's statement is made.

At the meeting, Committee members expressed interest in proceeding with an amendment to Rule 804(b)(3). Members stated that the rule would provide an important guarantee of reliability in criminal prosecutions, and could rectify confusion and dispute among the courts. But the Department of Justice representative asked the Committee to wait before proposing an amendment. He argued that *Whorton v. Bockting* — the decision which may make an amendment to the rule necessary to protect against unreliable hearsay — was less than a year old. He suggested that the courts be given a chance to construe the rule in light of the new legal landscape. He stated that the Department had no interest in introducing unreliable hearsay against a criminal defendant, but that the precise contours of any amendment should be shaped at least in part by how the courts construe Rule 804(b)(3) and its corroborating circumstances language after *Whorton v. Bockting*.

The Committee agreed to wait until the next meeting to consider the amendment in detail. At that time the Committee will review any new case law to determine whether it is appropriate to proceed on the amendment. The Department of Justice representative promised to provide the Committee, before its next meeting, any relevant information that the Department can obtain about the current operation of Rule 804(b)(3) as applied to hearsay offered by the government.

Crawford v. Washington and the Hearsay Exceptions

The Reporter prepared a report for the Committee on case law developments after *Crawford v. Washington*. The Court in *Crawford* held that if hearsay is "testimonial," its admission against an accused violates the right to confrontation unless the declarant is available and subject to cross-

examination. The Court in *Crawford* declined to define the term "testimonial," but the later case of *Davis v. Washington* provides some guidance on the proper definition of that term: a hearsay statement will be testimonial only if the primary purpose for making the statement is to have it used in a criminal prosecution. Thereafter the Court in *Whorton v. Bockting* held that if hearsay is not testimonial, then its admissibility is governed solely by rules of evidence, and not by the Confrontation Clause. This Supreme Court case law has been reviewed and developed in a large body of lower court case law.

The Reporter noted that most of the case law development after *Davis* has involved one of four complex areas: 1) when is an out-of-court statement offered "not for its truth" and therefore outside the proscription of *Crawford*?; 2) when are records prepared with some anticipation of a prosecution (such as warrants of deportation, toxicology reports, and certificates authenticating business records) testimonial and thus inadmissible unless the preparer of the records is produced to testify?; 3) how should an expert's testimony be treated if the expert has relied on testimonial hearsay?; and 4) does the accused forfeit his confrontation objection if his wrongful act causes the declarant to be unavailable — even if the accused did not act with the intent to prevent the declarant from testifying?

The Reporter noted that the resolution of these questions in the federal cases did not, at this point, justify any amendment to the Evidence Rules. He explained as follows: 1. The scope of the "not-for-truth" analysis is applied under *Crawford* in the same way as it is applied to the federal hearsay rule itself; 2) courts have held that if a record is admissible under the Federal Rules of Evidence, it is by that fact non-testimonial — so under the current case law, there appears to be no risk that one of the federal hearsay exceptions governing records could be used to admit testimonial evidence in violation of *Crawford*; 3) as to expert reliance on testimonial hearsay, Rule 703 already provides that an expert cannot be used as a means to introduce inadmissible hearsay before the jury, so there appears to be no risk that testimonial hearsay can be brought before the jury under the guise of use as the basis of expert testimony; and 4) Rule 804(b)(6) — the forfeiture exception to the hearsay rule — requires the government to show that the accused intended to prevent the declarant from testifying. So whatever the uncertainty is about the elements of forfeiture of a constitutional objection, it will have no effect on federal courts as the standards of Rule 804(b)(6) will still have to be met. [While it might be argued that the forfeiture standards of Rule 804(b)(6) should be *reduced*, such a suggestion is premature, as it must first be made clear that the constitutional standard is so reduced; and there is currently disagreement in the courts about the elements required for forfeiture of a confrontation objection.]

Committee members resolved to continue to monitor case law developments after *Crawford*, and to propose amendments should they become necessary to bring the Federal Rules into compliance with the *Crawford* standards as developed in the federal case law.

Hate Crime Bill and Its Possible Effect on Evidence Rule 404(b)

The Reporter prepared a memorandum for the Committee on hate crime legislation that is pending in both Houses. The hate crime legislation in the House is H.R. 1592: The Local Law Enforcement Hate Crimes Prevention Act of 2007. The Senate bill is S.1105, and is known as the Matthew Shepard Local Law Enforcement Hate Crimes Prevention Act of 2007. Both these bills contain language that purport to regulate admission of uncharged misconduct in a way that might be difficult to square with Evidence Rule 404(b). The language is identical in both bills, and provides as follows:

> (6)(d) Rule of Evidence- In a prosecution for an offense under this section, evidence of expression or associations of the defendant may not be introduced as substantive evidence at trial, unless the evidence specifically relates to that offense. However, nothing in this section affects the rules of evidence governing impeachment of a witness.

Some possible concerns about the statutory language include its problematic distinction between substantive and impeachment evidence; the scope of the bar against substantive use of evidence of expression or association; the vagueness of the exception for evidence that "specifically relates" to the offense and the likelihood that the exception will swallow the rule of exclusion; and most importantly the general lack of connection between the statutory language and the language of Rule 404(b), which covers the same ground.

The Committee discussed whether to prepare a letter to Congress addressing the evidentiary concerns raised by the legislation. After discussion, the Committee decided that a letter was not appropriate, for the following reasons: 1) it is unclear whether the legislation is going to be enacted; 2) the legislation does not purport to amend the Federal Rules of Evidence, and therefore the Committee would not appear to have a strong justification for commenting on the legislation; and 3) the effect of the legislation is limited as it applies only in hate crime prosecutions.

The meeting was adjourned on November 16, 2007, with the time and place of the Spring 2008 meeting to be announced.

Respectfully submitted,

Daniel J. Capra
Reporter