Advisory Committee on Evidence Rules

Minutes of the Meeting of April 12-13, 1999

New York, N.Y.

The Advisory Committee on the Federal Rules of Evidence met on April 12th and 13th at Fordham University in New York City.

The following members of the Committee were present:

Hon. Fern M. Smith, Chair
Hon. Milton I. Shadur, Acting Chair for the first day of the meeting
Hon. David C. Norton
Hon. Jerry E. Smith
Hon. James T. Turner
Professor Kenneth S. Broun
Laird Kirkpatrick, Esq.
Gregory P. Joseph, Esq.
Frederic F. Kay, Esq.
John M. Kobayashi, Esq.
David S. Maring, Esq.
Professor Daniel J. Capra, Reporter

Also present were:

Hon. Anthony J. Scirica, Chair of the Standing Committee on Rules of Practice and Procedure
Hon. Frank W. Bullock, Jr., Liaison to the Standing Committee on Rules of Practice and Procedure
Hon. Richard Kyle, Liaison to the Civil Rules Committee
Hon. David D. Dowd, Liaison to the Criminal Rules Committee
Professor Daniel R. Coquillette, Reporter, Standing Committee on Rules of Practice and Procedure
Professor Leo Whinery, Reporter, Uniform Rules of Evidence Drafting Committee
Roger Pauley, Esq., Justice Department
Peter G. McCabe, Esq. Secretary, Standing Committee on Rules of Practice and Procedure

John K. Rabiej, Esq., Chief, Rules Committee Support Office
Joe Cecil, Esq., Federal Judicial Center

Opening Business

Judge Shadur chaired the first day of the meeting. Judge Fern Smith was available by way of telephone conference call on the first day, and was present to chair the second day of the meeting. Judge Shadur opened the meeting by asking for approval of the minutes of the October, 1997 meeting. These minutes were unanimously approved.

The Committee then considered the proposed amendments to the Evidence Rules that had been released for public comment. The proposed amendments covered Evidence Rules 103, 404(a), 701, 702, 703, 803(6) and 902. The Committee evaluated the public comments received on the proposals, considered changes to the proposed amendments and Committee Notes, and approved the proposals, as modified, for recommendation to the Standing Committee that they be approved and referred to the Judicial Conference. What follows is a breakdown of the discussions, and the action taken, with respect to each of the proposals.

Rule 702

The proposal to amend Rule 702 requires that expert testimony have a sufficient basis, that the expert employ reliable principles and methods, and that those principles and methods are reliably employed to the facts of the case. The intent of the proposal is to recognize and refine the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals* and its progeny.

Judge Shadur opened the discussion on Rule 702 by noting that in deciding how to amend the Rule, the Committee was not technically bound by the Supreme Court's intepretation of the existing Rule 702 in *Daubert* and in the recent case of *Kumho Tire v. Carmichael*. However, all members of the Committee were in agreement that the approach taken by the Supreme Court--an approach that is followed in the proposal issued for public comment--provided an excellent and definitive means of regulating unreliable expert testimony. There was unanimous agreement that if the Rule is to be amended, it should stick as closely as possible to the Supreme Court's teachings in *Daubert* and *Kumho.*

The Committee then considered some of the major criticisms and suggestions that arose in the public comment period. The topics addressed are listed by number:

1. Proliferation of motions challenging expert testimony

Some public commentators were concerned that the proposed amendment would lead to a flood of motions challenging expert testimony. A discussion ensued in which some members said they had encountered no increase in challenges to experts since *Daubert*, while other members noted some (but not major) increase. Committee members noted that the public

comment had expressed particular concern about the possibility that motions to exclude would increase due to the proposed amendment's extension of the gatekeeper function to non-scientific expert testimony. Since the Supreme Court had resolved that question in *Kumho* consistently with the proposed amendment, Committee members considered most of the concern over a proliferation of motions to be mooted by the *Kumho* decision.

While the concerns expressed in the public comment period did not, in the Committee's view, warrant a rejection or limitation of the language in the text of the proposed amendment, the Committee unanimously agreed to add language to the Committee Note indicating that the amendment is not intended to provide an excuse for an automatic challenge to the testimony of every proffered expert. This language, and supporting authority, is included in the Committee Note attached as an appendix to these minutes.

2. Infringing the Right to Jury Trial

Some public commentators asserted that the proposed amendment would deny plaintiffs a right to jury trial, because it would allow the trial judge to exclude expert testimony by deciding credibility questions that should be left to the jury. The Committee found these general criticisms to be unjustified. To the extent the criticism was based on trial judges acting as gatekeepers, this is simply the result of the proposed amendment's codification of *Daubert* and *Kumho*. Even if Rule 702 were not amended, plaintiffs would have to deal with the trial judge's gatekeeping function in excluding the testimony of any expert if that testimony is unreliable. Moreover, the right to jury trial does not mean that litigants are permitted to bring any evidence, no matter how dubious or prejudicial, before a jury. Rather, the right to jury trial means that it is the jury's role to consider all the *reliable* evidence that is not unduly prejudicial, privileged, etc.. There is a legitimate concern that the jury, unschooled in the ways of experts, will if unregulated give undue weight to expert testimony that is in fact unreliable. Therefore, a rule of evidence excluding unreliable expert testimony--such as either the current or the amended Rule 702-- does not violate the right to jury trial.

For all these reasons, the Committee unanimously agreed that any concerns over the loss of the right to jury trial did not warrant a change in the text of the proposed amendment to Evidence Rule 702. The Committee agreed, however, to add to the Committee Note a quotation from the Court in *Daubert*, in which the Court indicates that "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." This language, and supporting authority, is included in the Committee Note attached as an appendix to these minutes.

3. Extending the Gatekeeper Function to Non-scientific Expert Testimony

Some public commentators objected to the proposed amendment's explicit extension of

the *Daubert* gatekeeping function to the testimony of non-scientific experts. These comments were rendered before the Supreme Court's decision in *Kumho*, however. The Court in *Kumho*, citing favorably the Committee Note to the proposed amendment released for public comment, held that the *Daubert* gatekeeping function must be applied to all expert testimony. The *Kumho* Court emphasized the same flexible standards for assessing reliability that are set forth in the proposed amendment and Committee Note. The Committee therefore decided that there was no need to modify either the text or the note of the proposed amendment to address any concerns about extending the gatekeeper function to non-scientific expert testimony.

4. Competing Methodologies in the Same Field

Some public commentators have expressed the concern that the proposed amendment to Rule 702 fails to recognize that there might be two or more competing reliable methodologies in the same field. The Committee considered these criticisms and concluded unanimously that the broad language of the proposed amendment, which refers to "reliable principles and methods", is broad enough testimony based on competing methodologies in the same field, where both are reliable. In order to assuage any concerns on the matter, the Committee agreed to add language to the Committee Note providing that the amendment "is broad enough to permit testimony that is the product of competing principles or methods in the same field of expertise." This language, and supporting authority, is included in the Committee Note attached as an appendix to these minutes.

5. Experience-based Experts

A few public commentators took the position that the proposed amendment would exclude the testimony of any expert relying on experience, rather than scientific or technical knowledge. The Committee considered these comments and found them to be without merit. Rule 702 specifically states that experts may be qualified by experience. The proposed amendment, in requiring that experts must employ reliable principles and methods, in no way implies that experience cannot qualify under its terms. The Committee therefore unanimously rejected a suggestion that the term "experience" be included together with the terms "principles and methods" in the text of the proposed amendment. Such a change might give too much weight to experience as a basis for expert testimony.

The Committee nonetheless agreed to amend the Committee Note to emphasize that the testimony of experience-based experts can qualify under the Rule. The revision provides, among other things, that in certain fields, "experience is the predominant, if not sole, basis for a great deal of reliable expert testimony." This language, and supporting authority, is included in the Committee Note attached as an appendix to these minutes.

6. Requiring the Testimony to be Sufficiently Based on Reliable Facts or Data

Several organizations expressed concern that the reference in Subpart (1) of the proposed amendment to an expert's reliance on "reliable facts or data" would create several problems. One possibility is that the trial judge could exclude the expert's testimony on the ground that the judge did not believe the underlying data; the concern is that this type of credibility determination could usurp the jury's role. Another possibility expressed in the public comment is that the reference to "reliable facts or data" could be construed to prohibit an expert from relying on hypothetical facts or data. Finally, and most importantly, the commentators noted a possibly problematic overlap between imposing a limitation on reliable facts or data in Rule 702, and imposing a similar limitation on otherwise inadmissible facts or data under Rule 703.

The Committee considered all of these criticisms and collectively found that some or all had merit. The Committee noted that the problems derived from the focus on "reliable" facts or data in Subpart (1). The intent of Subpart (1) is to assure that the expert has relied on a sufficient *quantity* of information; calling for a qualitative assessment (by requiring the information to rise to some independent level of reliability) risks a conflict with Rule 703. Nor is a qualitative assessment of the underlying data necessary in Subpart (1). Subparts (2) and (3) already require the expert to use reliable principles and methods and to apply those principles and methods reliably, so there is virtually no chance that deletion of the term "reliable" from Subpart (1) would result in the admission of unreliable expert testimony.

The Committee therefore unanimously agreed to revise Subpart (1) of the proposed amendment to Rule 702, to delete the word "reliable", and to restylize the language of Subpart (1) to provide that an expert's opinion must be based on "sufficient facts or data". The proposed Committee Note was modified where necessary to take account of this minor change. A subsequent motion was made to delete Subpart (1) entirely from the proposed amendment. This motion failed by a vote of eight to two.

7. Focus on an Expert's Reasoning

One public comment suggested that the proposed amendment should be revised to focus on an expert's "reasoning" rather than the use of "principles and methods". The Committee considered this comment and unanimously concluded that the suggested change was one of style rather than substance, that any stylistic change was not for the better, and therefore that the proposal should not be amended to focus on "reasoning."

8. Retaining the Existing Rule:

The Committee considered and discussed several public comments suggesting that Rule 702 should not be amended at all. One member of the Committee expressed some sympathy

with this position. But the remaining Committee members were of the view that the amendment should be forwarded to the Standing Committee, for a number of reasons. First, even after the *Kumho* decision, there are a number of *Daubert* questions on which the courts disagree, including the appropriate standard of proof and the rigor with which expert testimony should be scrutinized. Second, Congress has in the past shown an interest in "codifying" *Daubert*, and the Committee was concerned that these previous legislative proposals created many more problems than they solved. The Committee resolved that it was necessary to respond to these Congressional initiatives with the kind of flexible and carefully drafted amendment that the Committee has proposed.

9. Generalized Expert Testimony:

One public comment expressed the concern that the proposed amendment would preclude the testimony of experts who would testify only to instruct the jury on general principles--what one Committee member referred to as expert "tutorials." The cause of the concern was Subpart (3) of the proposed amendment, which states as a condition of admissibility that "the witness has applied the principles and methods reliably to the facts of the case." With respect to expert "tutorials", the argument could possibly be made that the expert has not attempted to apply any principles or methods to the facts of the case.

The Committee engaged in an extensive discussion and analysis of whether the proposed amendment should be revised to more specifically permit the testimony of experts who testify to general principles only. One possibility considered was to revise the proposal to provide that the witness must apply the principles and methods reliably to "the issues in the case." But this proposal was found by a majority of Committee members to call for a distinction without a difference.

Ultimately, the Committee agreed, by a vote of seven to three, that the existing text of the proposal was clear enough to indicate that an expert tutorial would be admissible, so long as the expert's testimony was reliable and fit the facts of the case. The Committee then voted unanimously to revise the Committee Note to emphasize that reliable expert testimony can be admitted even where the expert makes no attempt to apply any methodology to the specific facts of the case. Among other things, the revision states that the amendment "does not alter the venerable practice of using expert testimony to educate the factfinder on general principles." This language, and supporting authority, is included in the Committee Note attached as an appendix to these minutes.

10. Public Comment Suggestions to Revise Committee Note

The Committee considered two sets of public comments that had suggested certain revisions to the Committee Note to the proposed amendment to Evidence Rule 702.

One comment suggested that the Committee Note be amended to state that Rule 104(b), rather than Rule 104(a), provides the standard of proof for determining the reliability of expert opinion under Rule 702. The Committee considered this comment and unanimously determined that the suggestion was inconsistent with a number of important precedents: 1) the Supreme Court in *Daubert* expressly stated that the trial judge's gatekeeper function is found within Rule 104(a), and this position was reiterated implicitly in *Joiner v. General Electric* and *Kumho*; 2) the recent amendment adding Evidence Rule 804(b)(6) specifically states in the Committee Note that admissibility questions thereunder are to be decided under Rule 104(a)--the Committee found no distinction between issues decided by the judge under Rule 804(b)(6) and those decided by the judge under Rule 702; and 3) for admissibility determinations by the judge, Rule 104(a) sets the basic rule, to which Rule 104(b) is the exception that is applicable in certain very limited situations. The Committee unanimously determined that none of the reasons for employing the exceptional Rule 104(b) standard applied to the trial judge's determination of the reliability of an expert's opinion.

A second set of comments expressed concern with the Committee Note that was released for public comment, insofar as the Note suggests certain factors that a trial court could consider in determining whether an expert's testimony is reliable. The concern was that the listed factors might be read as being dispositive of the reliability question. The Committee agreed to add language to the Committee Note providing that "no single factor is necessarily dispositive of the reliability of a particular expert's testimony."This language, and supporting authority, is included in the Committee Note attached as an appendix to these minutes.

11. Style Subcommittee

The Evidence Rules Committee considered a change suggested by the Style Subcommittee of the Standing Committee. That change substituted the word "if" for the words "provided that" at the beginning of the proposed amendment to Rule 702. The Committee unanimously agreed to adopt the suggestion.

12. Kumho

The Committee unanimously resolved to add language to the Committee Note to take account of the Supreme Court's decision in *Kumho*. The sense of the Committee was that the analysis in *Kumho* is completely consistent with and supportive of, the approach taken by the proposed amendment and Committee Note; therefore it would be appropriate to cite and quote *Kumho* throughout the Committee Note. All of this language, and supporting authority, is included in the Committee Note attached as an appendix to these minutes.

12. Recommendation

A motion was made and seconded to recommend to the Standing Committee that the proposed amendment to Evidence Rule 702, as modified following publication, be approved and forwarded to the Judicial Conference. That motion passed by a unanimous vote.

A copy of the proposed amendment to Rule 702, and the proposed Committee Note to Rule 702, is attached to these minutes.

Rule 701

The Committee considered the proposed amendment to Evidence Rule 701. As released for public comment, the proposal would preclude testimony under Rule 701 if it were based on "scientific, technical, or other specialized knowledge." The goal of the amendment is to prevent testimony from being admitted under Rule 701 when in fact it is expert testimony and treated as such by the proponent.

An extensive discussion ensued on whether it was appropriate to establish a bright line between expert and lay testimony. Justice Department representatives argued that the proposal would create uncertainty, and would result in many more witnesses being subject to the disclosure provisions applicable to experts. They argued further that any expansion of discovery rules should not come by way of a rule of evidence. Other members argued, in contrast, that the proposal would not change existing law in any substantial way. A proponent who purports to present lay witness testimony that is based on extensive experience will have to establish a foundation in any case--the experiential foundation that would qualify the witness under Rule 701 would be the same as the foundation necessary to establish the witness as an expert under Rule 702. Justice Department representatives argued in response that the real problem was one of finding it necessary to disclose such witnesses in advance of trial.

Ultimately, the Committee agreed that both the text and the Note to Rule 701 had to be revised to accommodate DOJ concerns about pretrial disclosure of witnesses such as eyewitnesses testifying on the basis of extensive, particularized experience. The Committee agreed that there was no intent to prevent such witnesses from testifying under Rule 701. On the other hand, the Committee was strongly of the view that a proponent should not be permitted to end-run the requirements of Rule 702 simply by calling testimony "lay witness testimony" when in fact the proponent emphasizes the witness' specialized knowledge and expertise.

After extensive discussion on possible compromise language, and taking account of the suggestions of the Justice Department, the Committee ultimately agreed to one change in the text of the proposal that was issued for public comment. That change modifies the exclusion of testimony under Rule 701 to testimony "not based on scientific, technical or other specialized

knowledge **within the scope of Rule 702**." The inference is, therefore, that some specialized knowledge may provide a permissible basis of lay witness testimony--just not the specialized knowledge that is traditionally within the scope of expert witness testimony. Corresponding changes were made to the Committee Note, and the Note was also amended to delete a paragraph that had implied that all testimony based on specialized knowledge must be considered expert testimony. Finally, a section was added to the Committee Note indicating that there was no intent to prevent lay witnesses from traditionally accepted subjects such as the value of property and the fact that a certain substance was a narcotic. This new section of the Committee Note also elaborates on the distinction between lay testimony, which "results from a process of reasoning familiar in everyday life", while expert testimony "results from a process of reasoning which can be mastered only by specialists in the field."

Recommendation:

A motion was made and seconded to recommend to the Standing Committee that the proposed amendment to Evidence Rule 701, as modified following publication to address the Justice Department's concerns over the scope of the Rule, be approved and forwarded to the Judicial Conference. Nine Committee members voted in favor of the motion. The Justice Department representative abstained.

A copy of the proposed amendment to Rule 701, and the proposed Committee Note to Rule 701, is attached to these minutes.

Rule 703

The proposed amendment to Evidence Rule 703 would impose limitations on the disclosure to the jury of otherwise inadmissible information used as the basis of an expert's opinion.The Committee considered some of the major criticisms and suggestions that arose in the public comment period concerning the proposed amendment to Evidence Rule 703. The topics addressed are listed by number:

1. A Change to the Rule is Unnecessary

The intent of the proposed amendment is to prevent an opponent from bringing unreliable hearsay or other inadmissible evidence before the jury in the guise of information relied upon by an expert. A few public comments argued that the Rule need not be amended, on the ground that courts have been guarding against the abuses that the amendment seeks to prevent. But based on an extensive review of the case law, as well as other public comments and the experiences of the Committee members, the Committee unanimously agreed that there remains a substantial risk that parties will use the existing Rule 703 as a backdoor means of evading exclusionary rules. Consequently, the Committee determined that the Rule should be amended to guard against that risk.

2. Rebuttal, and Response to an Anticipated Attack on the Expert's Basis

Some public comments suggested that the Committee Note should be amended to clarify that a proponent may be able to bring out inadmissible used by the expert on rebuttal, if the opponent attacks the basis of an expert's opinion on cross-examination. Along the same lines, these public comments suggested that the Note address whether an expert's inadmissible basis could be brought out on direct in an effort to "remove the sting" of an anticipated attack on the expert's basis. The Committee concluded that the possibilities of disclosing inadmissible information relied upon by an expert— either for rebuttal or in anticipation of an attack on the expert's basis— are encompassed within the balancing test set forth in the proposed amendment. There was therefore no need to amend the text of the Rule to account for these possibilities. The Committee did agree, however, to amend the Committee Note to clarify that the balancing test should be applied to questions of rebuttal and anticipated attack. The added language provides that "an adversary's attack on an expert's basis will often open the door to a proponent's rebuttal with information that was reasonably relied upon by the expert, even if that information would not have been discloseable initially under the balancing test provided by this amendment." It further provides that "in some circumstances the proponent might wish to disclose information that is relied upon by the expert in order to 'remove the sting' from the opponent's anticipated attack," and that the trial court "should take this consideration into account in applying the balancing test provided by this amendment."

3. Requiring Proponents to Qualify Evidence Relied on by an Expert

One public commentator suggested that the proposed amendment would result in wasted expense, because it would force a proponent to qualify evidence as admissible even if it was only to be used as part of the basis of an expert's testimony. The Committee found this suggestion to be without merit. If information relied on by an expert is in fact admissible, there is no legitimate reason why a proponent would want or need to admit it solely to explain the basis of an expert's testimony and not for substantive purposes. Nor is there a legitimate reason to forego the process of qualifying evidence that is in fact admissible.

4. Information "Not in Evidence"

At its October, 1998 meeting , the Evidence Rules Committee tentatively concluded that the proposed amendment should refer to information "not in evidence" rather than information that is "otherwise inadmissible." The thought was that the reference to information "not in evidence" would provide more clarity. However, on reconsideration, the Committee unanimously determined that the phrase "not in evidence" would be problematic. It would subject even admissible information used by an expert to the strict balancing test simply because the information was not yet put in evidence at the time of the expert's testimony. This could lead to disruption in the order of proof because a proponent could be forced to qualify evidence out of

the ordinary sequence, in order to avoid the strict balancing test of the proposed amendment.

After extensive discussion, the Committee resolved to return to the "otherwise inadmissible" language that had been included in the version of the proposed amendment that was issued for public comment. The Committee also resolved to address the concern of some public comments that it might be confusing to refer to the "probative value" of "otherwise inadmissible" evidence. The Committee unanimously agreed to add language to the text of the Rule to indicate that the probative value to be assessed is the degree to which the otherwise inadmissible information assists the jury in understanding the expert's opinion. The Committee Note was also revised to accord with the change in the text. This language is included in the proposed amendment and Committee Note attached as an appendix to these minutes.

5. Explicating Balancing Factors in the Committee Note

The Committee considered the suggestion of some public commentators that the Committee Note to the proposed amendment to Rule 703 should be revised to add a list of factors that a trial court should consider in determining whether otherwise inadmissible information relied on by an expert should be disclosed. Committee members generally expressed a reluctance to include such a checklist. Members were confident that trial judges were experienced in balancing probative value and prejudicial effect in a variety of situations. There was also a concern that by including some factors, courts and litigants might draw a negative inference concerning other factors that are not expressly included on the list. The Committee therefore unanimously agreed that the suggested addition should not be adopted.

6. Recommendation

A motion was made and seconded to recommend to the Standing Committee that the proposed amendment to Evidence Rule 703, as modified following publication, be approved and forwarded to the Judicial Conference. The motion was passed by a unanimous vote.

A copy of the proposed amendment to Rule 703, and the proposed Committee Note to Rule 703, is attached to these minutes.

Rule 103

The proposal to amend Rule 103 that was issued for public comment would provide that a party need not renew an objection or offer of proof where the trial court has made a definitive advance ruling admitting or excluding evidence. It further codifies and extends the rule of *Luce v. United States*. *Luce* held that a criminal defendant who objects to an advance ruling admitting

impeachment evidence must take the stand to preserve any claim of error for appeal.

The Chair began the discussion on Rule 103 by stating that she did not believe it was the Committee's role to expand the application of *Luce*--that was an important policy issue that should be left to the courts. Several Committee members echoed this sentiment, and stated that the proposed Rule should leave the applicability of *Luce* to case law. The way this could be done would be to delete the second sentence of the proposed amendment (the sentence codifying and extending *Luce*), and to state in the Committee Note that there was no intent to address any of the questions raised in *Luce*.

The Justice Department representatives objected to this solution, arguing that deleting the second sentence of the proposal would implicitly overrule *Luce*, and that this implication could not be corrected by a Committee Note. They argued that most of the expressed concern over the second sentence was in its application to civil proceedings. The Justice Department representatives suggested that the text of the proposal could be changed to limit the second sentence, concerning *Luce*, to criminal cases. Some members responded that this solution would implicitly overrule some of the court decisions that had in fact applied *Luce* in a civil setting. The Justice Department representatives responded that the Committee Note could state that there was no intent to deal with *Luce* in a civil setting. It was unclear to many Committee members, however, why a Committee Note would be considered sufficient to clarify any ambiguity about the effect of the Rule on *Luce* in civil cases when, according to the Justice Department, a Committee Note would not be sufficient to clarify any ambiguity about the effect of the Rule on *Luce* in every case.

Other Committee members rejected the contention that dropping the sentence on *Luce* could be construed as an implicit overruling of that decision. The first sentence of the proposed amendment states that there is no need to renew an objection or offer of proof when the advance ruling is definitive. But *Luce* has nothing to do with renewing an objection--rather, it requires a party to testify in order to preserve a claim of error with respect to the admission of impeachment evidence. Testifying and renewing an objection are separate concepts.

Other Committee members, addressing the Justice Department's proposal to limit the *Luce* language to criminal cases, noted that such a limitation had been rejected by the Standing Committee when a previous version of an amendment to Rule 103 was proposed for release for public comment.

A motion was made to delete the second sentence of the proposed amendment to Rule 103 that was issued for public comment; to amend the Committee Note to indicate that there is no intent to disturb *Luce;* and to add language to the Committee Note describing why the question of renewal of objection or offer of proof is different from the question confronted by the Court in *Luce.* This motion passed by a vote of 7 to 3. A second motion was made to retain the second sentence but limit it to criminal cases, and to amend the Committee Note accordingly. This motion failed by a vote of 7 to 3.

After these votes, Committee members expressed concern that Justice Department objections to the deletion of the second sentence of the proposal might result in the rejection of the proposed amendment in its entirety. The sense of the Committee was that it would be most unfortunate if the first sentence of the proposal were to be rejected due to expressed objections over the deletion of the second sentence. Therefore, in a separate vote, the Committee unanimously agreed that it would prefer to have an amendment with the *Luce* language, limited to civil cases, rather than to have no amendment at all.

Magistrate Judge's Rulings:

28 U.S.C section 636(b)(1) and Fed.R.Civ. P. 72(a) require that a party who would object to the nondispositive determination of a magistrate judge on a matter adjudicated without consent of the parties must file an objection with the district court within ten days of the ruling, in order to preserve a claim of error on appeal. A public commentator expressed concern that the proposed amendment to Evidence Rule 103(a) could be construed as in conflict with the statute and the Civil Rule, because the proposed amendment states that a party need not renew an objection or offer of proof as to pretrial definitive rulings.

The Committee, after discussion, determined that there was no inconsistency between the proposed amendment and the statute and Civil Rule. The proposed amendment provides that an objection or offer of proof need not be *renewed* at trial when the pretrial ruling is definitive. The statute and Civil Rule do not require a renewal of an objection; rather, they require the party to essentially *appeal* the Magistrate Judge's ruling to the district court, in order to preserve the right to appeal further to the court of appeals. The Committee therefore found it unnecessary to amend the text of the proposal to refer to 28 U.S.C section 636(b)(1) and Fed.R.Civ. P. 72(a).

The Committee did agree, however, that it would be useful to add language to the Committee Note that would mention the statute and Civil Rule, and to state that there is no intention to abrogate those provisions. The Committee unanimously agreed to add the following language to the Committee Note:

> Nothing in the amendment is intended to affect the provisions of Fed.R.Civ.P. 72(a) or 28 U.S.C. §636(b)(1), pertaining to nondispositive pretrial rulings by magistrate judges in proceedings that are not before a magistrate judge by consent of the parties. Fed.R.Civ.P. 72(a) provides that a party who fails to file a written objection to a magistrate judge's nondispositive order within ten days of receiving a copy "may not thereafter assign as error a defect" in the order. 28 U.S.C. §636(b)(1) provides that any party "may serve and file written objections to such proposed findings and recommendations as provided by rules of court" within ten days of receiving a copy of the order. Several courts have held that a party must comply with this statutory provision in order to preserve a claim of error. *See, e.g., Wells v. Shriners Hospital*, 109 F.3d 198, 200

(4th Cir. 1997)("[i]n this circuit, as in others, a party 'may' file objections within ten days or he may not, as he chooses, but he 'shall' do so if he wishes further consideration."). When Fed.R.Civ.P. 72(a) or 28 U.S.C. §636(b)(1) is operative, its requirement must be satisfied in order for a party to preserve a claim of error on appeal, even where Evidence Rule 103(a) would not require a subsequent objection or offer of proof.

Subsequent Foundation

The Committee reviewed a public comment suggesting that the Committee Note to the proposed amendment to Rule 103 be revised to address the problem arising when evidence is admitted subject to connection or foundation, and the proponent never ends up satisfying that foundation requirement. In such circumstances, the objecting party should not be led to believe that an initial objection at the time of the advance ruling would be sufficient to preserve a claim of error predicated on the proponent's failure to establish a foundation. The Committee agreed that it would be useful to amend the Committee Note to provide guidance to practitioners on this question. The Committee voted unanimously to add language to the Committee Note providing that "if the court decides in an advance ruling that proffered evidence is admissible subject to the eventual introduction by the proponent of a foundation for the evidence, and that foundation is never provided, the opponent cannot claim error based on the failure to establish the foundation unless the opponent calls that failure to the court's attention by a timely motion to strike or other suitable motion."

Style Subcommittee

The Style Subcommittee of the Standing Committee suggested a minor change to the proposed amendment to Evidence Rule 103 as it was released for public comment. The suggestion was to move the clause "at or before trial" to a different place in the first sentence of the proposal. The Committee unanimously agreed to this change.

Recommendation:

A motion was made and seconded to recommend to the Standing Committee that the proposed amendment to Evidence Rule 103, as modified following publication, be approved and forwarded to the Judicial Conference. The motion was passed by a vote of seven to three.

A copy of the proposed amendment to Rule 103, and the proposed Committee Note to Rule 103, is attached to these minutes.

Rule 404(a)

The proposed amendment to Evidence Rule 404(a) that was issued for public comment would provide that if an accused attacks the victim's character, this opens the door to an attack on a "pertinent" trait of character of the accused. At its October, 1998 meeting, the Committee tentatively agreed to change the word "pertinent" to the word "same", thus limiting the door-opening effect to the very trait of character as to which the accused attacked the victim. The Committee Note was also tentatively revised to accord with this textual change, and to clarify that the Rule does not apply if the accused proffers evidence of the victim's character for some purpose other than proving the victim's propensity to act in a certain way. These tentative changes were approved by the Committee at the April meeting, as appropriate and helpful limitations and clarifications.

The Committee also discussed a suggestion that all the references in Rule 404 to a "victim" should be changed to refer to an "alleged victim." Use of the term "alleged" would provide consistency with Rule 412, and would reflect the reality that at the time the character evidence is proffered, the victim's status is alleged, not proven. The Committee agreed to make this change to the text of the proposed amendment, and to make corresponding changes to the Committee Note.

The Committee then discussed the underlying merits of the proposed rule change. Some members expressed concern that the proposal imposes an unjustified penalty on an accused who decides to attack the victim's character; but most members were of the view that the proposal is necessary to prevent a one-sided presentation of character evidence.

Recommendation:

A motion was made and seconded to recommend to the Standing Committee that the proposed amendment to Evidence Rule 404(a), as modified following publication, be approved and forwarded to the Judicial Conference. The motion was passed by a vote of nine to one.

A copy of the proposed amendment to Rule 404(a), and the proposed Committee Note to Rule 404(a), is attached to these minutes.

Rule 803(6)

The proposed amendment to Evidence Rule 803(6) would provide a means of qualifying business records without the necessity of calling a witness to testify at trial. The public comment on the proposal was almost uniformly favorable. The Committee considered one public comment arguing that the proposal could violate a criminal defendant's right to confrontation. But after extensive research into the case law, the Committee found that there is no viable confrontation

question where the record itself fits the requirements of a business record and is qualified by a sworn declaration of the custodian or other qualified witness. The Committee unanimously found that there was no need to amend either the text or the Committee Note of the proposal that was released for public comment.

Recommendation:

A motion was made and seconded to recommend to the Standing Committee that the proposed amendment to Evidence Rule 803(6), as issued for public comment, be approved and forwarded to the Judicial Conference. The motion was passed by a unanimous vote.

A copy of the proposed amendment to Rule 803(6), and the proposed Committee Note to Rule 803(6), is attached to these minutes.

Rule 902

The proposed amendment to Rule 902 would provide a means of authenticating certain business records, other than through the live testimony of a foundation witness. The proposal is intended to work in tandem with the amendment to Evidence Rule 803(6). The intent of the amendment is to provide similar treatment for domestic records, and foreign records in civil cases, as is provided for foreign records in criminal cases by 18 U.S.C. section 3505.

Right to Confrontation:

A Justice Department representative suggested that the Committee Note to the proposed amendment to Evidence Rule 902 include a statement that the admission of business records through certification of a qualified witness does not violate a criminal defendant's right to confrontation. Most Committee members thought it unwise, however, to opine about constitutional issues in a Committee Note. The suggestion was therefore rejected.

Tracking Section 3505

18 U.S.C. 3505 provides that foreign business records can be admitted in criminal cases by way of certification of a qualified witness. The proposed amendment to Rule 902 seeks to apply the principles of section 3505 to all domestic business records, and to foreign business records in civil cases. The proposed amendment is not a carbon copy of section 3505, however. For example, section 3505 contains a provision that an objection to the record must be entered before trial, or it is deemed waived. It also provides that the court's ruling on a motion to exclude the record must be made before trial. There are no similar procedural provisions in the proposed amendment to Evidence Rule 902.

A Justice Department representative argued that because the language section 3505 differed from that of the proposed amendment, the proposed Rule 902(12) should be expanded to criminal cases. This would in effect provide the government two means of qualifying foreign business records in criminal cases--section 3505 and Rule 902(12). Committee members generally opposed this suggestion, expressing concern that it would result in much confusion. Nor did the Committee find any reason to replicate section 3505 word for word in the Evidence Rules. Section 3505 contains intricate procedural provisions, the type of which are not generally found in the Evidence Rules. The suggestion from the Justice Department representative failed for want of a motion.

Records Admissible Under Rule 803(6)

One public comment suggested that the reference in the proposed amendment to records admissible under Rule 803(6) would create a problematic circularity. The argument was that a record is only admissible under Rule 803(6) if a qualified witness authenticates the record at trial, or if the record is certified in accordance with Rule 902. But since the proposed amendment to Rule 902 refers back to admissibility under Rule 803(6), the public commentator envisioned an endless cycle of inadmissibility. The Committee concluded that this concern could be remedied by revising the text of the proposal slightly to refer to a "record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by a written declaration of its custodian or other qualified person . . ." Committee members expressed the opinion that it was important to refer to Rule 803(6) in the proposed amendment to Rule 902--such a reference was necessary to provide a connection between the two rules. The Committee voted unanimously to modify the language of the text of Rules 902(11) and (12) to refer to records "that would be admissible under Rule 803(6) if accompanied by a written declaration of its custodian or other qualified person".

Record Made by a Regularly Conducted Activity

One public comment suggests that the reference in the proposed amendment to records "made by the regularly conducted activity as a regular practice" is awkward, because, it is asserted, an activity cannot make a record. The Committee considered this criticism and determined that the chosen language was appropriate--it tracked the terms of Rule 803(6) and 18 U.S,C. 3505, both of which refer to records made by an activity.

Explication of Certification Standards

A public comment suggested that the text of the proposed amendment be amended to refer to rules and statutes governing the methods of proper certification. The Committee noted that Rule 902(4), governing authentication of public records, contains language providing for

certification “in a manner complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority”. The Committee unanimously agreed that it would be appropriate and helpful to add identical language to Rule 902(11). Similar language could not be added to Rule 902(12), however, since that provision governs foreign business records, and certification of those records could not be expected to follow a manner complying with domestic law. The Committee also agreed, in accordance with a tentative decision reached at the October meeting, to amend the Committee Note to provide a reference to 28 U.S.C. §1746, the most important statutory provision governing affirmations under oath. The language added to the text and Committee Note can be found in the appendix to these minutes.

Notice Provision

The Committee determined, in response to a suggestion in a public comment, that it would be useful to specify that the proponent must make both the underlying record and the signed declaration available in advance of trial. The Committee also affirmed a tentative decision reached at the October meeting--that the text of the Rule specify that the opponent should have sufficient time to challenge the declaration of the custodian or other qualified witness. These changes were agreed to by unanimous vote.

Some public commentators suggested that the notice provisions should be amended to provide more procedural detail. But the Committee unanimously concluded that such an approach would be inconsistent with the notice provisions found in other Evidence Rules, which are mostly cast in general terms.

Style Subcommittee

The Style Subcommitee of the Standing Committee made a number of suggestions for restylizing the proposed amendment to Rule 902. Some of the suggestions were mooted because they were made with respect to proposed revisions that were not adopted. The Evidence Rules Committee unanimously agreed to all of the other suggestions except one--the suggestion for restylizing the phrase “in a manner complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority” was not adopted because the existing phrase is drawn verbatim from other Evidence Rules, and the Committee believed it appropriate to use consistent terminology throughout the Evidence Rules.

Recommendation:

A motion was made and seconded to recommend to the Standing Committee that the proposed amendment to Evidence Rule 902, as modified following publication, be approved and forwarded to the Judicial Conference. The motion was passed by a unanimous vote.

A copy of the proposed amendment to Rule 902, and the proposed Committee Note to Rule 902, is attached to these minutes.

Privileges

At the October meeting, the Chair appointed a Subcommittee to conduct a preliminary investigation into whether it would be advisable for the Evidence Rules Committee to begin a project that might propose a codification of the law of privileges. The Subcommittee reported at the meeting, and unanimously recommended that the Committee should begin a long-term project to attempt to draft proposed rules that would codify the federal law of privileges. The Subcommittee noted that there are many questions on which the courts are divided, both as to the extent of well-accepted privileges and the existence of newer privileges. The Subcommittee also noted that Congress has expressed an interest in codifying privileges on a case-by-case basis, and asserted that if Congress was determined to tinker with privilege law, it would be better to conduct a more wide-ranging review through the rulemaking process. Finally, the Subcommittee noted that the lack of a codified privilege law created a major gap in the Evidence Rules--a gap that should be closed at some point.

The Committee unanimously agreed that an investigation of the privileges would be a useful project even if the Committee never reached the stage of formally proposing codified rules. In light of this general agreement, the Chair appointed a subcommittee to begin an investigation into codification of the privileges. It was suggested that the Subcommittee begin by reviewing the proposed codification of the original Advisory Committee on Evidence Rules. The Subcommittee consists of Laird Kirkpatrick, David Maring, and the Reporter. Ken Broun will act as a consultant to the Subcommittee. The Committee was in general agreement that this would be a long-term project.

Technology

Judge Turner, who is the Evidence Rules Committee's representative on the Technology Subcommittee of the Standing Committee, reported on developments in the Standing Committee's technology project. The current focus is on promulgation of rules that will permit electronic filing with consent of the parties. The Technology Subcommittee has held a meeting with a number of judges and lawyers involved in pilot electronic filing projects, and has fashioned a proposed amendment to the Civil Rules that would permit electronic filing with consent of the parties. No changes to the Evidence Rules are contemplated, at least in the immediate future, though the Evidence Rules Committee will continue to monitor technological developments in the presentation of evidence..

Uniform Rules

Professor Whinery, the Reporter for the Uniform Rules of Evidence Drafting Committee, reported on developments in the Uniform Rules project. The Drafting Committee is revising the working draft after its first reading before the Uniform Laws Commissioners. The Uniform Rules Committee has generally followed the Federal Rules of Evidence, but Professor Whinery noted that there are some marked differences. For example, Proposed Uniform Rule 702 establishes a presumption of admissibility for expert testimony that passes the *Frye* test, and a presumption of inadmissibility for expert testimony that does not. Then the Rule provides a number of factors that would be relevant to overcoming the presumption one way or another. Also, the Uniform Rules have been amended throughout to update language that might not accommodate the presentation of evidence in electronic form.

New Business

The Chair noted that this April meeting has completed a cycle of the Committee--the end of a three-year-long project to propose a package of amendments to the Evidence Rules, most importantly the rules governing expert testimony. The Committee, after discussion, agreed that barring unforeseen developments (such as Congressional activity), there is no need to propose any amendments to the Evidence Rules in the near future.

Next Meeting

The next meeting of the Evidence Rules Committee is scheduled for October 25th and 26th in Washington, D.C.

The meeting was adjourned at 11:45 a.m., Tuesday, April 13th

Respectfully submitted,

Daniel J. Capra
Reed Professor of Law