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

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TO: Honorable Lee H. Rosenthal, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Robert L. Hinkle, Chair
Advisory Committee on Evidence Rules

DATE: May 6, 2009

RE: Report of the Advisory Committee on Evidence Rules

Introduction

The Advisory Committee on Evidence Rules met on April 23-24 in Washington, D.C. The meeting produced two action items for Standing Committee consideration at the June 2009 meeting.

First, as the Standing Committee knows, the Advisory Committee has been restyling the Evidence Rules. The Advisory Committee divided the rules into three groups for this purpose. At its last two meetings, the Standing Committee approved the first two groups but delayed publication until after all three groups had been approved. The Standing Committee did this with the understanding that at the end of the process there would be a top-to-bottom review of all the restyled rules for consistency and to address "global" issues that had been deferred during the initial restyling.

At the April 2009 meeting, the Advisory Committee completed its work on the restyling project. First, the Committee restyled the third (and last) group of rules, consisting of Rules 801 to 1103. Second, the Committee undertook the promised top-to-bottom review of all the restyled rules. This resulted in limited changes to the first two groups of restyled rules. Third, the Committee approved a set of proposed committee notes to the restyled rules. The entire set of restyled rules is attached to this Report as Appendix A. The Committee now asks the Standing Committee to approve the entire set for release at this time for public comment.

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I. Action Item — Restyled Evidence Rules 101–1103

Beginning in the early 1990s, Judge Robert Keeton, who was chair of the Standing Committee, and a committee member, University of Texas Professor Charles Alan Wright, led an effort to adopt clear and consistent style conventions for all of the rules. Without consistent style conventions, there were differences from one set of rules to another, and even from one rule to another within the same set. Style varied because a committee seeking to amend a rule did not always consider how another rule expressed the same concept. Style varied based on the membership of a particular advisory committee. Style varied as the membership of a particular advisory committee changed over time. And style varied as the membership of the Standing Committee changed over time. Different rules expressed the same thought in different ways, leading to a risk that they would be interpreted differently. Different rules sometimes used the same word or phrase to mean different things, again leading to a risk of misinterpretation. And in other respects, too, rules drafters who were experts in the relevant substantive and procedural areas sometimes did not express themselves as clearly as they might have.

Judge Keeton appointed Professor Wright to chair a newly formed Style Subcommittee of the Standing Committee. At Professor Wright's suggestion, the Standing Committee retained a legal-writing authority, Bryan Garner, as its style consultant. Mr. Garner is the author of such books as *The Elements of Legal Style* and *A Dictionary of Modern Legal Usage*. These are generally regarded as the leading authorities on these subjects. Mr. Garner also is the current editor of *Black's Law Dictionary* and the co-author, with Justice Scalia, of *Making Your Case: The Art of Persuading Judges*.

In conjunction with his work for the Standing Committee, Mr. Garner wrote *Guidelines for Drafting and Editing Court Rules*. First published in 1996, the *Guidelines* manual is now in its fifth printing. It has guided all rules amendments since it was written—whether or not they related to a restyling project. And the *Guidelines* manual has guided successful restylings of the Federal Rules of Appellate, Criminal, and Civil Rules, which took effect in 1998, 2002, and 2007. For matters not addressed in the *Guidelines*, the restylings have followed Garner's *A Dictionary of Modern Legal Usage*. Professor Daniel R. Coquillette has been the Standing Committee's reporter through all of these projects.

Mr. Garner was himself the style consultant for the restyled Appellate and Criminal Rules. Professor Joseph Kimble took over near the end of the Criminal Rules restyling project and was the style consultant as the Civil Rules project went forward. Professor Kimble is the editor in chief of *The Scribes Journal of Legal Writing* and the author of *Lifting the Fog of Legalese*, a book that compiles some of his many essays. He and Mr. Garner are co-authors of a forthcoming book, *The Elements of Legal Drafting*, which West Publishing Company will publish. Professor Kimble has taught legal writing at Thomas Cooley Law School for 25 years.

Despite some initial opposition, each of the restyling projects has proved enormously successful. Indeed, in recognition of their work in restyling the Civil Rules, Professor Kimble, the Standing Committee, and the Civil Rules Advisory Committee each received a Burton Award for Reform in Law. The Burton is probably the nation's most prestigious legal-writing award. Judge Rosenthal, Judge Thrash (of the Style Subcommittee), and Professor Kimble accepted the awards at a black-tie dinner at the Library of Congress on June 4, 2007.

The division of responsibility on the restyling projects has conformed generally to the protocol the Standing Committee has adopted for addressing style issues for a proposed amendment to a rule outside the restyling process. For an amendment outside a restyling project, the relevant Advisory Committee must submit its proposed language to the Style Subcommittee. On style issues, the Style Subcommittee, not the Advisory Committee, has the last word. Thus when an Advisory Committee submits a proposed amendment to any rule to the full Standing Committee, the amendment already has gone through a style review, and style issues have been determined by the Style Subcommittee. The Standing Committee chairs have kept the Style Subcommittee small in order to promote consistency. Although the Standing Committee retains the ultimate authority, through the years it has followed the style decisions of the Style Subcommittee, thus ensuring a high level of consistency across all sets of rules.

With this background, the Advisory Committee on Evidence Rules undertook its restyling project beginning in the Fall of 2007. The Committee established a step-by-step process for restyling that is substantially the same as that employed in the earlier restyling projects. Those steps are: 1) draft by Professor Kimble; 2) comments by the Reporter; 3) response by Professor Kimble and changes to the draft where necessary; 4) expedited review by Advisory Committee members and redraft by Professor Kimble if necessary; 5) review by the Style Subcommittee of the Standing Committee; 6) review by the Advisory Committee; and 7) review by the Standing Committee to determine whether to release the restyled rules for public comment.

The Advisory Committee divided the Evidence Rules into three parts. The process described above thus was conducted in three stages. The Committee also agreed that the entire package of restyled rules should be submitted for public comment at one time.

The Advisory Committee established a working principle for whether a proposed change is one of "style" (in which event the decision is made by the Style Subcommittee) or one of "substance" (in which event the decision is for the Advisory Committee). A proposed change is "substantive" if:

1. Under the existing practice in any circuit, it could lead to a different result on a question of admissibility; or
2. Under the existing practice in any circuit, it could lead to a change in the procedure by which an admissibility decision is made; or

3. It changes the structure of a rule or method of analysis in a manner that fundamentally changes how courts and litigants have thought about, or argued about, the rule; or

4. It changes what Professor Kimble has referred to as a “sacred phrase”—“phrases that have become so familiar as to be fixed in cement.”

At its Spring 2008 meeting the Advisory Committee approved the restyling of the first third of the rules (Rules 101–415). The Standing Committee, at its June 2008 meeting, approved these rules for release for public comment, with the understanding that there could be further changes and that publication would occur after the Standing Committee approved all of the rules.

At its Fall 2008 meeting, the Advisory Committee approved the restyling of the second third of the rules (Rules 501–706). The Standing Committee, at its January 2009 meeting, approved these rules for release for public comment, again with the understanding that there could be further changes and that publication would occur after the Standing Committee approved all of the rules.

At its April 2009 meeting, the Advisory Committee approved the restyling of the final third of the rules (Rules 801–1103). The rules came to the Advisory Committee after the full process outlined above. The Committee addressed each rule separately. The Committee then doubled back to all of the prior rules to ensure consistency throughout the entire set and to address global issues such as how to refer to a writing in a manner that would include its electronic form and how to refer to a public office or agency. These and similar matters were handled through a new set of definitions in proposed Rule 101(b). Finally, the Committee approved proposed Committee Notes conforming to the template and general approach of the Committee Notes to the restyled Civil Rules. The Committee delegated to the Reporter, the Style Consultant, and the Chair the authority to compile and implement the Committee’s many decisions and to ensure that no new inconsistencies were introduced. Two of the Style Committee’s three members attended and participated fully in the Advisory Committee meeting.

The April 2009 minutes—which summarize but are by no means a transcript of the two-day meeting—run to 85 pages and are attached to this report. I have not attempted to summarize in this report the extensive discussions and many drafting decisions detailed in the minutes.

The entire set of proposed restyled Evidence Rules—consisting of Rules 101 to 1103—are attached to this Report as Appendix A, with Committee Notes at the end. The rules are presented in a “side-by-side” version, with the existing rule in the left column and the restyled rule in the right.

Recommendation: The Advisory Committee on Evidence Rules recommends that the Standing Committee approve proposed restyled Evidence Rules 101–1103 for release for public comment.

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