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OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

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TO: **Honorable Alicemarie H. Stotler, Chair**
Standing Committee on Rules of Practice and Procedure

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

DATE: **May 1, 1997**

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

I. Introduction

The Advisory Committee on Evidence Rules met on April 14th and 15th in Washington, D.C. At the meeting, the Committee approved two items for action by the Standing Committee--proposed amendments to two Evidence Rules with the recommendation that they be published for public comment. The Committee discussed several other proposals for amending the Evidence Rules. Some of these were rejected, and the Committee agreed to consider others more fully at the next meeting. The discussion of these matters is summarized in Part III of this report, and is more fully set forth in the draft minutes of the April meeting, which are attached to this report.

II. Action Items

A. Rule 103(e). Motions *in limine*.

The proposed amendment to Rule 103 would add a new subdivision to govern *in limine* practice. Currently, the Evidence Rules do not address *in limine* practice, and this has resulted in some conflict in the courts and confusion in the practicing bar.

The Evidence Rules Committee previously proposed an amendment to Evidence Rule 103 that would have covered only the question of when and whether an *in limine* objection had to be renewed at trial to preserve error. This proposal was withdrawn, partly because the standards provided were somewhat difficult to apply. The new proposal sets forth clear-cut standards on the question of renewal, and is more comprehensive in its treatment of *in limine* practice than the earlier proposal. The proposed amendment is attached to this Report.

Recommendation: The Evidence Rules Committee recommends that the amendment to Evidence Rule 103 be published for public comment.

B. Rule 615. Sequestration of Witnesses.

Evidence Rule 615, which currently requires a court to exclude witnesses from the trial on motion of one of the parties, is in conflict with two subsequently enacted statutes designed to protect the rights of victims of crime. The Victim's Rights and Restitution Act provides that a victim-witness has the right to attend trial proceedings unless her testimony would be materially affected by the testimony at trial. The Victim Rights Clarification Act provides that a victim-witness's potential testimony at a sentencing proceeding cannot be the basis for exclusion from the trial. The proposed amendment to Evidence Rule 615 incorporates the relevant provisions of these two Acts. This amendment is, in the Committee's view, necessary to ensure that the Evidence Rules comport with these legislative enactments. The proposed amendment is attached to this Report.

Recommendation: The Evidence Rules Committee recommends that the amendment to Evidence Rule 615 be published for public comment.

III. Information Items

A. Correcting Advisory Committee Notes.

Several of the original Advisory Committee Notes to the Evidence Rules contain material inaccuracies. These inaccuracies are of two types. First, there are typographical errors in a few of the Notes, at least one of which arguably changes the sense of

the Note. The Note to Rule 104(b) states: "If after all the evidence on the issue is in, pro and con, the jury could reasonably conclude that fulfillment of the condition is *not* established, the issue is for them" (emphasis supplied). The Note would appear to make more sense if the "not" were taken out.

More importantly, the Advisory Committee Notes provide comment on the Advisory Committee draft of the Evidence Rules. Several of the Rules ultimately adopted by Congress differ markedly, however, from the Advisory Committee's version. For example, the Advisory Committee Note to Evidence Rule 804(b)(1) states that the Rule allows "substitution of one with the right and opportunity to develop the testimony with similar motive and interest." Yet Congress rejected the Advisory Committee's position, and added a "predecessor in interest" requirement to the Rule. Another example is the Advisory Committee's Note on Evidence Rule 301. Congress rejected the Advisory Committee's "burden-shifting" approach to presumptions in favor of the "bursting bubble" approach. The Committee Note states that the Rule provides for burden-shifting, and is critical of the "bursting bubble" approach ultimately adopted by Congress.

The Evidence Rules Committee is concerned that any discrepancy between a provision commented upon in the Advisory Committee Note, and the provision ultimately enacted, is a trap for the unwary.

The Reporter to the Evidence Rules Committee is preparing a list of statements in the original Advisory Committee Notes that are either wrong as written, or that comment on a draft that was materially changed by Congress. The Evidence Rules Committee is undecided on the best means of alerting lawyers and judges about these outmoded and/or inaccurate provisions. One option discussed at the April meeting is to submit a list of short editorial comments to all publishers of the Federal Rules of Evidence, requesting that these comments be included in the appropriate places. For example, after the language concerning substitution of parties in the Advisory Committee Note to Rule 804(b)(1), the following editorial comment could be included: "[This approach was rejected by Congress.]" The Evidence Rules Committee would appreciate the Standing Committee's view of this proposal.

B. Omnibus Crime Bill

The Omnibus Crime Bill of 1997 contains two proposed amendments to Evidence Rule 404: 1. Rule 404(a) would be amended to provide that a defendant who attacked the victim's pertinent character trait would open the door to an attack on his own pertinent character traits; and 2. Rule 404(b) would be amended to add "disposition toward another" to the list of permissible purposes for evidence of uncharged misconduct. The Evidence Rules Committee has conferred with the Chair of the Standing Committee on a proposed letter to Congress, asking, among other things, that the Congressional proposal to amend Evidence Rule 404 be delayed until the Evidence Rules Committee has a chance to consider these proposed changes more fully. The Committee agreed to place the substance of the proposed amendments on the agenda for its October, 1997 meeting, with a view to determining whether Rule 404 should be amended, through the rulemaking process, along the lines suggested by the Omnibus Crime Bill proposal.

C. Rule 702 and *Daubert*

Both the Senate and the House are considering proposals to amend Evidence Rule 702, purporting to codify the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals*. The Committee reviewed both proposals at its April meeting and concluded that they do not meet their stated goal of codifying *Daubert*; that they are inconsistent with much of the post-*Daubert* case law; that they would create confusion; and that both proposals, but particularly the Senate proposal, would impose requirements so stringent as to exclude experts who heretofore have testified as a matter of routine.

The Evidence Rules Committee has agreed to consider the issues created by *Daubert* and its progeny at its October meeting. The Committee will carefully consider all the options, including the possibilities of codifying *Daubert*, limiting or extending *Daubert*, or doing nothing other than to continue to monitor the case law development under Evidence Rule 702.

D. Evidence Rule 703. Basis of an Expert's Opinion.

The Evidence Rules Committee has decided to consider whether Evidence Rule 703 should be amended to provide a structure to

assist trial courts in regulating the presentation of otherwise inadmissible evidence, when it is offered only as the basis of an expert opinion. The proposal would give the trial court three options, after balancing the probative value of the evidence in elucidating the expert's opinion against the risk that the jury will misuse the evidence. The three options are: 1) permitting the expert to disclose the details of the inadmissible bases to the jury, subject to a limiting instruction; 2) limiting disclosure to a general reference to the source or nature of the inadmissible information; and 3) precluding any mention at all of the inadmissible information, allowing only the expert opinion testimony that is predicated upon it.

The Evidence Rules Committee discussed the proposal at its April meeting and will consider it more fully at its October meeting. No decision has been made on the merits of an amendment to Evidence Rule 703.

E. Evidence Rule 803(6). Records of Regularly Conducted Activity.

The Evidence Rules Committee has decided to consider whether Evidence Rule 803(6) should be amended to permit foundational proof of business records other than through a live witness. Currently, foreign business records can be admitted through certification in criminal cases. 18 U.S.C. § 3505. However, a foundation witness is required for domestic business records in criminal cases, and for all business records in civil cases. This anomaly would be corrected by the proposal being considered by the Evidence Rules Committee. The proposal would amend Rule 803(6) to permit the foundation requirements to be established by certification. It would also, of necessity, add two new provisions to Evidence Rule 902, to permit self-authentication of certified business records, when stringent reliability requirements are met. A subcommittee has been appointed to consider the merits of this proposal.

F. Issues the Committee Has Decided Not to Pursue

After discussion at the April meeting, the Evidence Rules Committee has decided not to pursue the following issues at this time:

1. *Rules 404(b) and 609*--The Committee considered whether it

would be useful to provide a more structured procedure for trial courts to follow in ruling on the admissibility of evidence of uncharged misconduct and prior convictions. The Committee decided that these Rules were working well and that there was no need to add procedural requirements to them at this time.

2. *Rule 706*--The Committee considered several possible problems in the use of court-appointed experts under Evidence Rule 706. Possible problem areas include the selection process, funding, and the relationship between court-appointed experts, technical advisers, and special masters. The Committee concluded, however, that any problems existing under Rule 706 do not appear so prevalent as to warrant an amendment at this time. Moreover, the Committee on Court Administration and Case Management is currently overseeing a pilot project on court-appointed experts. The Evidence Rules Committee has concluded that any consideration of an amendment to Rule 706 should be deferred at least until CACM reports on the pilot project.

3. *Statutes Bearing on Admissibility of Evidence*--The Committee considered whether it would be advisable to amend the Evidence Rules to incorporate by reference all legislation that affects the admissibility of evidence in the federal courts. At the April meeting, the Committee determined that any amendment along these lines would not be advisable. There are more than 100 statutes affecting the admissibility of evidence in the federal courts. It would be impossible to craft a helpful amendment to the Evidence Rules that would be both comprehensive and able to accomodate subsequent legislative changes.

IV. Minutes of the April, 1997 Meeting

The Reporter's draft of the minutes of the Evidence Rules Committee's April, 1997 meeting are attached to this report. These minutes have not yet been approved by the Evidence Rules Committee.

Attachments:

Rules and Committee Notes
Draft Minutes

Rule 103. Rulings on Evidence

* * * *

(e) Motions in limine. -- If a party moves for an advance ruling to admit or exclude evidence, the court may rule before the evidence is offered at trial or may defer a decision until the evidence is offered. A motion for an advance ruling, when definitively resolved on the record, is sufficient to preserve error for appellate review. But in a criminal case, if the court's ruling is conditioned on the testimony of a witness or the pursuit of a defense, error is not preserved unless that testimony is given or that defense is pursued. Nothing in this subdivision precludes the court from reconsidering an advance ruling.

COMMITTEE NOTE

Since the Federal Rules of Evidence became effective, litigants have increasingly relied on motions *in limine* to raise issues about the admissibility of evidence. As originally enacted, the Federal Rules did not refer to motions *in limine*. This Rule is intended to provide some guidance on the use of *in limine* motions.

One of the most difficult questions arising from *in limine* motions is whether a losing party has to renew an objection or offer of proof in order to preserve an issue for appeal. Courts have taken differing approaches to this question. Some courts have held that a renewal at the time of the offer is always required. *See, e.g., Collins v. Wayne Corp.*, 621 F.2d 777 (5th Cir. 1980). Some courts have taken a more flexible approach, holding that renewal at the time of the offer is not required if the issue decided *in limine* is one that (1)was fairly presented to the trial court at the *in limine* hearing, (2) may be decided as a final matter in the *in limine* context, and (3)was ruled on definitively by the trial judge. *See, e.g., Rosenfeld v. Basquiat,* 78 F.3d 84 (2d Cir. 1996) (admissibility of former testimony under the Dead Man's Statute). Other courts have distinguished between objections to evidence, which must be renewed when evidence is offered at trial, and offers of proof, which need not be renewed. *See, e.g., Fusco v. General Motors Corp.*, 11 F.3d 259 (1st Cir. 1993). Other courts have held that an objection or proffer made *in limine* is sufficient to preserve error because the *in limine* ruling constitutes "law of the case." *See, e.g., Cook v. Hoppin,* 783 F.2d 684 (7th Cir. 1986). These differing approaches create uncertainty for litigants and unnecessary work for the appellate courts.

Subdivision (e) provides that a motion *in limine* definitively resolved by order of record is sufficient to preserve appellate review. Where the ruling is definitive, a renewed objection or offer of proof is more a formalism than a necessity. See Fed.R.Civ.P. 46 (formal exceptions unnecessary); Fed.R.Cr.P. 51 (same). On the other hand, where the trial court reserves its ruling or declares the ruling provisional, it makes sense to require the party to bring the issue to the court's attention subsequently. See *United States v. Holmquist,* 36 F.3d 154 (1st Cir. 1995) (where order excluding evidence is provisional, "the exclusion of evidence pursuant to that order may be

challenged on appeal only if the party unsuccessfully attempts to offer such evidence in accordance with the terms specified in the order"); *Doty v. Sewall,* 908 F.2d 1053, 1056 (1st Cir. 1990) ("a pre-trial motion *in limine* is not sufficient to preserve an issue for appeal where the district court declines to rule on the admissibility of the evidence until the evidence is actually offered.").

Even where the court's ruling is definitive, nothing in this Rule prohibits the court from revisiting its decision when the evidence is offered. If the court changes its *in limine* ruling, or if the opposing party violates the *in limine* ruling, objection must be made when the evidence is offered to preserve error. The error if any in such a situation occurs only when the evidence is offered and admitted. *United States Aviation Underwriters, Inc. v. Olympia Wings, Inc.,* 896 F.2d 949 (5th Cir. 1990) ("objection is required to preserve error when an opponent, or the court itself, violates a motion *in limine* that was granted"); *United States v. Roenigk,* 810 F.2d 809 (8th Cir. 1987) (error not preserved where defendant failed to object at trial to secure the benefit of a favorable advance ruling).

The fourth sentence in Subdivision (e) is intended to codify the principles of *Luce v. United States,* 469 U.S. 38 (1984), and its progeny. In *Luce,* the Supreme Court held that a criminal defendant must testify at trial to preserve an objection to a trial court's decision to admit the defendant's prior convictions for impeachment. The *Luce* principle has been extended by the lower courts to other comparable situations. See *United States v. DiMatteo,* 759 F.2d 831 (11th Cir. 1985) (applying *Luce* where defendant's witness would be impeached with evidence offered under Rule 608); *United States v. Ortiz,* 857 F.2d 900 (2d Cir.), *cert. denied,* 489 U.S. 1070 (1989) (where uncharged misconduct is ruled admissible if the defendant pursues a certain defense, the defendant must actually pursue that defense at trial to preserve error); *United States v. Bond,* 87 F.3d 695 (5th Cir.

1996) (where trial court rules *in limine* that the defendant would waive his fifth amendment privilege were he to testify, the defendant must take the stand and testify in order to challenge that ruling on appeal).

The Rule does not purport to answer whether a party objecting to impeachment evidence *in limine* waives the objection by offering the evidence on direct to "remove the sting" of anticipated impeachment. The Rule states that calling the witness is necessary, but does not state that it is sufficient, to preserve the objection. See *Gill v. Thomas,* 83 F.3d 537, 540 (1st Cir. 1996) ("by offering the misdemeanor evidence himself, Gill waived his opportunity to object and thus did not preserve the issue for appeal"); *United States v. Williams,* 939 F.2d 721 (9th Cir. 1991)(objection to impeachment evidence was not preserved where the defendant was impeached on direct examination).

Rule 615. Exclusion of Witnesses

At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. <u>But in a criminal case, the court shall not exclude a victim, as defined in Section 503(e)(2) of the Victims' Rights and Restitution Act of 1990, unless the court determines that the victim's trial testimony would be materially affected if the</u>

victim heard other testimony at the trial. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause.

COMMITTEE NOTE

The amendment incorporates a provision from the Victim's Rights and Restitution Act of 1990, 42 U.S.C. § 10606, which guarantees, within certain limits, the right of a crime victim to attend the trial. The intent of the amendment is to make the Rule consistent with the statute. By referring to trial testimony, the Rule further provides that a victim who would testify only at the sentencing proceeding cannot, on that basis, be excluded from the trial. This is in accordance with the Victim Rights Clarification Act of 1997 (18 U.S.C. § 3510).

As of 1997, the Victim's Rights and Restitution Act, incorporated by reference in the Rule, defines a "victim" as

> a person that has suffered direct physical emotional, or pecuniary harm as a result of the commission of a crime, including--
>
> (A) in the case of a victim that is an institutional entity, an authorized representative of the entity; and
>
> (B) in the case of a victim who is under 18 years of age,

incompetent, incapacitated, or deceased, one of the following (in order of preference):

(i) a spouse;
(ii) a legal guardian;
(iii) a parent;
(iv) a child;
(v) a sibling;
(vi) another family member; or
(vii) another person designated by the court.