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ADVISORY COMMITTEE ON EVIDENCE RULES

Minutes of the Meeting of May 6 - 7, 1993

Washington, D.C.

The first meeting of the Advisory Committee on the Federal Rules of Evidence was held on May 6, 1993 in the Thurgood Marshall Judiciary Building in Washington, D.C. The following members were present:

Circuit Judge Ralph K. Winter, Jr., Chairman
Circuit Judge Jerry E. Smith
District Judge Fern M. Smith
District Judge Milton I. Shadur
Federal Claims Judge James T. Turner
Chief Justice Harold G. Clarke
Professor Kenneth S. Broun
Gregory P. Joseph, Esq.
John M. Kobayashi, Esq.
James K. Robinson, Esq.
Magistrate Judge Wayne D. Brazil
Professor Stephen A. Saltzburg
Roger Pauley, Esq.
Professor Margaret A. Berger, Reporter

The following persons also attended all or a part of the meeting:

District Judge Robert Keeton, Chairman, Committee on Rules of Practice and Procedure
Peter McCabe, Secretary, Committee on Rules of Practice and Procedure
John Rabiej, Chief, Rules Committee Support Office, Administrative Office of the U.S. Courts
Judith W. Krivit, Rules Committee Support Office, Administrative Office of the U.S. Courts

The following summary of matters discussed at the meeting should be read in conjunction with the various memoranda and other written materials referred to, all of which are on file in the office of the Secretary to the Committee on Rules of Practice and Procedure. References to the Standing Committee are to the Committee on Rules of Practice and Procedure. References to the Civil Rules are to the Federal Rules of Civil Procedure. References to the Criminal Rules are to the Federal Rules of Criminal Procedure. References to the Evidence Rules are to the Federal Rules of Evidence.

Civil Rule 43

Magistrate Judge Wayne Brazil, liaison to the Civil Rules Committee informed the Committee that the Civil Rules Committee had withdrawn a proposal to amend Rule 43 that would allow a judge to direct parties to submit direct testimony in writing even if the parties objected. Magistrate Judge Brazil stated that the withdrawal of the proposal was in no way intended to suggest that judges lack inherent power to require the submission of direct testimony, particularly with regard to foundational or non-controversial matters. A proposal amending Rule 43 to permit witnesses to testify from remote locations by electronic transmission was submitted to the Standing Committee with the request that it be published for public comment.

Public Hearing on Rule 412

Judge Winter advised the Committee that the discussion of Rule 412 had to be concluded before the Standing Committee meeting on June 16-17. Legislation to amend Rule 412 is pending in Congress, and it is the custom of Rules Committees to consider matters in which Congress is interested. The Committee then heard testimony from four witnesses on Rule 412, all of whom had been provided with the materials on Rule 412 that had been distributed to the Committee.

Association of the Bar

The first witness was Mr. Michael Chepiga of Simpson, Thatcher & Bartlett testifying on behalf of the Federal Courts Committee of the Association of the Bar of the City of New York. He amplified his written remarks primarily with regard to three points:

A. The commentary needs to emphasize more that Rule 412 is limited to victims even though privacy concerns apply to everyone, and explain why victims need special protection.

B. The commentary should discuss the interrelationship between Rule 412 and discovery. The rule should not be read to preclude discovery; the victim will, however, presumptively be entitled to a protective order ensuring confidentiality.

C. Unlike all others commenting on the proposed amendment to Rule 412, the Federal Courts Committee endorsed an "essential issue" test for civil cases rather than the proposed alternative balancing test for four reasons:

1. The emphasis on "essential issue" makes the test more specific and therefore more in line with the criminal exceptions;

2. It provides for a higher level of scrutiny than present law by focusing on claim or defense rather than merely relevancy;

3. The test is better focused than the balancing test because it focuses on the issues being litigated;

4. In sexual harassment cases, evidence law should not interfere with development of substantive law. The Federal Courts Committee thinks that the first alternative better achieves this, and believes that harassment cases should not be covered by the consent exception.

In summary, Mr. Chepiga approved of the amendment as a good proposal that is more user friendly.

Women's Legal Defense Fund

Helen Norton stated that the proposed amendments are an important step in strengthening protections. In response to a question, she stated that the rule is limited to victims, not parties and not every witness. Pattern witnesses should be included.

Ms. Norton would like the Note to state that sexual harassment is covered. The rule should bar all opinion and reputation evidence as does the present rule. She agreed, however, after a discussion of hypotheticals, that if reputation is an essential element of the plaintiff's claim for damages then the rule should make clear that reputation evidence is admissible. She urged retention of the balancing test for civil cases, because it is familiar and ratchets up protection with the word "substantial." She would, however, prefer to broaden the consent exception in (b)(2) to include "unwelcomeness" issues in sexual harassment cases. As a fall back position she would cover these cases under the second alternative balancing test. The Fund also supports the NOW proposal that the rule should state that evidence may not be offered to prove propensity.

American College of Trial Lawyers (ACTL)

Michael A. Cooper of Sullivan & Cromwell appeared as Chair of ACTL's Federal Rules of Evidence Committee. Mr. Cooper stated that it is distinctly preferable to amend Rule 412 by rule-making rather than by Congress. The ACTL Committee considers it good sense to extend Rule 412 to all criminal cases, but has some reservations about extending the rule to all civil cases, particularly employment discrimination cases under Title VII. The ACTL Committee is unaware of any empirical evidence that indicates that courts are failing to exclude evidence of a victim's past sexual conduct in civil cases pursuant to their

broad powers under Rule 403. The Committee's discomfort is heightened by the absence of a definition of "past sexual behavior" in the rule or accompanying note. It is unclear whether the consent exception would be interpreted harmoniously with court interpretations of "unwelcomeness" pursuant to Title VII law. The ACTL Committee agrees that unwelcomeness should be handled under (b)(4) and not pursuant to the (b)(2) consent exception.

The Committee is in favor of the balancing test set forth in the second formulation as speaking in familiar evidentiary terms. The first alternative would require considerable interpretation. However, the Committee wants "substantially" deleted as tipping the scales too far. Even without the word "substantially" the formulation upsets the existing Rule 403 balance too much. Furthermore, the alternative formulation (by placing the burden on the proponent to demonstrate admissibility) is inconsistent with the Supreme Court's Meritor decision. Language in subdivision (c) is much better than under the present rule for criminal cases but the ACTL Committee does not think these procedures must be applied in all civil cases. The issue has probably been dealt with in the pretrial order and a motion would unnecessarily burden the court.

Judge Winter pointed out that Rule 403 does not cover harm to the privacy interests of the victim whereas Rule 412 does and that one cannot therefore get the same result by applying Rule 403.

NOW Legal Defense & Education Fund

Danielle Ben-Jehuda limited her testimony to issues in rape trials. The Fund endorses a broad definition of "past sexual behavior" and approves of proposed language in the Note. She expressed a reservation about language in subdivision (b)(4) that might allow some evidence in civil rape cases. The Fund is concerned because anecdotal evidence suggests that more women are pursuing a civil route. She would prefer retaining present language that bars all reputation and opinion evidence even in civil cases, although she agreed that evidence should be admissible when reputation is in issue.

She believes that "predisposition" means "propensity" and that "propensity" evidence should never be admitted, and that the rule should so state. She would like constitutional exception to contain guidelines. In the absence of guidelines, the provision is a tautology -- constitutionally required evidence is of course admissible. She wishes to include in this guideline evidence of past sexual behavior with someone other than defendant if needed to show bias to this defendant or motive to lie. She suggested the need to differentiate between treatment of predisposition in

sexual assault cases (in which such evidence should always be barred) and sexual harassment cases.

The Fund endorses the present burden of proof in subdivision (c). The Fund also wishes specific mention of taking into account that no less damaging evidence is available to make the same point. The Fund is in favor of the interlocutory appeal provision in the pending Senate bill.

Evidence Committee's Discussion of Rule 412

Need to Republish Rule. In answer to a question, Judge Winter stated that the rule would not be republished unless the Committee came up with something materially different than the version that had been circulated. The problem is that although the Evidence Committee did not draft the Rule, and had not previously met, republication would extend the amendment process by another year and a half. Congress is very interested in the rule and might amend the rule in the interim.

Subdivision (a)

Definition of Prohibited Evidence. It was suggested that "predisposition" be replaced with evidence offered to show a claimed or asserted propensity to engage in sexual behavior on the part of an alleged victim. Two major problems emerged: 1) if the definition of sexual behavior was enlarged, the scope of the exceptions would correspondingly be enlarged, and 2) the definitions had to make sense in criminal as well as in civil cases. Judge Winter explained that the rules assumed generally that what was admissible in a criminal case would be admissible in a civil case. The Reporter explained that she had tried to set up two different categories: sexual behavior involves actual sexual activity whereas predisposition describes evidence that is being offered for a sexual innuendo. The Reporter explained that she had rejected "propensity" in favor of "predisposition" because "propensity" was misleading as it would suggest that if there was a non-propensity inference for which evidence could be used then lifestyle, etc. evidence would be admissible.

This discussion led to a reconsideration and acceptance of the word "predisposition." The Committee also discussed whether this formulation endorses the view that a victim's dress, lifestyle, and other kinds of activities imply a sexual predisposition. It was suggested that the words "offered to prove" be inserted after "evidence" to deal with this problem. The Committee agreed that the Note must state clearly that sexual predisposition evidence is a type of evidence relating to sexual innuendo that is excluded regardless of whether it is being used for a propensity inference.

Substitution of "Other" for "Past". The Committee discussed ways in which to capture the notion that it did not want the general bar to exclude evidence of sexual conduct of the alleged victim at the time or times of the alleged sexual misconduct. The Committee considered whether this should be done by rule or by exception. The Committee feared that the prosecutor would be barred from presenting evidence relating to the alleged sexual misconduct. The Committee considered "in connection", "in association" "inextricably intertwined." Judge Winter stated that he thought "other sexual behavior" coupled with an explanation in the Note would be much less confusing and more understandable.

Who is Covered by the Rule? The Committee discussed at length whether Rule 412 is intended to bar the sexual history of someone who in the context of the case is a victim, including a pattern witness, or whether it also applies to a witness in a case not involving sexual misconduct. An example of a person in the second category is the eye-witness to a bank robbery whom defendant is seeking to impeach. Defendant wants to show that this witness has delusions through psychiatric records which would show that some of these delusions are sexual in nature. The Committee agreed that while the rule applies to victims who are not necessarily parties, Rule 412 does not apply to the witness who is not a victim of sexual misconduct. Rule 401, 403, 404 and the credibility rules take care of a witness in a case not involving sexual misconduct.

It was decided that the plain-meaning of Rule 412 should differentiate between the victim who is covered and the witness who is not. This was accomplished by limiting the proceedings in which the rule is applicable to "any civil or criminal proceeding involving alleged sexual misconduct" and by inserting the word "any" before "alleged victim" to ensure that pattern witnesses are covered.

Subdivision (b)(1)

Type of Evidence Admissible. The Committee agreed that allowing specific instances testimony with regard to the first two exceptions for criminal cases was not inconsistent with Rule 405(b) which allows specific instances testimony when a trait of character is an essential element of a claim or defense. With regard to the constitutional exception, it was agreed that the limitation to specific acts should be dropped. When constitutionally required, no limitations should be placed on the type of evidence available or methods of proof. The Committee agreed that although the constitutional exception is perhaps intellectually redundant, it is too late to change the formulation. Furthermore Mr. Pauley suggested that the constitutional exception formulation is a useful, political type of statement to make in these kinds of cases.

"The" Victim. Subdivisions (A) and (B) speak of "the" alleged victim rather than "any" victim because it is evidence of the behavior of the victim in connection with whom the defendant has been charged that is covered by the exception.

The (b)(1)(A) Exception. The Committee discussed the hypothetical of the child abuse case where the prosecution offers evidence of the child's ruptured hymen. The Reporter pointed out that under the old rule some courts found that there had been no "injury" and would not allow the defense to offer evidence that the child had been having sex with someone else. Since the exception now reads "physical evidence" it makes this evidence relevant. Professor Saltzburg stated that admissibility should depend on the evidence the prosecution has introduced. The Committee also agreed that the exception is subject to Rule 403 since all of this evidence is admissible only if it is otherwise admissible under the rules.

Should the (b)(1)(B) Consent Exception Apply to Civil Cases? The Committee discussed at length whether the consent provision should be expanded to deal with the "welcomeness" issue in civil sexual harassment cases. Members of the Committee expressed fears that handling welcomeness evidence pursuant to the consent exception would open the door to admission of all evidence arguably relevant to welcomeness, whereas treating the issue pursuant to a catch-all exception would allow more balancing of the factors relevant to admissibility. The Committee concluded that criminal and civil cases had to be handled separately.

Criminal Exceptions Should Not Be Handled Pursuant to a Balancing Test. The Committee considered the desirability of a balancing test for criminal cases because the specific exceptions might prove inadequate to handle as yet unforeseen contingencies. According to Professor Broun, however, one needs a broad provision in civil cases because they are unpredictable whereas one can predict far better the kinds of criminal cases that come up. He was concerned that in light of Rule 412's history a balancing test would be read as an invitation to allow in evidence that was previously excluded. Judge Winter expressed concern lest the lack of a general rule result in barring evidence with regard to crimes that we have not thought of.

In answer to a question about whether the balancing test presently in subdivision (c)(3) had ever been criticized on due process grounds, the Reporter pointed out that the constitutional exception had always worked as a safety valve.

Professor Saltzburg explained that when the Criminal Rules Committee first drafted Rule 412, there were more defense lawyers on the committee than prosecutors and the defense bar never objected to the rule. The defense bar did not think a balancing test was needed because it agreed that such a test would open the

door too widely. They were willing to say that if a new problem or statute came along then one might have to revisit the rule. With regard to civil cases, everybody realized that so many different possibilities exist that a balancing test is needed.

Judge Keeton observed that the proceeding discussion led him to conclude that criminal cases should be treated separately because it is important not to do more than appropriate. A balancing test for criminal cases would be dangerous because it would be perceived as changing the import of the rule. He, therefore, suggested keeping the three separate exceptions for criminal cases in subdivision (b), after a general rule for criminal and civil cases in subdivision (a). He explained that this revision would retain the elements of the draft that were acceptable to the whole Committee in the criminal area and would accommodate the concerns that had been expressed. The Committee also agreed that the additional balancing test now specified in Rule 412(c)(3) was not needed in light of the narrowness of the (b)(1) exceptions and the applicability of Rule 403.

Rule 104(b) Standard Applies to Preliminary Questions. The Committee was also persuaded that it was appropriate to eliminate the judge's theoretical ability presently afforded by subdivision (c)(3) to exclude the accused's entire line of defense if the judge does not believe the defense's evidence. Professor Saltzburg reported that members of the defense bar on the Criminal Committee and the Justice Department had no objection to eliminating the substance of the last sentence in subdivision (c)(2) of the present rule.

Subdivision (b)(2)

The Reporter reminded the Committee that all persons commenting on the proposed amendment to Rule 412 except the Association of the Bar of the City of New York had recommended a balancing test rather than an "essential element" test, and that the majority feared that an "essential element" test would mean that materiality alone would open the door to any relevant evidence.

The Committee agreed to allow proof of reputation if the victim had placed her reputation in issue. The Reporter inquired whether this formulation was broad enough to allow a defendant to bring in evidence that plaintiff had not been damaged to the extent alleged because her reputation had already been damaged before the events giving rise to the lawsuit. Mr. Joseph suggested that the commentary could make the point that there need not be a direct allegation of reputation in the pleadings. Mr. Joseph remarked that such a provision would be analogous to the Civil Rule 35 provision with regard to placing bodily condition in controversy.

The Committee debated whether to use the Rule 405 formulation about "testimony in the form of" since that Rule currently applies, or to improve the rule by dealing better with the issue in Rule 412. If a letter were offered to prove reputation pursuant to Rule 412 could one object that Rule 412 requires evidence to be otherwise admissible? The Committee decided that this was an interim issue and to use the word "evidence" in the last sentence of (2).

The Committee agreed that a simple Rule 403 test was inadequate because harm to the victim had to be considered. The word "danger" was added to the balancing test to provide a closer parallel to Rule 403.

Subdivision (c)

Same Rule for Criminal and Civil Cases. Although the Committee was concerned about causing work for judges by creating too much inflexibility in civil cases, Judge Fern Smith proposed that the rule should be the same in civil and criminal cases since the central consideration is protection of the victim and not the convenience of the court. Although in civil cases a matter may often be brought to the court's attention other than by motion, a motion is more formal, delivers more political muscle, and is easier to put under seal. Mr. Joseph explained that requiring the motion late in the proceeding makes it less likely that the motion will have to be considered as the case may settle. Furthermore, the provision adopted by the Committee leaves a court free to mandate a different time frame, which may be appropriate in a civil case. Judge Winter asked whether substituting "for good cause shown" for language in the current rule would suggest that a change was being made in the meaning of the rule. The Committee agreed that the "good cause" formulation could pick up the details previously specified and that the commentary should so indicate.

Requirements re Motion. Judge Keeton suggested that the rule provide for filing the written motion at least 14, rather than 15 days, before trial so that the motion date will not fall on a weekend. The Committee debated the advisability of adding a provision requiring the judge to rule on the motion by a particular time, but decided that such a provision was unnecessary and impracticable.

The Committee chose language requiring a motion "specifically describing" the evidence and purpose to take care of the situation in which a party is not completely sure what evidence will be available, but to prevent hearings whenever a proponent hopes to have something to offer.

Notice. The Committee agreed that the most important aspect of subdivision (c) was providing notice and specifying the preclusive effect were notice not given. On the issue of who gets notice, the Committee recognized that the victim may have different interests than the parties. It was decided, therefore, that the victim should be informed of a right to attend, but that the victim would not be under a compulsion to attend. There is no requirement that the victim has to be heard.

Hearing. A hearing is required only if the court might allow in evidence barred by the general rule in subdivision (a). If the judge excludes the evidence, a hearing need not be held. The Committee decided that any hearing would have to be in camera and that the word "must" should be used to convey this thought. The hearing may not be ex parte. All the papers and record must be under seal from the beginning and must remain under seal.

It was agreed that the victim must have the right to attend and an opportunity to be heard. Subdivision (c) refers to "the" victim rather than "any" victim to indicate that evidence regarding each victim must be considered separately. No victim may be present at the hearing except the victim as to whom the hearing is being held.

The Committee discussed ways to make the hearing procedure less intimidating to the victim. It feared that at times summoning the victim to the hearing might itself be a form of intimidation. Professor Saltzburg pointed out that confrontation concerns might be present in a criminal case that would require the judge to conduct a more extensive hearing than would be necessary in a civil case.

The right to have a hearing does not mean that there always has to be an evidentiary hearing. The fact that parties have the opportunity and right to be heard does not mean that the judge does not have discretion to limit cross-examination. Judge Keeton pointed out that Rule 43 of the FRCP permits a hearing on papers.

It was suggested that the Note should state that a protective order would be presumptively appropriate in civil cases because of the constriction on admissibility mandated by Rule 412.

Title of the Rule

The Committee discussed how the title of the rule should read. It took out "past" because the rule no longer refers to past behavior. It took out "sexual proceedings" because of kidnapping cases, and took out "relevancy" because of policy determination to exclude evidence of sexual predisposition.

Next Meeting

The Committee agreed that the next meeting of the Evidence Committee would be held September 30 - October 2, 1993 in New Orleans at the 5th Circuit's facilities.

Judge Winter asked each member of the Committee to correspond with the Reporter and himself about an agenda for subsequent meetings, and to suggest priorities for what is to be considered. Judge Winter made a number of suggestions as to what might be considered by the Committee: evidentiary issues as to which there are conflicts among the circuits; questions raised in Judge Becker's recent article in the Case Western Law Review and in the ABA's Emerging Problems publication. He also recommended consideration of whether the Committee has the power to update the commentary -- and whether it would be prudent to exercise this power if it exists -- and whether evidentiary rules for sentencing hearings are within our powers to prescribe. He also pointed out the obvious gaps in the impeachment rules. The possibility of drafting rules on specific privileges was also mentioned.

Magistrate Judge Brazil suggested that the Committee watch what the Supreme Court does in the Daubert cases. If the Committee thinks different standards should apply, it may wish to rewrite Rule 702.

Judge Winter asked that any comments on the Note to Rule 412, which would be circulated after the meeting, be sent to all members of the Committee.

Respectfully submitted,

Margaret A. Berger
Reporter