COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

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

FROM: **Jerry E. Smith, Chair**
Advisory Committee on Evidence Rules

DATE: **December 5, 2002**

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

I. Introduction

The Advisory Committee on Evidence Rules (the "Committee") met on October 18, 2002, in Seattle, Washington. It worked on and reviewed a number of possible long-term projects, but it is not proposing any action items for the Standing Committee at its January 2003 meeting. The proposed amendment to Evidence Rule 804(b)(3) is still in the public comment period, so no action is required on that proposal at this time. At its Spring 2003 meeting, the Committee will consider the comments received on the proposed amendment to Rule 804(b)(3) and will determine how and whether to proceed with the proposal.

Part III of this Report provides a summary of the Committee's long-term projects. A complete discussion can be found in the draft minutes of the October meeting, attached to this Report.

II. Action Items

No Action Items

III. Information Items

A. Long-Term Project on Possible Changes to Evidence Rules

The Committee has directed the Reporter to review scholarship, caselaw, and other sources of evidence law to determine whether there are any evidence rules that might be in need of amendment. At its April 2002 meeting, the Committee reviewed a number of potential changes and directed the Reporter to prepare a report on a number of different rules, so the Committee could take an in-depth look at whether those rules require amendment. The Committee's decision to investigate those rules is not intended to indicate that the Committee has agreed to propose any amendments. Rather, the Committee determined that with respect to those rules, a more extensive investigation and consideration is warranted.

At its October 2002 meeting, the Committee began to consider the Reporter's memoranda on some of the rules that have been found worthy of in-depth consideration. The Committee agreed that the problematic rules should be considered over the course of four Committee meetings and that if any Rules are found in need of amendment, the amendment proposals would be delayed in order to package them as a single set of amendments to the Evidence Rules. This would mean that the package of amendments, if any, would go to the Standing Committee at its June 2004 meeting, with a recommendation that the proposals (again, if any) be released for public comment.

The Committee considered reports on a number of possibly problematic evidence rules at its Fall 2002 meeting. The goal of the Committee was not to vote definitively on whether to propose an amendment to any of those Rules, but rather to determine whether to proceed further with the rules as part of a possible package of amendments. Thus, a "no" vote from the Committee meant rejection of any proposed amendment. A "yes" vote meant only that the Committee was interested in further inquiry into a possible amendment and might consider possible language for an amendment at a later date.

The Committee voted to reject the following proposals:

1. *Rule 106:* Commentators have suggested that Rule 106, the rule of completeness, should be expanded to cover oral as well as written statements. But the Committee determined that such a change would be unnecessarily disruptive to the order of proof at a trial.

2. *Rule 412*: The rule has certain stylistic and technical anomalies, and it has been suggested that the rule be amended to correct those anomalies. But the Committee determined that those tech-

nical matters have not created any practical problems in the application of the rule, so the costs of an amendment are not justified. The Committee also rejected a proposed amendment that would have clarified whether false claims of rape were covered by the Rule 412 exclusionary rule. The question of the admissibility of false claims has not arisen with sufficient frequency to justify the costs of an amendment.

3. *Rule 803(4)*: The Committee considered and rejected a proposal that would have excluded from this hearsay exception (covering statements to medical personnel) those statements made solely for purposes of litigation. The Committee determined, among other things, that it would be too difficult to distinguish between statements made solely for purposes of litigation and statements made for purposes of both treatment and litigation. The Committee also concluded that, to the extent the amendment would be intended to exclude statements made by victims of child abuse to medical personnel for purposes of litigation, this is an enormously complicated question that is better left to caselaw development.

4. *Rule 804(a)(5)*. The rule establishes a "deposition preference" for hearsay exceptions premised on unavailability. Occasionally, this preference has led to anomalous results—hearsay statements otherwise admissible as declarations against interest under Rule 804(b)(3) have been excluded when the declarant has given a deposition on the subject, and the asserted ground of unavailability is absence. The Committee determined that although the rule has created problems and anomalous results from time to time, those cases are relatively infrequent. The problems were not found to be so serious or prevalent as to justify the costs of an amendment.

5. *Rule 804(b)(1)*. The rule provides that in a civil case, prior testimony may be admitted against a party who had a similar motive to develop the testimony at the time it was given, or whose "predecessor in interest" had such a motive. The courts have divided over whether the term "predecessor in interest" is broad enough to cover parties in a prior litigation with no legal relationship to the party against whom the testimony is now offered, but whose development of that testimony was as effective as the current party could have done. The Committee determined that it was not necessary to propose an amendment to the rule, because any dispute among the courts over the scope of the rule is one of form rather than substance. Courts that have refused to interpret "predecessor in interest" expansively nonetheless admit prior testimony under the residual exception where the party who initially cross-examined the declarant was as effective as the current party could have been.

6. *Rule 807*. It has been suggested that the residual exception to the hearsay rule should be modified to clarify both the breadth of the exception and the notice requirement of the Rule. The Committee determined that the breadth of the residual exception presented a policy question that most courts had already worked through—therefore an amendment on this ground was unjustified. As to notice, the Committee noted that courts have applied the notice requirement flexibly even

though the language of Rule 807 does not seem to permit excuses for late notice or the failure to notify. The Committee determined that it might be useful to change the language of the text to codify the result already reached by the courts, but the benefits of such codification would be outweighed by the costs of an amendment. Those costs including the risk of upsetting settled expectations and the risk that the amendment will be misinterpreted as broader than intended.

7. *Rule 902(1).* This rule contains a possible stylistic anomaly, because it provides for self-authentication of domestic public records of the Canal Zone. Because there is no longer a Canal Zone, it has been suggested that the rule be amended to delete the reference. The Committee decided not to proceed with an amendment to the rule, however, because such an amendment would be the kind of stylistic, non-substantive change that the Committee has decided, as a matter of policy, is insufficient to justify, on its own, the substantial costs of amending an evidence rule.

The Committee also rejected, at least tentatively, a proposal to provide for self-authentication of public documents without the necessity of affixing a seal. The former Justice Department representative on the Committee had suggested that the Rule should be amended, because many state officials who certify documents no longer use a seal; but to this date, the Department has made no showing that the sealing requirement has created a problem in practice. The Committee invited the DOJ representative to look into the matter to determine whether DOJ lawyers were in fact having a substantial problem in complying with the sealing requirement. Any further consideration of an amendment to Rule 902(2) was tabled pending a report from the DOJ representative.

Finally, the Committee rejected a proposal to amend Rule 902(6) to permit self-authentication of internet materials that serve the same function as printed newspapers or periodicals. The Committee reasoned that a party can authenticate internet materials by making the necessary showing of authenticity under Rule 901. The benefits of permitting self-authentication in this single area were found to be outweighed by the cost of amendment. Moreover, Committee members expressed concern that there might be legitimate questions concerning the authenticity of material taken from the internet, as distinguished from printed newspapers that are obviously likely to be authentic.

8. *Rule 1006.* The Committee observed that there has been some confusion in distinguishing between summaries admissible under Rule 1006 and summaries of evidence already admitted at trial. Summaries of evidence admitted at trial are demonstrative or pedagogical devices that are not governed by Rule 1006. It has been argued that Rule 1006 should be amended to clarify that it does not apply to summaries of evidence admitted at trial. But the Committee decided not to proceed with an amendment to Rule 1006, because it concluded that any confusion among litigants as to the scope of the Rule has been handled adequately by the courts and has not created a problem that affected any result in the reported cases. Thus, any problem is one of form rather than substance and does not justify the substantial costs of an amendment to an evidence rule.

The Evidence Rules Committee voted to give further consideration to the following proposals:

1. *Rule 106*: The Committee agreed to further consider a proposal to provide that evidence necessary to complete a misleading written statement could be admissible even if it is hearsay. The Committee instructed the Reporter to determine whether the apparent conflict in the circuits about the use of Rule 106 has actually led to a difference in result in the cases.

2. *Rule 404(a)*: The Committee resolved to inquire further into whether an amendment is necessary to clarify that evidence of character is never admissible to prove a person's conduct in a civil case. The text of Rule 404(a) seems to prohibit the circumstantial use of character evidence in a civil case, and yet two circuits have held that such evidence is admissible when a defendant is charged by the plaintiff with what amounts to criminal activity.

3. *Rule 408:* The Committee agreed to investigate whether an amendment to Rule 408, which limits the admissibility of evidence of settlement and compromise, is necessary. Currently there is substantial dispute over three important questions: a) whether evidence of a civil compromise is admissible in subsequent criminal litigation; b) whether statements made during settlement negotiations can be admitted to impeach a party for prior inconsistent statement; and c) whether an offer to settle can be admitted in favor of the party who made the offer. The Reporter's memorandum on Rule 408 indicated that there is direct conflict in the caselaw on all three of these questions; that the conflicts on each of these issues raise important policy questions about the need to encourage settlement and the intent of Rule 408; and that each of the problems derives from the fact that the current Rule 408 is (as is widely acknowledged) poorly drafted.

4. *Rule 410:* The Committee agreed to consider whether Rule 410—the rule that, among other things, limits the admissibility of statements and offers made during guilty plea negotiations—could be amended to cover the statements and offers of prosecutors as well as defendants and defense counsel. Currently the rule does not protect statements and offers of prosecutors from admissibility at trial. Some courts have relied on Rule 408 to provide such protection, but that rule plainly is applicable only to offers and settlements made in civil litigation. The Committee resolved, at least tentatively, that the policy of encouraging plea bargaining would be furthered by providing protection for the statements of all of the parties to a plea negotiation.

5. *Rule 806*: The Rule provides that if a hearsay statement is admitted under a hearsay exception or exemption, the opponent may impeach the hearsay declarant to the same extent as if the declarant were testifying in court. The courts are in dispute, however, about whether a hearsay declarant's character for truthfulness may be impeached with prior bad acts under Rule 806. The

Committee directed the Reporter to prepare a report on whether the conflict in the cases is significant enough to require an amendment to the rule.

6. *Rule 901:* Some commentators have argued that the use of digital photography poses special concerns for establishing and challenging authenticity and have suggested that Rule 901 should be amended to provide special rules for authenticating digital photography—such as requiring evidence of a digital "fingerprint." Committee members were skeptical that such a rule would be necessary, because the current Rule 901 probably is flexible enough to allow the judge to exercise discretion to assure that digital photographs are authentic and have not been altered. The Reporter noted, however, that it might be worthwhile for the Committee to allow the Reporter to conduct further research on the problem and to provide a background memorandum to the Committee, especially given the Standing Committee's interest in assuring that the rules are updated, where necessary, to accommodate technological changes. The Committee directed the reporter to prepare a background memorandum on the use of digital photographs as evidence, to be considered at a future meeting.

In addition, and as set forth in the Report to the Standing Committee in June 2002, the Committee has directed the Reporter to prepare memoranda on the following rules, to determine whether any changes to these rules are necessary:

Rule 606(b) (to consider whether statements by jurors should be admissible where the inquiry is to determine whether the jury made a clerical error in rendering the verdict).

Rule 607 (to consider whether the rule should be amended to prohibit a party from calling a witness solely to impeach that witness with otherwise inadmissible information).

Rule 609 (to consider whether to adopt the Uniform Rules definition of a conviction involving dishonesty or false statement).

Rule 613(b) (to consider whether to require a party to confront a witness with a prior inconsistent statement before it can be admitted for impeachment).

Rule 704(b) (to consider whether the rule should be amended to exclude only opinions of mental health experts).

Rule 706 (to consider certain stylistic suggestions and to determine whether to incorporate civil trial practice standards developed by the ABA).

Rule 801(d)(1)(B) (to consider whether the rule should be amended to provide that a prior consistent statement is admissible for its truth whenever it is admissible to rehabilitate the witness).

Rule 803(3) (to consider whether the rule should be amended to cover statements of the declarant's state of mind where offered to prove the conduct of someone other than the declarant).

Rule 803(4) (to consider whether statements made to medical personnel for purposes of litigation should continue to be admissible under the exception).

Rule 803(5) (to consider whether the hearsay exception should cover records prepared by someone other than the party with personal knowledge of the event).

Rule 803(6) (to consider whether the business records exception should be amended to require that statements recorded by a person without knowledge of the event must be shown to be reliable, either because of business duty or some other guaranty of trustworthiness.)

Rule 803(8) (to consider whether the language excluding law enforcement reports in criminal cases should be replaced by general language requiring that public reports are to be excluded if they are untrustworthy under the circumstances).

Rule 803(18) (to consider whether the "learned treatise" exception should be amended to provide for admissibility of "treatises" in electronic form).

I wish to emphasize that in regard to any rules or other items as to which the Committee has indicated possible interest, this should by no means be read as an indication that the Committee ultimately will propose, or has a substantial likelihood of proposing, an amendment. The Committee merely wishes to be thorough in its consideration of any potential problems in the existing rules, but the Committee continues to be wary of recommending changes that are not considered absolutely necessary to the proper administration of justice.

B. Privileges

The Committee's Subcommittee on Privileges has been working on a long-term project to prepare provisions that would state, in rule form, the federal common law of privileges. At its October 2002 meeting, the Committee once again considered what the proper goal and scope of the privilege project should be. The Committee resolved that it would not propose any privilege rules as amendments to the Federal Rules of Evidence. Privilege rules must be enacted by Congress

directly; and submitting a new set of privileges for congressional consideration could create far more problems than it would solve.

It should be noted, however, that, from time to time, Congress has proposed rules of privilege. Therefore the Committee believes that it needs to be prepared to comment on such proposals and that the work of the Privileges Subcommittee will be helpful in responding to such Congressional ventures. The Committee also believes that it would perform a valuable service to the bench and bar by giving guidance on what the federal common law of privilege currently provides. This could be accomplished by a publication outside the rulemaking process, such as has been done previously with respect to outdated Advisory Committee Notes and caselaw divergence from the Federal Rules of Evidence.

The Committee therefore has resolved to continue with the privileges project and has determined that the goal of the project will be to provide, in the form of a draft rule and commentary, a "survey" of the existing federal common law of privilege. Any end-product will be intended as a descriptive, non-evaluative presentation of the existing federal law. It will not be a "best principles" attempt to write how the rules of privilege "ought" to look. Rather, any survey would be intended to help courts and lawyers determine what the federal law of privilege actually is.

The Committee has directed the Subcommittee on Privileges to prepare a draft of one of the privileges as an example for the Committee to review. The Subcommittee has chosen the psychotherapist-patient privilege as an exemplar and will prepare a survey on that rule and the necessary commentary for the Committee's review at the Spring 2003 meeting.

IV. Minutes of the October 2002 Meeting

The Reporter's draft of the minutes of the Committee's October 2002 meeting is attached to this report. These minutes have not yet been approved by the Committee.

Attachment:

Draft minutes