Advisory Committee on Evidence Rules

Minutes of the Meeting of January 15th, 2005

San Francisco, California

The Advisory Committee on the Federal Rules of Evidence (the "Committee") met on January 15th 2005 in San Francisco, California.

The following members of the Committee were present:

Hon. Jerry E. Smith, Chair
Hon. Robert L. Hinkel
Hon. Andrew D. Hurwitz
Thomas W. Hillier, Esq.
Patricia Refo, Esq.
William W. Taylor III, Esq.
John S. Davis, Esq., Department of Justice

Also present were:

Hon. David F. Levi, Chair of the Standing Committee on Rules of Practice and Procedure
Hon. Thomas W. Thrash, Jr., Liaison from the Standing Committee on Rules of Practice and Procedure
Hon. Christopher M. Klein, Liaison from the Bankruptcy Rules Committee
Hon. Thomas B. Russell, Liaison from the Civil Rules Committee
Hon. David Trager, Liaison from the Criminal Rules Committee
Hon. Jeffrey L. Amestoy, former member of the Evidence Rules Committee
David S. Maring, Esq., former member of the Evidence Rules Committee
Professor Daniel Coquillette, Reporter to the Standing Committee
Peter G. McCabe, Esq., Secretary, Standing Committee on Rules of Practice and Procedure
John K. Rabiej, Esq., Chief, Rules Committee Support Office
James Ishida, Esq., Rules Committee Support Office
Jennifer Marsh, Esq., Liaison from Federal Judicial Center
Professor Daniel J. Capra, Reporter to the Evidence Rules Committee
Professor Kenneth S. Broun, Consultant to the Evidence Rules Committee
Brook D. Coleman, Esq., law clerk to Judge Levi

Opening Business

Judge Smith noted that this meeting was the Fall meeting of the Evidence Rules Committee. The meeting was delayed in order to be held with hearings that were scheduled on the proposed amendments to the Evidence Rules. However, no member of the public asked to testify, and so the hearing was cancelled. Judge Smith emphasized that for purposes of committee continuity, it is important to hold two meetings per year.

Judge Smith then introduced and welcomed the two new members of the Committee: Justice Hurwitz of the Arizona Supreme Court and William Taylor, Esq. a partner at Zuckerman Spader in Washington, D.C.

Judge Smith noted that this was the last meeting for two departing members: Chief Judge Jeffrey Amestoy and David Maring. He expressed the gratitude of the Committee for their excellent service.

Judge Smith asked for approval of the minutes of the April 2004 Committee meeting. The minutes were approved.

Proposed Amendments to the Evidence Rules That Have Been Issued for Public Comment

The Standing Committee has issued for public comment four proposed amendments to the Evidence Rules—Rules 404(a), 408, 606(b), and 609. To date only four comments have been received, but it was noted that most of the comments come in at the end of the comment period, which in this case is March 15, 2005. Judge Smith noted that the package of amendments were all addressed to resolving longstanding conflicts in the federal courts about the meaning and application of the respective rules.

The Committee proceeded to discuss, as a preliminary matter, the merits of the proposed amendments. Most of the discussion focused on Rule 408, particularly the portion of the amendment providing that statements made in civil settlement discussions would not be barred from admission in a subsequent criminal case. Committee members noted that in most cases this provision would not raise a concern, because a lawyer for a civil defendant would not allow that defendant to make a statement that could be used as an admission of guilt in a subsequent criminal case. But several members of the Committee expressed concern that the proposal could be a trap for civil defendants who were not represented by counsel. Special concern was expressed for situations such as court-required mediation of a civil dispute; arguably it would be unfair to require a party to participate in court-appointed mediation (e.g., for a domestic dispute) and then use the party's statements against it as admissions of guilt in a related criminal case. While statements made in mediation might not

present a major issue in the federal system, members noted that it could present a concern in the state systems, and that states often adopt the amendments that are made to the Federal Rules.

One Committee member suggested that the proposed amendment might be changed to allow for admissibility in criminal cases only when the statement was made in the course of settling charges from a regulatory agency, such as the SEC, while barring admissibility if the civil litigation is a private matter.

The Committee member from the Justice Department stressed that the Department supported the proposed amendment as it is written. He stressed that it was important, because of the need to search for truth in criminal cases, to admit a defendant's statements acknowledging criminal culpability; that such statements may be made in either private or public civil litigation; and that such statements are probative of a defendant's guilt even when they are made in the course of settling a private dispute. Judge Smith asked the DOJ representative whether barring compromise statements in a criminal case would make it difficult or impossible for the Department to prove a subsequent criminal case. The Department representative responded that he would look into the practical burdens that would arise if Rule 408 barred statements made in civil compromise from admission in a subsequent criminal case, and that he would report back to the Committee at the next meeting.

Based on the discussion, the Reporter stated that he would provide the following alternatives for the Committee to consider at the next meeting:

1. Language that would allow admission in criminal cases only where the statement is made in an attempt to settle a civil dispute with the government.

2. Language in the Committee Note that would refer to the possibility of a mediation privilege as protecting statements made in the course of a voluntary or mandatory mediation proceeding.

3. Language in the Committee Note to the effect that Rule 403 might justify exclusion in a criminal case of a defendant's statement made in a civil settlement, if that statement was made without the presence or advice of counsel.

As a final point, it was noted that all Committee members agreed that it was necessary to amend Rule 408, as the courts are in conflict about whether statements made in civil settlements are admissible in subsequent criminal cases.

Rule 1101

When the Supreme Court decided *Blakely v. Washington*, it raised the possibility that certain

facts ordinarily found by the judge at a sentencing proceeding would have to be found instead by the jury. That holding consequently created the possibility that it might be necessary to amend Evidence Rule 1101, because Rule 1101 provides that the Federal Rules of Evidence are not applicable in sentencing proceedings. If a jury were required to determine "sentencing facts", it could be argued that the Rules of Evidence should be applicable to such proceedings. Accordingly, the Reporter prepared a memorandum to assist the Committee in determining whether an amendment to Rule 1101 should be proposed.

But three days before the Committee met, the Supreme Court decided *United States v. Booker*. In *Booker*, the Court held that the Federal Sentencing Guidelines are now advisory, rather than mandatory. Because the Guidelines are advisory, it did not violate the Constitution for a judge to sentence on the basis of facts not found by the jury. Thus the *Booker* decision obviated any immediate or critical need to amend Rule 1101.

The Committee recognized that Rule 1101 could be amended to "clean up" some of the text and to codify some case law holding that the Federal Rules are inapplicable to certain proceedings not currently mentioned in the Rule (such as supervised release revocation proceedings). But the Committee noted that none of the problems that would be addressed by an amendment were serious enough to warrant the costs of an amendment. Accordingly, the Committee agreed unanimously to take no action on an amendment to Evidence Rule 1101. It directed the Reporter to report on *Blakely/Booker* developments at future meetings.

Rule 803(8)

The Evidence Rules Committee considered a proposal by the Center for Regulatory Effectiveness to amend Evidence Rule 803(8), the hearsay exception for public reports. The Center proposed that the Rule be amended to require the trial court to consider whether the public report comports with information standards promulgated by Congress; the proposal would also require courts to exclude public reports if the government investigation was incomplete, speculative, or biased.

The Reporter prepared a memorandum for the Committee, in which he concluded that 1) trial courts are already permitted to take account of all of the factors suggested by the Center; 2) amendment of the Rule would be inconsistent with the Committee's policy that amendments to the Evidence Rules should be packaged, rather than proposed seriatim; 3) courts do not appear to be having substantial problems in applying Rule 803(8) in civil cases, and any minor problems that have arisen would not be solved by the Committee's proposed amendment; and 4) the Committee has decided to defer any amendment to the hearsay exceptions until the impact of *Crawford v. Washington* can be assessed.

The Committee decided unanimously to take no action on the Center's proposed amendment. A representative of the Center attending the meeting suggested that the Committee's no-action

decision should be issued for public comment. Committee members noted that inaction on a rule is ordinarily not a reason to invite public comment. The only time that Committee inaction was published occurred when the Evidence Rules Committee was reconstituted, and conducted a full-scale review of the Evidence Rules, deciding not to take any action to amend a large number of rules. The Committee unanimously rejected the suggestion that its inaction on Rule 803(8) should be issued for public comment. The Center's representative also suggested that an amendment to the existing Committee Note to Rule 803(8) might suffice. But Committee members observed that the Notes are tantamount to legislative history and that a Note cannot be changed or abrogated independently from an amendment to a rule.

Crawford v. Washington

The Reporter prepared a report for the Committee on case law developments after *Crawford v. Washington*. The Court in *Crawford* held that if hearsay is "testimonial", its admission against the defendant violates the right to confrontation unless the declarant is available and subject to cross-examination. The Court rejected its previous reliability-based confrontation test, at least as it applied to "testimonial" hearsay. The Court in *Crawford* declined to define the term "testimonial" and also declined to establish a test for the admissibility of hearsay that is not "testimonial."

Crawford raises questions about the constitutionality as-applied of some of the hearsay exceptions in the Federal Rules of Evidence. The Evidence Rules Committee has therefore resolved to monitor federal case law developments after *Crawford*, in order to determine whether and when it might be necessary to propose amendments that would be necessary to bring a hearsay exception into compliance with constitutional requirements. The Reporter prepared a memorandum for the Committee on post-*Crawford* case law, and these case law developments were discussed by the Committee at its meeting. It was noted that *Crawford* may prevent the authentication of business records under Evidence Rules 902(11) and (12), as those rules permit a party to prepare an affidavit for purposes of the litigation and to submit it in lieu of in-court testimony of a foundation witness. Such an affidavit appears to be testimonial under *Crawford*—thus it may become necessary to amend, or abrogate, Evidence Rules 902(11) and (12). Similarly, Rule 803(10) might be constitutionally infirm, as it permits the absence of a public record to be proved through an affidavit prepared by the person who searched the records. Such an affidavit would be prepared for purposes of litigation and thus would seem to be "testimonial" under *Crawford*.

The Committee unanimously agreed that it was too soon to propose any amendments to the hearsay rules to comply with *Crawford*, as the lower courts have not yet had enough time to resolve the open questions left for them by the Supreme Court. The Committee directed the Reporter to keep it informed of post-*Crawford* developments at future Committee meetings.

Privileges

Professor Ken Broun, the consultant to the Evidence Rules Committee on the privileges project, reported on the status of the project. The goal of the privileges project is to prepare a document for publication. There is no intent to propose the codification of the federal law of privilege. For each privilege, the project will draft 1) a survey rule, equivalent to a restatement of the federal law of privilege; 2) commentary on the federal case law bearing on the respective privilege; and 3) a section addressing future developments and special issues such as circuit splits. The Committee has already reviewed the project's work on the medical privilege, which has been completed. The attorney/client privilege survey rule and case law commentary has been drafted and amended based on comments from the Committee's most recent review of the rule.

Professor Broun has been working on the future developments section for the attorney-client privilege. One of the issues that will receive attention is the procedure and standards that apply for determining the crime/fraud exception. A Committee member asked Professor Broun whether there is a problem in applying the crime-fraud exception in situations where the client is seeking legal advice to determine whether a prospective course of conduct is lawful, and is told by the lawyer that it is not. Professor Broun agreed to research the question and report back to the Committee.

Professor Broun informed the Committee that he will complete a section on waiver for the next meeting. Committee members noted a number of problems with the current law governing the waiver of privilege. In complex litigation the lawyers spend significant amounts of time and effort to preserve the privilege, even when many of the documents are of no concern to the producing party. The reason is that if a privileged document is produced, there is a risk that a court will find a subject matter waiver that will apply not only to the instant case but to other cases as well. An enormous amount of expense is put into document production in order to protect waiver. Moreover, the fear of waiver leads to extravagant claims of privilege. Members observed that if there was a way to produce documents in discovery without risking subject matter waiver, the discovery process could be streamlined.

Judge Levi observed that if the Committee believes that the current waiver law is leading to substantial problems and unjustifiable expense, it might think about suggesting to Congress that it consider enacting a statute on the subject, and the Committee might provide suggested language for such a statute. Professor Broun agreed to prepare a memorandum on the costs of preparing a privilege log and the implications of the current waiver rules as applied in complex civil litigations. That memorandum will include a draft statute on the subject of waiver. The Committee agreed to review the memorandum at the next meeting and consider whether to take action on the subject of waiver of attorney-client privilege. Judge Smith expressed his thanks to Professor Broun for all of his hard work on the privilege project.

Joint Project on Overlapping Civil and Evidence Rules

Judge Smith announced that the Evidence and Civil Rules Committee had agreed to

undertake a joint project that would determine whether amendments should be proposed for situations in which rules governing the admissibility of evidence are found in both the Civil Rules and the Evidence Rules. This overlap results from the fact that some rules concerning admissibility were enacted into the Civil Rules before the body of Evidence Rules became law. The most serious problem lies in the relationship between Evidence Rule 804(b)(1) and Civil Rule 32. Both rules provide for the admissibility of deposition testimony, but the standards and conditions for admissibility are not the same. This can lead to confusion and a trap for the unwary. The Evidence Rules Committee has taken the position that rules governing the admissibility of evidence at trial ordinarily should be located in the Evidence Rules. The ultimate result of the project may be the proposal of amendments to the Civil Rules, the Evidence Rules, or both.

E-Government Rule

The Reporter reported to the Committee on the status of a project to enact a set of rules protecting private information found in court filings. The enactment of privacy rules was mandated by Congress in the E-Government Act. Under the auspices of a subcommittee of the Standing Committee, the Advisory Committees on Appellate, Bankruptcy, Civil and Criminal Rules are working on a rule that will be as uniform as possible for each set of Rules. The current proposal would 1) impose a redaction requirement for certain private information; 2) provide an exemption from the redaction requirement for certain records as to which the cost of redaction would outweigh the privacy gains; 3) provide that filings in social security and immigration appeals would not be available to non-parties over the internet; and 4) provide for the possibility of filing under seal to protect privacy and security interests.

The Reporter noted that the proposed E-Government Rules govern filing and not admissibility; as such, they do not raise any question that would be addressed in the Evidence Rules.

New Projects

Privacy of Witnesses

The Department of Justice representative suggested that the Committee might consider whether an amendment should be proposed that would protect the privacy interests of witnesses who testify in a federal court. He suggested that Rule 611(a) authorizes a trial court to protect a witness from "harassment" and that it might be useful to specify that the court could intervene to protect the witness from unnecessary disclosure of sensitive or embarrassing information. The Reporter agreed to research the question in order to assist the Committee in determining whether 1) existing case law protects the privacy of witnesses, and 2) an amendment to protect such interests is necessary.

Electronic Evidence

The Reporter asked for permission from the Committee to prepare a proposal for its consideration that would make it clear that the Evidence Rules cover evidence presented in electronic form. The proposal would be to add a new Rule 1104 providing that the references throughout the Evidence Rules to terms such as "document", "paper" and "writing" cover not only hardcopy but also "electronically stored information." The Committee agreed unanimously that such an amendment was worthy of consideration, as it would be useful to accommodate technological advancements in the presentation of evidence.

Next Meeting

The next meeting of the Evidence Rules Committee is scheduled for Thursday, April 28, 2005 in Scottsdale.

The meeting was adjourned Saturday, January 15, 2005.

Respectfully submitted,

Daniel J. Capra
Reporter