Advisory Committee on Evidence Rules

Minutes of the Meeting of November 20, 2009

Charleston, S.C.

The Judicial Conference Advisory Committee on the Federal Rules of Evidence (the "Committee") met on November 20th in Charleston, S.C..

The following members of the Committee were present:

Hon. Robert L. Hinkle, Chair
Hon. Anita B. Brody
Hon. Joan N. Ericksen.
Hon. Andrew D. Hurwitz
Marjorie A. Meyers, Esq.,
William W. Taylor, III, Esq.
John Cruden, Esq., Department of Justice

Also present were:

Hon. Lee H. Rosenthal, Chair of the Committee on Rules of Practice and Procedure ("Standing Committee")
Hon. Marilyn L. Huff, Liaison from the Committee on Rules of Practice and Procedure and member of the Standing Committee's Style Subcommittee
Hon. Michael M. Baylson, Liaison from the Civil Rules Committee
Hon. Judith H. Wiznur, Liaison from the Bankruptcy Rules Committee
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 Standing Committee's Style Subcommittee
Professor Daniel R. Coquillette, Reporter to the Standing Committee
Elizabeth J. Shapiro, Esq., Department of Justice
Timothy Reagan, Esq., Federal Judicial Center
Jeffrey Barr, Esq., Rules Committee Support Office
Professor Stephen A. Saltzburg, Representative of the ABA Section on Criminal Justice
Landis Best, Esq., Representative of the ABA Section of Litigation

Kenneth Lazarus, Esq.

Andrea Kuperman, Law Clerk to Judge Rosenthal

Opening Business

Judge Hinkle welcomed the members of the Committee and other participants to the meeting. He welcomed John Cruden, the new representative of the Justice Department, and Landis Best, the new representative of the ABA Section of Litigation.

The Committee approved the minutes of the Spring 2009 meeting, with two minor changes suggested by Professor Kimble.

Judge Hinkle then reported on the Spring 2009 meeting of the Standing Committee. The Standing Committee unanimously approved the amendment to Evidence Rule 804(b)(3) proposed by the Advisory Committee. That amendment requires the government to provide corroborating circumstances clearly indicated the trustworthiness of a hearsay statement before it may be admitted against the accused as a declaration against penal interest. That amendment should go into effect on December 1, 2010. Judge Hinkle also noted that the Standing Committee approved all of the restyled Evidence Rules for release for public comment. The Standing Committee's vote in favor of publication was unanimous — though two members expressed some reservations about the use of certain style conventions. For example, one member of the Standing Committee objected to the use of bullet points, and another objected to the use of double dashes for any purpose other than to include a collateral point in a sentence. Judge Hinkle stated that it was important to convince these Standing Committee members that the style conventions employed in the Evidence Rules are the same as were used — very successfully — in the restylings of the Criminal, Civil and Appellate rules.

I. Restyling Project

A. Introduction

At its 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. Over the next two years, the Committee prepared restyled versions of all the Evidence Rules. As discussed above, the restyled Rules were approved for publication by the Standing Committee at its Spring 2009 meeting. The public comment period runs until February 15, 2010. Three hearings have been scheduled for comment on the restyled Rules.

The first draft of the restyled Rules was prepared by Professor Kimble. The Evidence Rules Committee has reviewed each Rule to determine whether any proposed change was one of substance rather than style — with "substance" defined as changing an evidentiary result or method of analysis, or changing language that is so heavily engrained in the practice as to constitute a "sacred

phrase." Under the protocol for the restyling project, if a significant minority of Evidence Rules Committee members agree that the proposed change is substantive, then that change should not be implemented. The Committee has also reviewed each rule to determine whether to recommend that a change, even though stylistic only, might be improved in any respect and reconsidered by the Style Subcommittee of the Standing Committee.

At the Fall 2009 meeting, the Committee considered comments that it had received on the restyled rules issued for public comment. Some comments were from members of the public — most importantly a detailed set of comments from the American College of Trial Lawyers. Other comments were submitted by Professor Kimble, the Reporter, or other Committee members after a top-to-bottom review of the restyled rules.

The Committee's review of these comments at the Fall meeting was tentative, because it anticipates receiving many more public comments. Nonetheless, the review indicated a number of rules that might be improved in some important respects.

What follows is a description of the Committee's tentative determinations, rule by rule.

Rule 101(b)(4)

Restyled Rule 101(b)(4) provides a definition of the term "record" — so that related and repetitive terms such as "memorandum," "report," etc. could be dropped from Rules such as 803(6) and 803(8). Professor Kimble was concerned that references in the Evidence Rules to rulings "on the record" might somehow raise confusion if applied to the definition of "record" under Rule 101(b)(4). So Rule 101(b0(4), as issued for public comment, provided a drafting alternative to distinguish a "record" that was evidence from a court record or a ruling on the record.

Rule 101(b)(4), as issued for public comment, reads as follows:

> **(b) Definitions.** In these rules:
>
> * * *
>
> **(4)** "record" [in Rules 803, 901, 902, and 1005] includes a memorandum, report, or data compilation;

Committee Discussion:

The Reporter suggested that the bracketed material be deleted, because there was little chance that any reader would confuse a record offered as evidence and a ruling "on the record" — the definition could not possibly apply to the reference "on the record." Professor Kimble suggested that a reader might think the Committee had made an oversight in defining "record" without treating or mentioning different uses of the term.

The Committee determined that the bracketed language should be dropped, because if the languages is added to the existing text it would read "In these rules record in Rules 803, 901," etc. The repetitive reference to rules would be awkward. The Committee approved two alternatives for Professor Kimble and the Style Subcommittee to consider for the next meeting. The first alternative is:

"a record includes a memorandum, report, or data compilation."

The Committee reasoned that adding the article "a" sufficiently distinguished a record as evidence from a ruling on the record. The use of the "a" was also useful to distinguish the noun "record" from the verb "record."

The second alternative approved by the Committee is:

"a record includes a memorandum, report, or data compilation, except in a phrase such as 'on the record.'"

The Committee will review Professor Kimble's rewrite before the next meeting.

Rule 101(b)(6)

Rule 101(b)(6) is intended to clarify that paper-based references in the Evidence Rules cover electronically stored information.

The Rule as issued for public comment provides as follows:

(b) Definitions. In these rules:

* * *

(6) a reference to any kind of written material includes electronically stored information.

Committee Discussion:

The Committee addressed a concern expressed by the Reporter to the Civil Rules Committee, that the reference to "any kind of written material" was not sufficiently comprehensive to cover all the electronically stored information that might be offered and admitted. For example, would "any kind of written material" cover a photograph offered in digital form? Another concern was that the term might not be as comprehensive as the use of the term "electronically stored information" in Civil Rule 34.

The Committee agreed that the term "any kind of written material" could be usefully expanded. But the definition could not be stated so broadly as to cover, for example, oral testimony of a witness. After discussing a number of alternatives, the Committee tentatively agreed on the following change to Rule 101(b)(6) as it was issued for public comment.

(b) Definitions. In these rules:

* * *

(6) a reference to any kind of written material or other medium includes electronically stored information.

The Committee also resolved to add a reference to Civil Rule 34 to the Committee Note to Rule 101(b)(6).

Rule 104(b)

Professor Kimble suggested an amendment to restyled Rule 104(b) — the rule governing conditional relevance. This proposal stemmed from suggestions of the American College of Trial Lawyers.

The proposal, blacklined for changes from the Rule as issued for public comment, was as follows:

Relevancy That Depends on a Fact. When the relevancy of evidence depends on ~~fulfilling a factual condition~~ whether a fact exists, the court may admit ~~it~~ the evidence on, or subject to, the introduction of evidence sufficient to support a finding that the ~~condition is fulfilled~~ fact does exist.

Committee Discussion:

The Reporter was concerned with the use of "may admit." That could be read as giving a trial court discretion to exclude evidence conditioned on the existence of a fact even when the judge determines that there is evidence sufficient to support a finding. One member responded that "may admit" could instead be read to refer to the fact that even if the standard for conditional relevance is met, the proffered evidence might nonetheless be excluded under other rules such as 403 and 801. But the Reporter responded that the Rule could accomplish both objectives — requiring the court to find the conditional relevance standard met if there is evidence sufficient to support a finding, and providing for the possibility of exclusion under other rules — by the following change:

When the relevancy of evidence depends on ~~fulfilling a factual condition~~ whether a fact

exists, the ~~court may admit it~~ proponent must provide the court with ~~on, or subject to, the introduction of~~ evidence sufficient to support a finding that the ~~condition is fulfilled~~ fact does exist.

But the problem with this alternative is that it does not treat the "sequencing" function of the Rule. Rule 104(b) has two functions: 1) establishing the evidentiary standard for questions of conditional relevance; and 2) allowing the judge to make a determination either at the time the evidence offered, or to admit the evidence subject to a showing of the conditional fact.

After discussion, the Committee suggested that Professor Kimble and the Style Subcommittee consider a revision that will more clearly set out the two functions of the Rule. One possibility might look like this:

When the relevancy of evidence depends on fulfilling a factual condition, a proponent must provide the court, at the time the evidence is offered or later in the trial, with evidence sufficient to support a finding that the fact does exist.

When the relevancy of evidence depends on ~~fulfilling a factual condition~~ whether a fact exists, the ~~court may admit it~~ proponent must provide the court with ~~on, or subject to, the introduction of~~ evidence sufficient to support a finding that the ~~condition is fulfilled~~ fact does exist.The proponent's showing may be made at the time the evidence is offered or later in the trial.

Professor Kimble will revise Rule 104(b) to cover both functions of the rule, and the Committee will consider the revisions before the next meeting.

Rule 104(c)

Professor Kimble suggested a change to the heading of Rule 104(c), as follows:

~~**Matters That the Jury Must Not Hear.**~~ **Conducting a Hearing Outside the Jury's Presence.** A hearing on a preliminary question must be conducted outside the jury's hearing if:

(1) the hearing involves the admissibility of a confession;

(2) a defendant in a criminal case is a witness and requests that the jury not be present; or

(3) justice so requires.

Committee Discussion:

Committee members noted that the word "presence" is not accurate because many preliminary determinations are made sidebar while the jury is still in the courtroom. Thus, "outside the jury's hearing" — the term used in the text, is correct.

The Committee, therefore, rejected the use of the word "presence" in the heading of the Rule, but did not disagree with Professor Kimble that the heading in the restyled rule could be improved. Members also noted that the text of the Rule was somewhat awkward because there are two different uses of the word "hearing" — the hearing conducted by the court and the protection against the jury hearing the evidence.

Professor Kimble will try to revise the Rule to sharpen the heading and to avoid the multiple references to "hearing." The Committee will review that proposal before the next meeting.

Rule 104(d)

Professor Kimble, and the Style Subcommittee, suggested a change to the heading of the Rule as it was issued for public comment:

> ~~**Testimony by**~~ **Limited Cross-Examination of a Defendant in a Criminal Case**. By testifying on a preliminary question, a defendant in a criminal case does not become subject to cross-examination on other issues in the case.

Professor Kimble argued that the current heading is incomplete because the rule is not about a defendant's testimony, but rather about limiting cross-examination of a criminal defendant who testifies on a preliminary question.

Committee Discussion:

Committee members were concerned that the heading was misleading — it seems to imply that cross-examination of a criminal defendant is limited in all cases. Nothing in the heading refers to the context of the rule — preliminary questions. Professor Kimble responded that all of Rule 104 is about preliminary questions — the Rule is titled "Preliminary Questions" — so there is no need to refer to preliminary questions in the heading of a subdivision. But Committee members remained concern that the broad reference to "a defendant in a criminal case" — made necessary by the fact that all references to an accused have been changed to "defendant in a criminal case" — would be misleading.

After discussion, the Committee and Professor Kimble agreed that the word "limited" should be taken out of the heading. So there was tentative agreement on the following heading

"Cross-Examining a Defendant in a Criminal Case"

Rule 201(d)

The American College of Trial Lawyers suggested a slight change to Rule 201(d), and Professor Kimble implemented that suggestion. The proposed change to the Rule, blacklined from the Rule as issued for public comment, is as follows:

> **Opportunity to Be Heard.** On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the ~~noticed~~ fact to be noticed. If the court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard.

Committee Discussion:

The Reporter noted that the reason for possible change is that a reference to "the noticed fact" is not completely accurate — because, at the time of the hearing, the fact has not yet been noticed.

The Committee unanimously approved the change to Rule 201(d).

Rule 301

The restyled Rule 301, as issued for public comment, reads as follows:

> In a civil case, unless a federal statute or these rules provide otherwise, the party against whom a presumption is directed has the burden of going forward with evidence to rebut the presumption. But this rule does not shift the burden of proof in the sense of the risk of nonpersuasion; the burden of proof remains on the party who had it originally.

The American College of Trial Lawyers suggested that the phrase "in the sense of the risk of nonpersuasion" was awkward and that the Rule could be sharpened. The suggestion led to a broad discussion of the Rule at the Committee meeting.

Committee Discussion:

Committee members noted that the two sentences in the restyled Rule address different questions. The first allocates a burden of *production* while the second allocates a burden of *persuasion.* The current restyled Rule uses the term "burden of going forward" for the former concept and "burden of proof in the sense of the risk of the burden of nonpersuasion" for the latter. While these terms are taken from the original Rule 301, the Committee discussed how the terminology might be improved to make the rule more easily understood. After significant discussion, the Committee unanimously approved tentative changes to the restyled Rule 301. Those changes provide as follows:

> In a civil case, unless a federal statute or these rules provide otherwise, the party against whom a presumption is directed has the burden of ~~going forward with~~ producing evidence to rebut the presumption. But this rule does not shift the burden of ~~proof in the sense of the risk of nonpersuasion; the burden of proof~~ persuasion, which remains on the party who had it originally.

Rule 401

Restyled Rule 401 provides as follows:

> Evidence is relevant if it has any tendency to make more or less probable the existence of a fact that is of consequence in determining the action.

The Committee considered suggestions raised by a law professor on a listserve that the term "more or less" might somehow make a substantive change in the standard for relevance. The Committee also addressed a concern that the term "more or less" might be taken for the colloquialism for a rough approximation. The Style Subcommittee had reviewed these concerns and voted to retain Rule 401 as it was released for public comment. After discussion, the Evidence Rules Committee agreed that no change to the published rule was needed.

Rule 404a

Professor Kimble proposed some minor changes to Rule 404(a): an addition to the heading of Rule 404(a)(2), and deletion of the word "crime" before "victim" in Rule 404(a)(2) (B). The

restyled Rule, blacklined to indicate the proposed changes, is as follows:

(a) Character Evidence.

(1) ***Prohibited Uses.*** Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.

(2) ***Exceptions <u>for a Defendant or a Victim</u> in a Criminal Case***. The following exceptions apply in a criminal case:

(A) a defendant may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it;

(B) subject to the limitations in Rule 412, a defendant may offer evidence of an alleged ~~crime~~ victim's pertinent trait, and if the evidence is admitted, the prosecutor may:

(i) offer evidence to rebut it; and
(ii) offer evidence of the defendant's same trait; and

(C) in a homicide case, the prosecutor may offer evidence of the alleged victim's trait of peacefulness to rebut evidence that the victim was the first aggressor.

(3) Exceptions for a Witness. Evidence of a witness's character may be admitted under Rules 607, 608, and 609.

Committee Discussion:

The Committee agreed that the deletion of the word "crime" was appropriate because that word is superfluous. Rule 404(a)(2) operates only in the context of a criminal case, and the reference to a victim can only be to a victim of crime.

A member questioned whether the proposed change to the heading was accurate. The use of the word "for" might make it seem like the defendant or victim were obtaining a benefit, when in fact the rule contemplates that evidence attacking their character may be admitted. But the Committee determined that in context, the heading must be read to mean that it is providing an exception for *character evidence* of a defendant or a victim — the rule is designated "character evidence" and under the restyling protocol, subheadings are assumed to incorporate the title of the rule.

The Committee therefore tentatively approved the suggested changes to Rule 404(a).

Rule 404(b)(2)

Professor Kimble suggested a minor clarification of the heading to Rule 404(b)(2), as follows:

(2) ***Permitted Uses; Notice in a Criminal Case.***

Committee Discussion

The Committee determined that the change was helpful in sharpening the heading and more accurately describing the text. The Committee unanimously approved the change.

Rule 405(a)

Professor Kimble proposed a change to Rule 405(a), the rule governing the means of proving character. The suggested change to the rule as published was as follows:

Methods of Proving Character.

(a) By Reputation or Opinion. When evidence of a person's character or character trait is admissible, it may be proved by testimony about the person's reputation or by testimony in the form of an opinion. On cross-examination of the witness, the court may allow an inquiry into relevant specific instances of the person's conduct.

Committee Discussion:

Professor Kimble suggested this change out of concern that the restyled version did not make it exactly clear that the witness being cross-examined would ordinarily be different from the person whose character is being proved. An evidence professor made a similar suggestion on the Evidence ListServ.

The Committee found that the clarification was useful. The Reporter noted that any problem

of ambiguity could be made even more clear by referencing the witness as a *character witness*. The Committee agreed and tentatively approved the following change to the rule as issued for public comment:

> **(a) By Reputation or Opinion.** When evidence of a person's character or character trait is admissible, it may be proved by testimony about the person's reputation or by testimony in the form of an opinion. On cross-examination of the character witness, the court may allow an inquiry into relevant specific instances of the person's conduct.

Rule 406

Restyled Rule 406, as released for public comment, provides as follows:

Habit; Routine Practice

> Evidence of a person's habit or an organization's routine practice may be admitted to prove that on a particular occasion the person or organization acted in accordance with the habit or routine practice. The court may admit this evidence regardless of whether it is corroborated or whether there was an eyewitness.

The American College of Trial Lawyers suggested that the second sentence of the Rule should be deleted as unnecessary, because it simply emphasized the apparent point that relevant evidence is admissible.

Committee Discussion:

Members were opposed to deleting the second sentence of Rule 406, because that sentence was necessary to explain the historical background of the Rule. Pre-Rules common law barred habit evidence 1) where there was no corroboration, or 2) if there was an eyewitness to the event. The original Advisory Committee determined that the second sentence of Rule 406 was necessary to emphasize that these prior limitations on habit evidence were abrogated. Indeed, the second sentence was the *major reason* for Rule 406, because the first sentence simply provides that a certain type of relevant evidence is admissible. The Committee reasoned that in light of the history, deleting the second sentence would raise an argument that the rule on habit evidence had restored the common-law limitations.

The Committee therefore unanimously rejected the suggested modification of Rule 406, as it called for a substantive change.

Rule 410

The American College of Trial Lawyers suggested a set of substantial revisions of restyled Rule 410, in order to clarify two asserted ambiguities in the existing Rule 410: 1) What is a "guilty plea" as defined in Rule 410?; and 2) When is a guilty plea considered "withdrawn" under Rule 410?

The American College noted that its proposals appeared to call for substantive changes and so were outside the scope of the restyling project. For example, the proposal provided for protection of statements regarding pleas when made in *any* proceeding, whereas courts have held that under the terms of the existing Rule 410 there is no protection for plea statements made in foreign proceedings. And generally speaking, the College called for somewhat broader protection for statements made during the guilty plea process than is currently provided by Rule 410.

Before the meeting, the Reporter referred the proposal to the DOJ for its opinion on whether the substantive changes proposed would be useful or necessary. The DOJ representative reported back that the line prosecutors interviewed had generally concluded that the Rule was clear and had not raised any serious problems of application.

When the restyling is completed, the Reporter will review the College's substantive proposals and report to the Committee.

While the College's substantive proposals were deferred, both the College and the DOJ noted a possible substantive change made in restyling the provisions describing the information protected by the Rule.

Specifically, the current Rule 410 in pertinent part protects the following statements:

> "(1) a plea of guilty which was later withdrawn;
>
> (2) a plea of nolo contendere;
>
> (3) any statement made in the course of any proceedings under Rule 11 of the Federal Rules of Criminal procedure or comparable state procedure *regarding either of the foregoing pleas;* * * *"

The restyled version of Rule 410 in pertinent part protects the following statements:

> "(1) a guilty plea that was later withdrawn;
>
> (2) a nolo contendere plea;
>
> (3) a statement *about either of those pleas* made during a proceeding under Federal Rule of Criminal Procedure 11 or a comparable state procedure; * * *"

The Department of Justice representative explained how the restyled language in subdivision (3) creates a substantive change: the restyling unintentionally narrows the class of statements that are inadmissible to those only "about the pleas." It appears that the restyling assumed that the phrase "regarding either of the foregoing pleas" modified the word "statement." Thus, the restyled rule limits the non-admissibility to only statements "about the pleas" as opposed to any statements made during the defined proceedings. But the currently understood meaning among practitioners is that the phrase "regarding either of the foregoing pleas" modifies the *comparable state procedure*, not the statement. Thus, under the current rule, a broader range of statements -- those made "in the course of any proceedings" would be excluded.

The Committee agreed with the Department's position that the restyled version of Rule 410 needed to be revised in order to avoid a substantive change by narrowing the class of statements subject to Rule 410 protection. Professor Kimble and the Reporter promised to come up with a rewrite for the Committee's consideration before the next meeting.

Rule 411

The restyled Rule 411 provides as follows:

Liability Insurance

Evidence that a person did or did not have liability insurance is not admissible to prove that the person acted negligently or otherwise wrongfully. But the court may admit this evidence for another purpose, such as proving a witness's bias or prejudice or — if disputed — proving agency, ownership, or control.

An Evidence professor on a listserve contended that the restyling made a substantive change because the current rule states that evidence of insurance is not admissible "upon the issue whether the person acted negligently or otherwise wrongfully." The academic contended that under the existing rule, a *plaintiff* is prohibited from proving that he is *not* insured, when the evidence is offered to prove that the plaintiff therefore had an incentive to be careful. But under the restyled rule, plaintiff's evidence of his own lack of insurance would be admissible because it would not be offered to prove that he acted negligently.

Committee Discussion:

The Committee concluded that the scenario posited by the academic — a plaintiff proving his own lack of insurance — was a farfetched hypothetical. Nonetheless, to avoid any contention that a substantive change has been made, the Committee adopted Professor Kimble's suggestion for a slight change to the restyled Rule 411.

The Committee tentatively approved the following change to the restyled Rule 411:

Evidence that a person did or did not have liability insurance is not admissible to prove ~~that~~ whether the person acted negligently or otherwise wrongfully. But the court may admit this evidence for another purpose, such as proving a witness's bias or prejudice or — if disputed — proving agency, ownership, or control.

Rule 412(b)(2)

The restyled Rule 412(b)(2) provides that in a civil case involving sexual misconduct, "the court may admit evidence offered to prove a victim's sexual behavior or sexual predisposition if its probative value substantially outweighs the danger of harm to *any victim* and of unfair prejudice to any party." (Emphasis added.)

The American College of Trial Lawyers recommended changing "any victim" to "a victim" on the ground that even in a multi-victim case, "only harm to the impeached victim" is to be considered.

Committee Discussion:

The Committee noted that Rule 412(b)(2) is primarily about admitting substantive evidence, not impeachment. The rule was designed to protect *all* victims against harm in a multi-victim case. Thus, the Committee determined that the American College's suggestion would result in a substantive change in the rule — it would change the application of the balancing test in a multi-victim case.

Rule 412(c)(2)

The restyled Rule provides that the court must conduct an "in-camera hearing." Professor Kimble suggested deleting the hyphen. The Committee approved the change.

Rule 413(a) and Rule 414(a)

The American College of Trial Lawyers suggested the following change to restyled Rule 413(a) — and an identical change to the identical words in Rule 414(a):

> **Rule 413. Similar Crimes in Sexual Assault Cases**
>
> **Permitted Uses.** In a criminal case in which a defendant is accused of a sexual assault, the court may admit evidence that the defendant committed any other sexual assault. The evidence may be considered ~~on any matter to which it is relevant~~ to prove predilection/predisposition.

Committee Discussion:

The American College suggested that the rule would be improved by clarifying the purpose for which evidence of sexual assault would be relevant. But the Committee noted that the description in the existing rule is accurate — the evidence is admissible for any matter to which it is relevant. Admissibility is *not* limited to proving the defendant's propensity. For example, in appropriate cases the evidence could also be admitted for a non-character purpose such as to prove intent, motive, identity, etc. So limiting admissibility to predisposition is unquestionably a substantive change, as it limits the breadth of the existing rule. The Committee voted unanimously to reject the suggested change as beyond the scope of restyling.

Rule 413(b) and Rule 414(b)

The Committee agreed with Professor Kimble's suggestion that the heading of these subdivisions governing notice should be changed from "Disclosure" to "Disclosure to the Defendant." The change makes the heading more descriptive and useful to the reader.

Rule 413(d) and 414(d)

The American College of Trial Lawyers notes that the definition of "sexual assault" in Rule 413(d) (and the definition of "child molestation" under Rule 414(d)) is tied to "any conduct prohibited by 18 U.S.C. chapter 109A." The American College states that the conduct covered by chapter 109A requires crossing a state line and states that "if the drafters intend to include state law violations * * * they might consider reviewing the language accordingly."

Committee Discussion:

The Committee was unanimously opposed to expanding the number of crimes covered by the Rules, as that would be a substantive change — the rule would be admitting more evidence than previously.

Members noted that the description of covered crimes in the existing Rule is not limited to conduct prohibited by chapter 109(a). The coverage is quite comprehensive. So a reference to state law violations either be unnecessary because such crimes are already covered, or it would add more crimes to the list, in which case it would be substantive. Accordingly, the Committee unanimously rejected the suggestion for change.

Rule 606(a)

Restyled Rule 606(a) provides as follows:

Rule 606. Juror's Competency as a Witness

(a) At the Trial. A juror may not testify as a witness before the other jurors at the trial. If a juror is called to testify, the court must give an adverse party an opportunity to object outside the jury's presence.

Professor Kimble suggested that the words "as a witness" were superfluous because the only way a person could testify under the terms of the rule would be as a witness. The Committee agreed that the words "as a witness" should be deleted.

Rule 608(a)

The American College suggested the following changes to the restyled Rule 608(a):

Rule 608. A Witness's Character for Truthfulness or Untruthfulness

(a) Reputation or Opinion Evidence. A witness's credibility may be attacked or supported by ~~testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by~~ testimony in the form of an opinion about — or a reputation for — truthfulness or untruthfulness ~~that character~~. But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked.

The American College thought the phrase "having a character for truthfulness" was awkward.

Committee Discussion:

The sense of the Committee was that the restyled version issued for public comment was precise and accurate. The Committee saw no need for change, and noted that the College's proposal tended to mute the purpose of the Rule — it made it less clear that the only attack permitted by the Rule is an attack on the witness's character for truthfulness.

Rule 608(c)

Restyled Rule 608(c) is a new subdivision, breaking out what is a hanging paragraph in the current Rule 608(b).

The restyled Rule 608(c) provides as follows:

> **(c) Privilege Against Self-Incrimination.** A witness does not waive the privilege against self-incrimination by testifying about a matter that relates only to a character for truthfulness.

The language in current Rule 608(b), from which restyled Rule 608(c) is taken, provides as follows:

> The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness' privilege against self-incrimination when examined with respect to matters that relate only to character for truthfulness.

Committee Discussion:

Professor Kimble suggested a change at the end of restyled Rule 608(c) to clarify that the "matter" relates to *the witness's* character for truthfulness. As this change was being discussed, Professor Saltzburg raised the argument that the restyled provision makes a substantive change by providing that there is no waiver "by testifying about a matter that relates only to a character for truthfulness." He noted that the original rule states that there is no waiver when the witness is "examined" on matters related only to truthfulness.

There is a difference between "testifying" about matters relating to character for truthfulness and being examined with respect to them. The provision is intended to allow a witness to refuse to answer questions about his past when they are offered solely to attack his character. For example,

if a witness testifies as a bystander to a crime, Rule 608 might allow the cross-examiner to ask the witness about a prior fraud that he committed, unrelated to the instant case. The provision would allow the witness to refuse to answer if the answer would tend to incriminate him — and the cross-examiner could not argue that the witness waived the privilege by testifying, because the prior fraud is being offered only to attack the witness's character for truthfulness.

The rule as restyled could be read to allow a witness to refuse to answer a question about his past whenever his *direct testimony* related only to a character for truthfulness. Thus, a witness who testified solely as a character witness might be able, under the terms of the restyling, to refuse to answer questions about criminal activity that might bear on his qualifications as a character witness. The focus of the restyled rule thus shifts from the adversary's attack (whether the bad act is offered solely to attack character for truthfulness) to the witness's direct testimony.

The Committee recognized that the restyled Rule 608(c) might be interpreted to make a substantive change. Professor Kimble and the Reporter resolved to work on a revision for the Committee's review before the next meeting. One possibility is to use the words of the existing rule — that there is no waiver when the witness is "examined about" matters relating only to the witness's character for truthfulness. Another possibility is to retain the emphatic reference to criminal defendants in the existing rule.

Rule 609(b)

Professor Kimble suggested the following change to restyled Rule 609(b)— the rule governing impeachment with prior convictions — as it was released for public comment:

> **Limit on Using the Evidence After 10 Years.** This subdivision (b) applies if more than 10 years have passed since the witness's conviction or release from confinement for ~~the conviction~~ it, whichever is later. Evidence of the conviction is admissible only if: * * *

The Committee approved the change.

Rule 609(d)(3)

The Committee approved a slight stylistic change: from "a conviction of an adult" to "an adult's conviction."

Rule 612

Restyled Rule 612 provides as follows:

Rule 612. Writing Used to Refresh a Witness's Memory

(a) Scope. This rule gives an adverse party certain options when a witness uses a writing to refresh memory:

(1) while testifying; or

(2) before testifying, if the court decides that justice requires a party to have those options.

(b) Adverse Party's Options; Deleting Unrelated Matter. Unless 18 U.S.C. § 3500 provides otherwise in a criminal case, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness about it, and to introduce in evidence any portion that relates to the witness's testimony. If the producing party claims that the writing includes unrelated matter, the court must examine the writing in camera, delete any unrelated portion, and order that the rest be delivered to the adverse party. Any portion deleted over objection must be preserved for the record.

(c) Failure to Produce or Deliver. If a writing is not produced or is not delivered as ordered, the court may issue any appropriate order. But if the prosecution does not comply in a criminal case, the court must strike the witness's testimony or - if justice so requires - declare a mistrial.

The Committee considered three suggestions for change:

1. The American College suggested that the reference to the Jencks Act, 18 U.S.C. § 3500, should be moved to the beginning of the rule, as it is in the current rule.

2. Professor Kimble suggested putting "adverse" before "party" in (a)(2).

3. Professor Kimble suggested changing the heading of subdivision (c) to "Failure to Produce or Deliver the Writing."

Committee Discussion:

1. The Committee saw no reason to move the reference to the Jencks Act. Professor Kimble noted that the location in the restyled rule made the rule flow more smoothly. And Committee members noted that there was no substantive reason to put the reference in subdivision (a), as that subdivision is descriptive only.

2. The Committee saw no reason to add "adverse" in (a)(2) as the rule is clear, and the term "adverse" is used throughout the rule and would essentially be repetitive here.

3. The Committee approved the suggestion to change the heading of subdivision (c) as it made the heading more descriptive and user-friendly.

Rule 613

Restyled Rule 613 provides as follows:

Rule 613. Witness's Prior Statement

(a) Showing or Disclosing the Statement During Questioning. When questioning a witness about the witness's prior statement, the party need not show it or disclose its contents to the witness. But the party must, on request, show it or disclose its contents to an adverse party's attorney.

(b) Extrinsic Evidence of a Prior Inconsistent Statement. Extrinsic evidence of a witness's prior inconsistent statement is admissible only if the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to question the witness about it, or if justice so requires. This subdivision (b) does not apply to an opposing party's statement under Rule 801(d)(2).

Professor Kimble suggested a minor change to subdivision (a): "a ~~the~~ party need not show it or disclose its content to the witness." This change was approved.

Professor Kimble also noted that the use of "adverse" and "opposing" should be made consistent in this rule, and indeed throughout the rules.

The Reporter noted that the use of "opposing" in the last sentence of subdivision (b) was necessary to tie in with the hearsay exception for statements of a party-*opponent* in Rule 801(d)(2). As to uniformity in the use of "adverse" and "opposing" the Reporter noted that some courts had construed "opponent" in Rule 801(d)(2) to mean that the parties had to be on opposite sides of the "v" — thus, some courts have held that co-defendants are not "opponents" for purposes of Rule 801(d)(2) even though they may be taking adversarial positions in a litigation. Under this view,

"adverse" and "opposing" are not the same — at least under Rule 801(d)(2) — and so it might create a substantive change to use one term rather than the other throughout the rules. The Reporter agreed to check every use of "adverse" and "opposing" in the restyled rules to ensure that no substantive change has been made.

Rule 614(a)

The restyled Rule 614(a) reads as follows:

Rule 614. Court's Calling or Questioning a Witness

(a) Calling. The court may call a witness on its own or at a party's suggestion. Each party is entitled to cross-examine the witness.

Professor Kimble suggested that the word "suggestion" — which comes from the original — should be replaced with "request." The Committee agreed, noting that the word "request" was more consistent with terminology used throughout the Evidence Rules.

Rule 706(d)

Professor Kimble suggested that the heading, "Disclosing the Appointment" should be changed to "Disclosing the Appointment to the Jury." The Committee approved the change, as it made the heading more specific and would aid users in applying the rules.

Rule 801(a)

The current Rule 801 defines hearsay as a "statement * * * offered in evidence to prove the truth of the matter asserted." Thus evidence must be a "statement" to be excluded as hearsay. Current Rule 801(a) defines a "statement" as follows:

> (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

The existing rule is vague on whether an oral written assertion can be hearsay if it is not intended to be so. The rule requires a showing of intent to assert for nonverbal conduct. But the placement

of the word “it” could be read to refer either to nonverbal conduct only, or to both verbal and nonverbal conduct.

This vagueness in drafting is clarified by the restyled version of Rule 801(a), which defines “statement” as follows:

> **(a) Statement.** "Statement" means:
>
> **(1)** a person's oral or written assertion; or
>
> **(2)** a person's nonverbal conduct, if the person intended it as an assertion.

The restyled version is structured to make it clear that an oral assertion is a statement even if it is not intended as such. But the problem with the restructuring is that many courts—in part perhaps because of the vagueness of the current rule — have held that an oral or written assertion cannot be hearsay unless the speaker intends to make the assertion that the proponent is offering into evidence.

The Committee therefore considered whether the restyled Rule 801(a) would make a substantive change in the hearsay rule. One member argued that the restructuring would not change any result in the cases because the intent requirement can be found in Rule 801(c), which defines hearsay as statements offered for the truth of the “matter asserted.” Under this argument, “asserted” must mean intentionally asserted. But some of the literature and case law puts the intent requirement in the definition of “statement” under Rule 801(a).

Some Committee members suggested that the best way to avoid any substantive change in this difficult area is to return, as closely as possible, to the original rule. That would mean that the rule would remain vague, but it would keep the existing case law intact. The Reporter noted that a “restyled” version that hews closest to the original would provide as follows:

> “Statement” means an oral or written assertion or nonverbal conduct of a person if it is intended by the person as an assertion.

Professor Kimble and the Reporter agreed to work on a possible change to the restyled version of Rule 801(a)**,** for the Committee to consider before the next meeting.

Rule 801(d)(2)(B)

The hearsay exemption for adoptive admissions currently covers “a statement of which the party has manifested an adoption or belief in its truth.”

The restyled version released for public comment covers a statement "that the party appeared to adopt or accept as true."

The Committee discussed whether the change from "manifested an adoption or belief" to "appeared to adopt or accept" was a substantive change. On its face the restyled language would appear to allow courts to find an adoptive admission more easily. The language "appeared to adopt" seems more diffident or passive than "manifested an adoption." Members noted, however, that the case law under the existing Rule does *not* require active conduct for an adoption — cases abound where parties are found to adopt by silence.

The restyled language seems less active and therefore more in accord with existing case law. But there is a legitimate concern that the less aggressive language may be interpreted as a signal for a substantive change that would liberalize *even further* the already minimal showing necessary for adoption.

Committee members determined that, in light of the problematic interface of rule language and case law, the restyled version should hew as closely to the existing rule as possible. Some members contended that under the circumstances, "manifested" was a sacred word that could not be restyled. The Committee voted to return to the word "manifested" in Rule 801(d)(2)(B) — subject of course, to receiving public comment on the question. (Comment on Rule 801(d)(2)(B) was specifically invited in the cover letter to the public). Professor Kimble agreed to revise the restyled version to include the word "manifested" and to submit it for the Committee's review before the next meeting.

Rule 801(d)(2)(E)

The existing rule on coconspirator hearsay provides an exemption for:

(E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

The restyled version of the rule provides the exemption in the following language:

(2) An Opposing Party's Statement. The statement is offered against an opposing party and:

* * *

(E) was made by the party's co-conspirator during and in furtherance of the conspiracy.

Professor James Duane argues that the restyled version makes a substantive change because the existing rule's reference to "a coconspirator of *a* party" allowed the government to admit a statement against *any* defendant so long as the government could prove that the declarant conspired with any one defendant in the case. As he puts it: "taken literally and at face value, [the existing language] has always meant that a statement is technically admissible against all of the defendants in a criminal case, as long as it was made in furtherance of a conspiracy that included any one of the defendants as a member." Professor Duane notes that this possibility is precluded in the restyled version, as the statement must be made by a coconspirator of the party against whom it is offered.

The Committee considered whether Professor Duane's contention had merit. Members noted that the existing rule has *never* been construed to allow the admission of coconspirator hearsay against a party who has not conspired with the declarant. There is no rationale in the coconspirator exception that would allow a court to pin admissibility on the fact that the defendant happened to be unluckily joined in a case with a party who did conspire with the declarant. The notion that a coconspirator statement can be admitted against one who is not a coconspirator is made extremely doubtful by other language in the existing rule. The final sentence of current Rule 801(d)(2) provides as follows:

> The contents of the statement shall be considered but are not alone sufficient to establish * * * the existence of the conspiracy and the participation therein *of the declarant and the party against whom the statement is offered* under subdivision (E).

That language indicates that admissibility is predicated on a conspiracy between the declarant and the party against whom the statement is offered — not on the declarant's relationship to any other party in the case.

Members noted that there does not appear to be a single case in which coconspirator hearsay was admitted in the absence of a finding of a conspiracy between the declarant and the defendant against whom the statement is offered. To the contrary, *all* the reported case law on the subject requires a showing of conspiracy between the declarant and the party against whom the statement is offered. See, e.g., *United States v. Bulman,* 667 F.2d 1134 (11th Cir. 1982) (coconspirator's statement properly excluded as to one defendant, while admitted against others, where government failed to establish a connection between the defendant and the declarant).

Under the restyling protocol, the definition of a substantive change is one that changes an admissibility determination under existing law. As applied to the restyling of the coconspirator exception, there is no substantive change because the law is as before — admissibility is dependent on a conspiratorial connection between the declarant and the party against whom the evidence is offered. The restyled version *clarifies* the existing rule, but it does not change any evidentiary result. The Committee therefore unanimously agreed to retain the restyled Rule 801(d)(2)(E).

Rule 803(2)

The existing Rule 803(2) provides a hearsay exception for statements relating to a startling event "made while the declarant was under the *stress of excitement*" caused by the event.

The restyled version of Rule 803(2) covers statements made while the declarant was under the "stress *or* excitement" caused by the event.

The change was made because "stress or excitement" was a more common usage than "stress of excitement." But research by Professor Broun indicated that the term "stress of excitement" was carefully chosen by the original Advisory Committee. The Advisory Committee specifically relied on pre-Rules case law that used the term "stress of excitement." In light of this history, the Committee determined, unanimously, that there was not a sufficient justification for the change to "stress or excitement." The Committee therefore voted to retain the original language.

Rule 803(6), (7) and (8)

The exceptions for business records, absence of business records, and public records each contain a clause providing that the court may exclude a proffered record if the source of information or the method or circumstances of preparation indicate lack of trustworthiness. Under the restyled versions issued for public comment, each of those Rules located the trustworthiness clause in a hanging paragraph at the end of each Rule. For example, restyled Rule 803(6) provides as follows:

> **(6) Records of a Regularly Conducted Activity.** A record of an act, event, condition, opinion, or diagnosis if:
>
> **(A)** the record was made at or near the time by - or from information transmitted by - someone with knowledge;
>
> **(B)** the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;
>
> **(C)** making the record was a regular practice of that activity; and
>
> **(D)** all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(b)(11) or (12) or with a statute permitting certification.
>
> But this exception does not apply if the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

Restylists try to avoid hanging paragraphs.

Professor Saltzburg proposed that the hanging paragraph be reconfigured as a new subdivision (E), which would provide as follows:

> ***(E) neither the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness.***

Professor Kimble agreed with this suggestion, and it was approved by the Style Subcommittee. At the meeting, the Committee voted unanimously in favor of the new subdivision (E).

Discussion then turned to whether the same solution could be employed in Rule 803(7) and (8). The Committee determined that the subdivision would work in subdivision (7) because the introductory clause of that Rule was the same as that of Rule 803(6).

The fix would *not* work for revised Rule 803(8) as currently conceived, however, because the introductory language to that Rule does not introduce admissibility requirements. Rather, it simply describes the records that are admissible under the Rule. Thus, starting the trustworthiness clause with a "neither" would make no sense.

Professor Kimble agreed to work on a solution by which the hanging paragraph in Rule 803(8) could be recast as a new subdivision. It that could not work, the hanging paragraph would be retained. The Committee resolved to review the matter at the next meeting.

Rule 1001

The Committee reviewed, and approved, Professor Kimble's suggested technical changes to the definitions section for the Best Evidence Rule — Rule 1001. The change are shown below in blacklined form:

In this article~~, the following definitions apply~~:

(a) ~~Writing.~~ A "writing" consists of letters, words, numbers, or their equivalent set down in any form.

(b) ~~Recording.~~ A "recording" consists of letters, words, numbers, or their equivalent recorded in any manner.

(c) ~~Photograph.~~ "Photograph" means a photographic image or its equivalent stored in any form.

(d) ~~Original.~~ An "original" of a writing or recording means the writing or recording itself

or any counterpart intended to have the same effect by the person who executed or issued it. For electronically stored information, "original" means any printout — or other output readable by sight — if it accurately reflects the information. An "original" of a photograph includes the negative or a print from it.

(e) ~~Duplicate.~~ "Duplicate" means a counterpart produced by a mechanical, photographic, chemical, electronic, or other equivalent process or technique that accurately reproduces the original.

Rule 1101

Rule 1101 describes the cases and proceedings to which the Evidence Rules are applicable. Bankruptcy Judge Isgur provided a comment to the Committee in which he suggested that restyled Rule 1101 might make an inadvertent substantive change with respect to the applicability of the Evidence Rules in Bankruptcy Courts. He noted that the restyled Rule 1101 provides that the Evidence Rules are applicable to "cases and proceedings under 11 U.S.C." — but that not all proceedings before Bankruptcy Judges are brought under that Chapter.

Committee Discussion:

Judge Wiznur, the liaison from the Bankruptcy Rules Committee, helpfully assisted the Committee in determining whether the restyled Rule 1101 changed the applicability of the Evidence Rules in any bankruptcy proceeding. She noted that the restyled language ("cases and proceedings under 11 U.S.C.") was not substantively different from the reference to Title 11 in the existing Rule. She recommended, however, that any question of coverage could be answered by simply adding "bankruptcy" to the civil cases and proceedings explicitly covered by the Rule. Thus, the first bullet point in Rule 1101(b) could provide as follows:

These rules apply in:

• civil cases and proceedings, including <u>bankruptcy,</u> admiralty and maritime cases;

When coupled with the later reference to "cases and proceedings under 11 U.S.C.," there should be no question about the Evidence Rules' applicability to all bankruptcy proceedings.

The Committee unanimously agreed that the reference to bankruptcy should be added in the first bullet point. It also voted unanimously to change the heading of subdivision (b) from "Proceedings" to "Cases and Proceedings" — because the term "cases and proceedings" is used throughout the text of the Rule.

Final Point

The Committee thanked and commended Professor Kimble for his outstanding efforts in restyling the Evidence Rules. Professor Kimble's dedication and professionalism were critical to the success of the project.

II. Proposals by a Physician Interest Group

A physician interest group suggested a number of changes to the Evidence Rules. The Committee reviewed the suggestions at the meeting.

1. The physician group suggested that the Committee draft and propose a doctor-patient privilege. After discussion, the Committee rejected the suggestion. Committee members, fresh from the experience of working for the enactment of Rule 502, found it unlikely that any proposal for a doctor-patient privilege would be enacted by Congress. Moreover, any physician-patient privilege would raise a number of difficult drafting questions and policy objections — for example, the Department of Justice would be concerned about application of the privilege to cases involving Medicaid fraud. The privilege is not uniform in the states and so a number of difficult policy questions would have to be resolved. The Committee determined that any effort to codify a new privilege should begin in Congress (as was the case with Rule 502). If Congress then wanted the assistance of the Committee in helping to draft the privilege, the Committee might at that point be of assistance.

2. For similar reasons, the Committee rejected the physician group's suggestion that it draft and propose a privilege protecting peer review. In addition, the Committee noted that the Supreme Court had refused to adopt a peer review privilege under federal common law — meaning that the difficulties of enacting a privilege were even more daunting.

3. The physician group suggested that Rule 407 — the Rule excluding subsequent remedial measures when offered to show fault or product liability — be amended to limit or prevent the use of subsequent remedial measures when offered to prove feasibility or for impeachment. The group contended that these exceptions had been used so broadly as to provide exceptions that swallowed the rule excluding subsequent remedial measures. The Committee rejected the suggestion that an amendment was needed. Reviewing the case law under Rule 407, the Committee noted that the courts had reasonably limited those exceptions. As to feasibility, courts have limited the exception to situations in which the defendant actively contested feasibility; and when feasibility *is* actively

contested, it would be unfair for the defendant to then argue that a subsequent remedial measure could not be admitted to prove the change was feasible. As to impeachment, the courts have refused to apply the exception to every case in which the remedial measure could contradict a defense witness; that is, the courts refuse to apply the impeachment exception in a way that would swallow the rule. Because the Committee rejected the physician group's premise that the feasibility and impeachment exceptions have been too broadly interpreted, it voted unanimously against any amendment to Rule 407 at this time.

4. The physician interest group suggested that Rule 702 be amended to require the court to instruct the jury to give added weight to an expert "with an advanced level of experience, training, education or certification relevant to the fact at issue in the case." The Committee voted unanimously against the proposal, on the following grounds: a) the Evidence Rules govern admissibility and not weight; b) the suggestion raises the specter of a judge invading the jury's province; c) many states have rules prohibiting the judge from commenting on the evidence, and so any rule in that regard in the Federal Rules would create disuniformity with those states; and d) practical problems would arise in giving such an instruction, such as, how much weight should be given, how much specialization must be found before an instruction is required, etc.

5. The physician interest group proposed a new evidence rule (numbered 707) that would require courts to hold *Daubert* hearings. The Committee unanimously rejected this suggestion for a number of reasons: a) the Evidence Rules are not ordinarily the place to set out procedural requirements; b) the Committee already rejected an absolute requirement for a hearing on experts when it drafted the 2000 amendment to Rule 702 — as the Committee Note to Rule 702 indicates, the Committee believed then, as it does now, that the trial court must have flexibility in evaluating challenged expert testimony; c) any amendment requiring hearings would be contrary to the law in every circuit, which indicates that judges have discretion to dispense with a *Daubert* hearing; d) the proposal conflicts with the Supreme Court's opinion in *Kumho Tire,* in which the Court declared that trial courts have discretion in how to evaluate an expert's opinion under *Daubert*; e) in many cases, the trial court will have more than enough information upon which to make a *Daubert* determination, and in those cases a hearing would be an empty exercise; and f) any concern that trial courts will make a *Daubert* ruling without sufficient information is sufficiently addressed by the case law providing that a trial court abuses its discretion in those circumstances.

In the end, the Committee thanked Mr. Lazarus, the representative of the physician interest group who attended the Fall meeting. While the Committee decided not to act on any of the group's suggestions, members noted that the Committee greatly appreciated input from the public. For his part, Mr. Lazarus thanked the Committee for its careful consideration of the proposals and expressed the physician group's interest in working with the Committee in the future.

III. Possible Amendments to the Evidence Rules in Response to Supreme Court

Cases on the Right to Confrontation

For the Committee meeting, the Reporter prepared a memorandum on the Supreme Court's recent decision in *Melendez-Diaz v. Massachusetts.* The *Melendez-Diaz* Court held that certain certificates reporting the results of forensic tests were "testimonial" and therefore the admission of such a certificate violated the accused's right to confrontation, unless the person who prepared the certificate were produced to testify. 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.*

Melendez-Diaz raises serious questions about the admissibility of certificates offered to prove the absence of a public record under Rule 803(10). Like the certificates at issue in *Melendez-Diaz*, a certificate proving up the absence of a public record is prepared with the sole motivation that it will be used at trial — as a substitute for live testimony. *Melendez-Diaz* is less likely to have an impact on the Federal Rules exceptions for business and public records (Rules 803(6) and (8)) because the federal courts have largely construed those exceptions to be inapplicable to records prepared solely in anticipation of litigation. The effect of *Melendez-Diaz* on provisions permitting the authenticity of evidence to be proven by certificate is uncertain.

The Reporter suggested that it would be premature to propose any amendment to the Evidence Rules to respond to *Melendez-Diaz*. The Supreme Court has another case on its docket this term — *Briscoe v. Virginia* — that will examine and perhaps alter the impact of *Melendez-Diaz*. Moreover, time is needed for lower courts to weigh in on any effect that *Melendez-Diaz* has on the Federal Rules of Evidence. The Committee asked the Reporter to continue to monitor the case law and to report to the Committee at the next meeting.

IV. Civil Rule 6(d) — Three Day Rule

Civil Rule 6(d) adds three days to any time specified to act after service is made by any means other than in-hand delivery or leaving the paper at a person's home or office. The Civil Rules Committee is considering whether to propose an amendment to Rule 6(d). The most important question is whether the three day bonus should be retained when service is made electronically. The initial reason for giving the three days for electronic service was that there may be glitches in the technology that justify the three-day protection.

The Civil Rules Committee is asking all the Advisory Committees for any views they may have about the need to amend Rule 6(d). The Evidence Rules Committee discussed the matter, and none of the members thought there was any need for an amendment to Rule 6(d) at this time. As to electronic service, members noted that technological glitches remain frequent enough to justify continuing the three-day rule.

V. Next Meeting

The Spring 2010 meeting of the Committee is tentatively scheduled for April 22-23 in New York City.

Respectfully submitted,

Daniel J. Capra
Reporter