

TO: **Honorable Anthony J. Scirica, Chair**
 Standing Committee on Rules of Practice
 and Procedure

FROM: **Honorable Fern M. Smith, Chair**
 Advisory Committee on Evidence Rules

DATE: **May 1, 1999**

RE: **Report of the Advisory Committee on Evidence Rules**

I. Introduction

The Advisory Committee on Evidence Rules met on April 12th and 13th, 1999, in New York City. At the meeting, the Committee approved seven proposed amendments to the Evidence Rules, with the recommendation that the Standing Committee approve them and forward them to the Judicial Conference. The discussion of these proposed amendments is summarized in Part II of this Report. An appendix to this Report includes the text, Committee Note, GAP report, and summary of public comment for each proposed amendment.

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II. Action Items — Recommendations to Forward Proposed Amendments to the Judicial Conference

At its January 1998 meeting, the Standing Committee approved the publication of proposed amendments to Evidence Rules 103, 404(a), 803(6) and 902. At its June 1998 meeting,

the Standing Committee approved the publication of proposed amendments to Evidence Rules 701, 702 and 703. The public comment period for all of these rules was the same — August 1, 1998 to February 1, 1999.

The Advisory Committee on Evidence Rules conducted two public hearings on the proposed amendments, at which it heard the testimony of 18 witnesses. In addition, the Committee received written comments from 174 persons or organizations, commenting on all or some of the proposed amendments.

The Committee has considered all of these comments in detail, and has responded to many of them through revision of the text or Committee Notes of some of the proposals released for public comment. The Committee has also considered and incorporated almost all of the suggestions from the Style Subcommittee of the Standing Committee. After careful review, the Evidence Rules Committee recommends that all of the proposed amendments, as revised where necessary after publication, be approved and forwarded to the Judicial Conference.

A complete discussion of the Committee's consideration of the public comments respecting each proposed amendment can be found in the draft minutes attached to this Report. The following discussion briefly summarizes the proposed amendments.

A. Action Item — Rule 103. Rulings on Evidence. [Rules App. B-10]

Courts are currently in dispute over whether it is necessary for a party to renew an objection or offer of proof at trial, after the trial court has made an advance ruling on the admissibility of proffered evidence. Some courts hold that a renewed objection or offer of proof is always required in order to preserve a claim of error on appeal. Some cases can be found holding that a renewed objection or offer of proof is never required. Some courts hold that a renewal is not required if the advance ruling is definitive. The Evidence Rules Committee has proposed an amendment to Rule 103 that would resolve this conflict in the courts, and provide litigants with helpful guidance as to when it is necessary to renew an objection or offer of proof in order to preserve a claim of error for appeal. Under the proposed amendment, if the advance ruling is definitive, a party need not renew an objection or offer of proof at trial; otherwise renewal is required. Requiring renewal when the advance ruling is definitive leads to wasteful practice and costly litigation, and provides a trap for the unwary. Requiring renewal where the ruling is not definitive properly gives the trial judge the opportunity to revisit the admissibility question in the context of the trial.

Public comment on the proposed amendment's resolution of the renewal question was almost uniformly favorable. Some comments suggested that certain details might be treated in the Committee Note. For example, it was suggested that the Committee Note might specify that developments occurring after the advance ruling could not be the subject of an appeal unless their relevance was brought to the trial court's attention by way of motion to strike or other suitable

motion. It was also suggested that the Committee Note refer to other laws that require an appeal to the district court from nondispositive rulings of Magistrate Judges. These suggestions were incorporated into the Committee Note.

The proposed amendment to Evidence Rule 103 that was issued for public comment contained a sentence that purported to codify and extend the Supreme Court's decision in *Luce v. United States*. Under *Luce* a criminal defendant must testify at trial in order to preserve the right to appeal an advance ruling admitting impeachment evidence. Lower courts have extended the *Luce* rule to comparable situations, holding, for example, that if the trial court rules in advance that certain evidence will be admissible if a party pursues a certain claim or defense, then the party must actually pursue that claim or defense at trial in order to preserve a claim of error on appeal. The proposal issued for public comment recognized that any codification of *Luce* would necessarily have to extend to comparable situations.

The public comment on the proposed codification and extension of *Luce* was generally negative. Substantial concerns were expressed about the problematic and largely undefinable impact of *Luce* in civil cases. The Evidence Rules Committee considered these comments and, after substantial discussion and reflection, determined that the comments had merit. The Committee therefore deleted the sentence from the published draft that codified and extended *Luce*. The Committee considered the possibility that deletion of the sentence could create an inference that the proposed amendment purported to overrule *Luce*. The Committee determined that such a construction would be unreasonable, because the proposed amendment concerns *renewal* of objections or offers of proof, but *Luce* concerns fulfillment of a condition precedent to the trial court's ruling. *Luce* does not require renewal of an objection or offer of proof; it requires the occurrence of a trial event that was a condition precedent to the admissibility of evidence. In order to quell any concerns about the effect of the proposed amendment on *Luce*, however, the Committee Note was revised to indicate that the proposed amendment is not intended to affect the rule set forth in *Luce*.

Recommendation — The Evidence Rules Committee recommends that the proposed amendment to Evidence Rule 103, as modified following publication, be approved and forwarded to the Judicial Conference.

B. Action Item — Rule 404(a). Character Evidence. [Rules App. B-26]

The proposed amendment to Evidence Rule 404(a) is designed to provide a more balanced presentation of character evidence when an accused decides to attack the alleged victim's character. Under current law, an accused who attacks the alleged victim's character does not open the door to an attack on his own character. The current rule therefore permits the defendant to attack an alleged victim's character without giving the jury the opportunity to consider equally relevant evidence about the accused's own propensity to act in a certain manner. The Evidence

Rules Committee proposed the amendment in response to a provision in the Omnibus Crime Bill that would have amended Evidence Rule 404(a) directly. The Congressional proposal would have permitted the government far more leeway in attacking the accused's character in response to an attack on the alleged victim's character.

The proposed amendment as issued for public comment provided that an attack on the alleged victim's character opened the door to evidence of any of the accused's "pertinent" character traits. Public comment on this proposal suggested that the language should be narrowed to permit only an attack on the "same" character trait that the accused raised as to the victim. The Committee agreed that this modification was necessary to prevent a potentially overbroad use of character evidence. The public comment on the proposal, as so modified, was substantially positive.

Recommendation — The Evidence Rules Committee recommends that the proposed amendment to Evidence Rule 404(a), as modified following publication, be approved and forwarded to the Judicial Conference.

C. Action Item — Rule 701. Opinion Testimony by Lay Witnesses. [Rules App. B-35]

The proposed amendment to Evidence Rule 701 seeks to prevent parties from proffering an expert as a lay witness in an attempt to evade the gatekeeper and reliability requirements of Rule 702. As issued for public comment, the proposed amendment provided that testimony cannot be admitted under Rule 701 if it is based on "scientific, technical or other specialized knowledge." The language of the draft issued for public comment intentionally tracked the language defining expert testimony in Rule 702.

The public comment on the proposal was largely positive. Some members of the public went on record as opposing the proposal, but in fact their comments were directed at the proposed amendment to Evidence Rule 702. The major source of objection directed specifically to the proposed amendment to Rule 701 has come from the Department of Justice. DOJ argued that it is appropriate to have overlap between Rules 701 and 702, so that experts could be permitted to testify as lay witnesses. DOJ also expressed concern that exclusion under Rule 701 of all testimony based on "specialized knowledge" would result in many more witnesses having to qualify as experts — leading to deleterious consequences because the government would have to identify many of those witnesses in advance of trial under the Civil and Criminal Rules governing disclosure.

At its April meeting, the Evidence Rules Committee carefully considered the objections of the Justice Department, and decided to revise the proposed amendment to address the concern

that all testimony based on any kind of specialized knowledge would have to be treated as expert testimony. The proposed amendment, as revised, provides that testimony cannot qualify under Rule 701 if it is based on “scientific, technical or other specialized knowledge *within the scope of Rule 702.*” The Committee Note was also revised to emphasize that Rule 701 does not prohibit lay witness testimony on matters of common knowledge that traditionally have been the subject of lay opinions. The Committee believes that the proposed amendment, as revised, will help to protect against evasion of the Rule 702 reliability requirements, without requiring parties to qualify as experts those witnesses who traditionally and properly have been considered as providing lay witness testimony.

Recommendation — The Evidence Rules Committee recommends that the proposed amendment to Evidence Rule 701, as modified following publication, be approved and forwarded to the Judicial Conference.

D. Action Item — Rule 702. Testimony by Experts. [Rules App. B-53]

The proposed amendment to Evidence Rule 702 is in response to the Supreme Court’s decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* It attempts to address the conflict in the courts about the meaning of *Daubert* and also attempts to provide guidance for courts and litigants as to the factors to consider in determining whether an expert’s testimony is reliable. The proposal is also a response to bills proposed in Congress that purported to “codify” *Daubert*, but that, in the Committee’s view, raised more problems than they solved. The proposed amendment to Evidence Rule 702 specifically extends the trial court’s *Daubert* gatekeeping function to all expert testimony, as affirmed by the Supreme Court in *Kumho Tire Co. v. Carmichael*, requires a showing of reliable methodology and sufficient basis, and provides that the expert’s methodology must be applied properly to the facts of the case. The Committee has prepared an extensive Committee Note that will provide guidance for courts and litigants in determining whether expert testimony is sufficiently reliable to be admissible.

The public comment on the proposed amendment was mixed. Those in favor of the proposal believed that it was important to codify the *Daubert* principles by using general language such as that chosen in the proposed amendment. They noted that many courts, even after *Daubert*, had done little screening of dubious expert testimony. Those opposed to the proposed amendment argued that it would 1) permit trial judges to usurp the role of the jury; 2) lead to a proliferation of challenges to expert testimony; 3) allow judges to reject one of two competing methodologies in the same field of expertise; and 4) result in the wholesale rejection of experience-based expert testimony.

The Evidence Rules Committee considered all of these comments in detail. It determined that most of the concerns were not directed toward the proposal itself, but rather toward the case law that the proposal codifies, most importantly *Daubert* and *Kumho*. In order to allay concerns

about the potential misuse of the amended Rule, however, the Committee revised the Committee Note to clarify that the amendment was not intended to usurp the role of the jury, nor to provide an excuse to challenge every expert, nor to prohibit experience-based expert testimony. The Note was also revised to emphasize that the Rule is broad enough to permit testimony from two or more competing methodologies in the same field of expertise. Finally, in response to public comment, the text of the proposal was revised slightly to avoid a potential conflict with Rule 703, which governs the reliability of inadmissible information used as the basis of an expert's opinion.

The Supreme Court granted certiorari in *Kumho* before the Standing Committee authorized the proposed amendment to Rule 702 to be released for public comment. *Kumho* was decided shortly after the public comment period ended. At its April meeting, the Evidence Rules Committee carefully considered the impact of *Kumho* on the proposed amendment. The Committee unanimously found that the Court's analysis in *Kumho* was completely consistent with, and supportive of, the approach taken by the proposed amendment. The Court in *Kumho* held that the gatekeeper function applies to all expert testimony; that the specific *Daubert* factors might apply to non-scientific expert testimony; and that the Rule 702 reliability standard must be applied flexibly, depending on the field of expertise. The proposed amendment precisely tracks *Kumho* in all these respects. The Court in *Kumho* emphasized the same overriding standard as that set forth in the Committee Note to the proposed amendment, i.e., that an expert must employ the same degree of intellectual rigor in testifying as he would be expected to employ in his professional life. The Committee also noted that the *Kumho* Court favorably cited the Committee Note to the proposed amendment to Evidence Rule 702 as issued for public comment.

For all these reasons, the Committee decided that the Supreme Court's decision in *Kumho* provided more rather than less reason for proceeding with the proposed amendment. The Committee Note was revised to include a number of references to *Kumho*. The Committee considered whether, in light of *Kumho*'s resolution of the applicability of *Daubert* to non-scientific experts, it made sense to amend the Rule. The Committee unanimously agreed that the amendment would perform a great service even after the Court's resolution in *Kumho*. Even after *Kumho*, there are many unresolved questions about the meaning of *Daubert*, such as 1) the standard of proof to be employed by the trial judge in determining reliability; 2) whether the trial court must look at how the expert's methods are applied; and 3) the relationship between the expert's methods and the conclusions drawn by the expert. Moreover, even without any obvious conflicts on the specifics, the courts have divided more generally over how to approach a *Daubert* question. Some courts approach *Daubert* as a rigorous exercise requiring the trial court to scrutinize in detail the expert's basis, methods, and application. Other courts hold that *Daubert* requires only that the trial court assure itself that the expert's opinion is something more than unfounded speculation. The Evidence Rules Committee believes that adoption of the proposed rule change, and the Committee Note, will help to provide uniformity in the approach to *Daubert* questions. The proposed amendment and the Committee Note clearly envision a more rigorous and structured approach than some courts are currently employing.

Finally, if the Rule is not amended, there is legitimate cause for concern that Congress will

act to amend Rule 702. Prior codification efforts were shelved partly because of assurances that the Rules Committee was already considering a change to Rule 702. If the Committee fails to act, these congressional efforts may be renewed.

Recommendation — The Evidence Rules Committee recommends that the proposed amendment to Evidence Rule 702, as modified following publication, be approved and forwarded to the Judicial Conference.

**E. Action Item — Rule 703. Bases of Opinion Testimony by Experts.
[Rules App. B-99]**

The proposed amendment to Evidence Rule 703 would limit the disclosure to the jury of inadmissible information that is used as the basis of an expert's opinion. Under current law, litigants can too easily evade an exclusionary rule of evidence by having an expert rely on inadmissible evidence in forming an opinion. The inadmissible information is then disclosed to the jury in the guise of the expert's basis. The proposed amendment imposes no limit on an expert's opinion itself. The existing language of Evidence Rule 703, permitting an expert to rely on inadmissible information if it is of the type reasonably relied upon by experts in the field, is retained. Rather, the limitations imposed by the proposed amendment relate to the disclosure of this inadmissible information to the jury. Under the proposed amendment, the otherwise inadmissible information cannot be disclosed to the jury unless its probative value in assisting the jury to evaluate the expert's opinion substantially outweighs the risk of prejudice resulting from the jury's possible misuse of the evidence.

The public comment on the proposed amendment was largely positive. Most comments agreed that under current practice, Rule 703 is all too often used as a device for evading exclusionary rules of evidence, and that the balancing test set forth in the proposal is necessary to prevent this abuse. Negative comments expressed concern that the proposal did not specify how the balancing test would apply in rebuttal, and did not mention whether a proponent might be able to introduce inadmissible information on direct examination in order to remove the sting of an anticipated attack on the expert's basis. In response to these comments, the Committee Note was revised to emphasize that the balancing test set forth in the amendment is flexible enough to accommodate each of these situations.

Other public comments suggested that the amendment clarify why inadmissible information relied upon by the expert might have probative value that would be weighed under the amendment's balancing test. In response to these comments, the Committee revised the text of the amendment to provide that the trial judge must assess the inadmissible information's "probative value in assisting the jury to evaluate the expert's opinion." Finally, the Committee adopted the suggestions of the Style Subcommittee of the Standing Committee, and made stylistic improvements to the proposal as it was released for public comment.

Recommendation — The Evidence Rules Committee recommends that the proposed amendment to Evidence Rule 703, as modified following publication, be approved and forwarded to the Judicial Conference.

**F. Action Item — Rule 803(6). Records of Regularly Conducted Activity.
[Rules App. B-120]**

Under current law, a foreign record of regularly conducted activity can be admitted in a criminal case without the necessity of calling a foundation witness. 18 U.S.C. § 3505 provides that foreign business records may be admitted if they are certified by a qualified witness, under circumstances in which the law of the foreign country would punish a false certification. In contrast, the foundation for all other records admissible under Evidence Rule 803(6) must be established by a testifying witness. The intent of the proposed amendment to Evidence Rule 803(6) is to provide for uniform treatment of business records, and to save the parties the expense and inconvenience of producing live witnesses for what is often perfunctory testimony. The approach taken by the proposed amendment, permitting a foundation for business records to be made through certification, is in accord with a trend in the states. The proposed amendment to Rule 803(6) is integrally related to the proposed amendment to Evidence Rule 902, discussed below.

The public comment on the proposed amendment to Evidence Rule 803(6) was almost uniformly positive. The Committee made no changes to the text or Note of the proposal that was issued for public comment.

Recommendation — The Evidence Rules Committee recommends that the proposed amendment to Evidence Rule 803(6), as issued for publication, be approved and forwarded to the Judicial Conference.

G. Action Item — Rule 902. Self-authentication. [Rules App. B-126]

The Evidence Rules Committee recognized that if certification of business records is to be permitted, Evidence Rule 902 must be amended to provide a procedure for self-authentication of such records. In that sense, the proposed amendments to Rules 803(6) and 902 are part of a single package — the amendment to Rule 902 is only necessary if the amendment to Rule 803(6) is adopted, and conversely the amendment to Rule 803(6) would be a nullity if the amendment to Rule 902 were rejected.

The proposed amendment to Evidence Rule 902 sets forth the procedural requirements for preparing a declaration of a custodian or other qualified witness that will establish a sufficient foundation for the admissibility of business records. Public comment on the proposed amendment was almost uniformly positive. Some comments suggested minor changes in the language of the

text, to provide more consistency in the terms “certification” and “declaration,” and to refer to independent statutes and rules governing the procedures for a proper certification. The Evidence Rules Committee has revised the proposal that was issued for public comment in response to these suggestions. The Committee also incorporated suggested changes from the Style Subcommittee of the Standing Committee.

Recommendation — The Evidence Rules Committee recommends that the proposed amendment to Evidence Rule 902, as modified following publication, be approved and forwarded to the Judicial Conference.

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