Advisory Committee on Evidence Rules

Minutes of the Meeting of October 28, 2011

Williamsburg, Virginia

The Judicial Conference Advisory Committee on the Federal Rules of Evidence (the "Advisory Committee") met on October 28, 2011 in Williamsburg, Virginia.

The following members of the Committee were present:

Hon. Sidney A. Fitzwater, Chair
Hon. Brent R. Appel
Hon. Anita B. Brody
Hon. John A. Woodcock, Jr.
Hon. William K. Sessions III
William T. Hangley, Esq.
Marjorie A. Meyers, Esq.
Paul Shechtman, Esq.
Elizabeth J. Shapiro, Esq., Department of Justice

Also present were:

Hon. Marilyn L. Huff, Liaison from the Committee on Rules of Practice and Procedure and member of the Standing Committee's Style Subcommittee
Hon. Wallace Jefferson, member of the Standing Committee
Hon. Joan N. Ericksen., former member of the Evidence Rules Committee
Hon. Judith H. Wizmur, Liaison from the Bankruptcy Rules Committee
Hon. Andrew Hurwitz, former member of the Evidence Rules Committee
Jonathan Rose, Chief, Rules Committee Support Office
Benjamin Robinson, Esq., Rules Committee Support Office
Peter McCabe, Esq., Secretary to the Standing Committee
Professor Daniel J. Capra, Reporter to the Evidence Rules Committee
Professor Kenneth S. Broun, Consultant to the Evidence Rules Committee
Timothy Reagan, Esq., Federal Judicial Center
Professor Laird Kirkpatrick, George Washington University Law School
Professor Frederic Lederer, William and Mary Law School
Professor Roger Park, Hastings Law School
Professor Katherine Schaffzin, University of Memphis School of Law

I. Opening Business

Introductory Matters

Judge Fitzwater, the Chair of the Committee, welcomed the members, liaisons, other members of the Standing Committee, and members of the public. The minutes of the Spring 2011 Committee meeting were approved.

Judge Fitzwater noted that the Restyled Rules of Evidence will go into effect on December 1, 2011. The Restyled Rules have won two important awards for excellence in legal writing — the Burton Award and the Clearmark Award. In honor of the Restyled Rules going into effect, the Advisory Committee sponsored a Symposium on the Restyled Rules of Evidence, which took place on the morning of the Advisory Committee meeting. Judge Fitzwater stated that the Symposium was a great success. He observed that the ideas exchanged by the panel members will provide an important historical record on the meaning of the Restyled Rules, and will also assist the Advisory Committee going forward. Judge Fitzwater thanked the Reporter for putting together the Symposium; William and Mary Law School for hosting the event; Professor Frederic Lederer for all his help in hosting the Symposium; the William and Mary Law Review for publishing the proceedings; and all the panelists and moderators who made such outstanding presentations.

Judge Fitzwater then welcomed and introduced the two new members of the Advisory Committee, Judge Sessions and Judge Woodcock.

Judge Fitzwater and the Reporter then provided heartfelt thanks to two former members — Justice Hurwitz and Judge Ericksen — who both provided excellent service to the Committee. Each has been and will be sorely missed.

II. Proposed Amendment to Rule 803(10)

In *Melendez-Diaz v. Massachusetts*, the Supreme Court held that certificates reporting the results of forensic tests conducted by analysts were "testimonial" and therefore the admission of such certificates (in lieu of testimony) violated the accused's right to confrontation. The Court reasoned that the certificates were prepared exclusively for use in a criminal trial, as substitutes for trial testimony, and so were testimonial within the meaning of the Confrontation Clause as construed by *Crawford v. Washington.*

The Advisory Committee at its Spring 2011 meeting proposed an amendment to Rule 803(10), which currently allows the government to introduce a certificate to prove that a public record does not exist. A certificate of the absence of public record is ordinarily prepared for use in a criminal case, and so under *Melendez-Diaz*, such a certificate would be testimonial. The proposed amendment to Rule 803(10) adds a "notice-and-demand" procedure to the Rule: requiring production of the person who prepared the certificate only if after receiving notice from the

government of intent to introduce a certificate, the defendant makes a timely pretrial demand for production of the witness. In *Melendez-Diaz* the Court declared that the use of a notice-and-demand procedure (and the defendant's failure to demand production under that procedure) would cure an otherwise unconstitutional use of testimonial certificates. The Advisory Committee's proposed amendment was approved for release for public comment.

The Reporter reported to the Advisory Committee that no public comments had yet been received on the proposed amendment to Rule 803(10). Any comments that are received will, of course, be reviewed by the Committee at its Spring 2012 meeting.

III. Possible Amendment to Rule 801(d)(1)(B)

At the Spring 2011 meeting the Committee considered a proposal to amend Evidence Rule 801(d)(1)(B), the hearsay exemption for certain prior consistent statements. Under the proposal, Rule 801(d)(1)(B) would be amended to provide that prior consistent statements are admissible under the hearsay exemption whenever they would otherwise be admissible to rehabilitate the witness's credibility. The justification for the amendment is that there is no meaningful distinction between substantive and rehabilitative use of prior consistent statements.

Under the current rule, some prior consistent statements offered to rehabilitate a witness's credibility — specifically those that rebut a charge of recent fabrication or improper motive — are also admissible substantively under the hearsay exemption. In contrast, other rehabilitative statements — such as those which explain a prior inconsistency or rebut a charge of faulty recollection — are not admissible under the hearsay exception but only for rehabilitation. There are two basic practical problems in the distinction between substantive and credibility use as applied to prior consistent statements. First, the necessary jury instruction is almost impossible for jurors to follow. The prior consistent statement is of little or no use for credibility unless the jury believes it to be true. Second, and for similar reasons, the distinction between substantive and impeachment use of prior consistent statements has little, if any, practical effect. The proponent has already presented the witness's trial testimony, so the prior consistent statement adds no real substantive effect to the proponent's case.

At the Spring 2011 meeting the Committee unanimously agreed that the current distinction between substantive and impeachment use of prior consistent statements is impossible for jurors to follow. But some members were concerned that any expansion of the hearsay exemption to cover all prior consistent statements admissible for rehabilitation might be taken as a signal that the Rules were taking a more liberal attitude toward admitting prior consistent statements generally. Parties might seek to use the exemption as a means to bolster the credibility of their witnesses. The Committee at the Spring meeting resolved to consider the amendment further, and also to seek the input of public defenders, the Department of Justice, and state court judges on the merits of amending Rule 801(d)(1)(B). Before the Fall meeting, the Department of Justice submitted a letter in favor of the amendment and the Public Defender submitted a letter opposed to the amendment. Justice Appel contacted courts in three states and reported that there was recognition that the current

distinction between rehabilitation and substantive use was confusing and not meaningful — but that there was no sense of urgency to amend the rule in those three states.

At the Fall meeting, the Public Defender expressed concern that courts would end up admitting more prior consistent statements under the amendment, leading to impermissible bolstering of witnesses. The Reporter responded that the amendment by its terms would admit no statements that are not already admitted for rehabilitation — and any possible risk of abuse would be tempered by the court's judicious use of Rule 403, as emphasized in the proposed Advisory Committee Note. The Reporter also noted that in Minnesota, where the Rule is similar to the proposed amendment, there does not appear to be any indication in the case law that prior consistent statements had been more liberally admitted.

The Public Defender also expressed concern that if a witness had made both consistent and inconsistent statements, all of them admissible for impeachment or rehabilitation, then under the amendment all of the consistent statements would be admissible for their truth while the prior inconsistent statements — if not made under oath — would be admissible only for impeachment and not for their truth. The Public Defender argued that in this situation the judge would completely confuse the jury by giving different instructions for consistent and inconsistent statements. (But in fact the judge in such a situation would not give any instruction about the consistent statements because, under the amendment, the consistent statements would be admissible for both rehabilitation and substantive use — this means that under the amendment there will be fewer, not more, instructions).

A member of the Committee noted that the rule as it exists is logically inconsistent and intellectually dishonest; as such the Committee should approve the amendment to further its goal of providing consistent and logical rules. Another member observed that prior consistent statements often had value as corroboration. He also noted that the clearer the judge can be to the jury, the better for the system — and the instruction required as to certain prior consistent statements under current law is incomprehensible to jurors and accordingly brings disrespect to the system. The Reporter and the Chair noted that the proposed amendment had been greeted with enthusiasm by some of the district court judges on the Standing Committee when it was raised as an information item at the Spring 2011 meeting. Those judges remarked that in their experience, an instruction that a prior consistent statement was admissible for rehabilitation and not for its truth is one that jurors find impossible to follow.

One Committee member suggested that the instruction currently given for consistent statements admissible only for rehabilitation might in fact have some value for counsel in argument to the jury.

Other members of the Committee were undecided about the amendment and suggested the Committee seek more input from judges and interested groups to determine whether it would be worthwhile to proceed with an amendment.

The Committee ultimately voted to table the proposal and conduct further research so that

it could be considered on the merits at the Spring 2012 meeting. The Reporter stated that he would work with Dr. Reagan, the FJC representative, to send out a survey to district judges to seek their views on the need for and merits of the proposed amendment. The Reporter stated that he would also send the proposal to the ABA, the American College of Trial Lawyers, the NACDL, and other interested groups for their views on the proposal. The Chair also stated that he would raise the proposal as an information item at the next Standing Committee, in order to seek guidance on whether the amendment was worth pursuing.

The working language for the proposed amendment, to be considered at the next meeting, is as follows:

> **(d) Statements That Are Not Hearsay.** A statement that meets the following conditions is not hearsay:
>
> > **(1)** ***A Declarant-Witness's Prior Statement.*** The declarant testifies and is subject to cross-examination about a prior statement, and the statement:
> >
> > * * *
> >
> > **(B)** is consistent with the declarant's testimony and ~~is offered to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying~~ rehabilitates [is otherwise admissible to rehabilitate] [supports] the declarant's credibility as a witness;

IV. *Crawford* Developments

The Reporter provided the Committee with a case digest of all federal circuit cases discussing *Crawford v. Washington* and its progeny. The digest was grouped by subject matter. The goal of the digest is to allow the Committee to keep apprised of developments in the law of confrontation as they might affect the constitutionality of the Federal Rules hearsay exceptions.

The Committee reviewed the memo and the Reporter noted that — with the exception of Rule 803(10), the proposed amendment currently out for public comment — nothing in the developing case law mandated an amendment to the Evidence Rules at this time. The Reporter observed that the Supreme Court is currently considering the case of *Williams v. Illinois*, in which it will address whether an expert witness can testify to the results of a lab test where the certificate of the test is not itself admitted at trial. The Court's decision in *Williams* may have an effect on the application of Rule 703. The Committee resolved to continue monitoring developments on the relationship between the Federal Rules of Evidence and the accused's right to confrontation.

V. Privilege Project

Several years ago the Committee voted to undertake a project to publish a pamphlet that would describe the federal common law on evidentiary privileges. The Committee determined that it would not be advisable to propose an actual codification of all the evidentiary privileges to Congress, or even to opine on what model rules of privilege would look like. But it concluded that it could perform a valuable service to the bench and bar by setting forth, in text and commentary, the privileges that exist under federal common law. Professor Broun had prepared drafts of a number of privileges, but the project was put on hold given the time and resources required for Rule 502 and the restyling project.

At the Fall meeting, Professor Broun submitted materials on the attorney-client privilege and the marital privileges. Committee members stated for the record that the project was intended only as a description of the federal common law of privilege, and would result in a published product that would assist the bench and bar. Members emphasized that the Committee has no intent to propose codification of privileges or to intrude on Congress's role in enacting privilege rules.

But some members expressed concern that the project might be read as the Committee's statement about what privileges *ought* to look like or which side of a dispute about the meaning or extent of a privilege should be adopted. There was also a concern that by even stating what the law was, the Committee might put its imprimatur on bad or disputed law. Other members suggested that calling the project a "survey" or a "restatement" might be misinterpreted as the Committee's attempt to establish the law of privileges.

Professor Broun and the Reporter emphasized that the project was not intended to provide the Committee's imprimatur on any question of privilege law. Committee members suggested that the title of the project should be changed to indicate the limited intent. After discussion, the working title of the project was changed from "privilege survey" to "compendium" on the federal common law of privilege.

The Committee also determined that the ultimate work product should not be published under the name of the Committee. The Reporter noted that he had, at the Committee's direction, written two articles about the Federal Rules. Those articles were reviewed and approved by the Committee, but they were published under the Reporter's name in pamphlets published by the Federal Judicial Center. Those pamphlets thus were not sent out under the Advisory Committee's auspices, and accordingly their publication was outside the rules process. They were not sent out for a period of public comment and they were not approved by a vote of the Standing Committee. Committee members generally agreed that the same or a similar process should be employed if and when the work on privileges is ready for publication.

Judge Fitzwater stated that he would raise the privilege project at the next Standing Committee meeting and seek advice on how and whether the project should be published. Professor Broun and the Reporter stated that they would prepare a memorandum for the Committee's next

meeting on the process questions involved in preparing and publishing a work on privileges.

VI. "Continuous Study" of the Evidence Rules

The Procedures for the Standing Committee require the Evidence Rules Committee to engage in a "continuous study" of the need for any amendment to the Rules. At the Chair's request, the Reporter prepared a memorandum setting forth the history of the studies that have already been undertaken by the Advisory Committee, and providing some suggestions of possible amendments for consideration by the Committee. The grounds for a possible amendment included: 1) a split in authority about the meaning of an Evidence Rule; 2) a disparity between the text of a rule and the way that the rule is actually being applied in courts; 3) difficulties in applying a rule, as experienced by courts, practitioners, and academic commentators.

Possible amendments raised by the Reporter included: 1) amending Rule 106 to provide that statements may be used for completion even if they are hearsay; 2) clarifying that Rule 607 does not permit a party to impeach its own witness if the only reason for calling the witness is to present otherwise inadmissible evidence to the jury; 3) clarifying that Rule 803(5) can be used to admit statements made by one person and recorded by another; 4) clarifying the business duty requirement in Rule 803(6); and 5) resolving the dispute in the courts over whether prior testimony in a civil case may be admitted against one who was not a party at the time the testimony was given.

At the meeting, after a brief discussion, Judge Fitzwater noted that the Committee was just coming off a number of difficult and time-consuming projects and could use more time to consider the possible amendments set out by the Reporter. Accordingly, the Committee resolved to place the Reporter's memorandum on the Spring agenda. One member stated for the record that he was in favor of the proposal to amend Rule 607 to prevent parties from abusing the rule by calling a witness solely to introduce otherwise inadmissible evidence.

VII. Next Meeting

The Spring 2012 meeting of the Committee is scheduled for Tuesday April 3 in Dallas.

Respectfully submitted,

Daniel J. Capra
Reporter