Advisory Committee on Evidence Rules

Minutes of the Meeting of April 1, 2011

Philadelphia, Pennsylvania

The Judicial Conference Advisory Committee on the Federal Rules of Evidence (the "Committee") met on April 1, 2011 in Philadelphia, Pennsylvania.

The following members of the Committee were present:

Hon. Sidney A. Fitzwater, Chair
Hon. Joseph F. Anderson, Jr.
Hon. Brent R. Appel
Hon. Anita B. Brody
Hon. Joan N. Ericksen.
William T. Hangley, Esq.
Marjorie A. Meyers, Esq.
Paul Shechtman, Esq.
Elizabeth J. Shapiro, Esq., Department of Justice

Also present were:

Hon. Lee H. Rosenthal, Chair of the Committee on Rules of Practice and Procedure ("Standing Committee")
Hon. Marilyn L. Huff, Liaison from the Committee on Rules of Practice and Procedure and member of the Standing Committee's Style Subcommittee
Hon. John F. Keenan, Liaison from the Criminal Rules Committee
Hon. Paul S. Diamond, Liaison from the Civil Rules Committee
Hon. Judith H. Wizmur, Liaison from the Bankruptcy Rules Committee
James N. Ishida, Esq., Rules Committee Support Office
Peter McCabe, Esq., Secretary to the Standing Committee
Professor Daniel J. Capra, Reporter to the Evidence Rules Committee
Professor Kenneth S. Broun, Consultant to the Evidence Rules Committee
Timothy Reagan, Esq., Federal Judicial Center
Jeffrey Barr, Esq., Rules Committee Support Office

I. Opening Business

Introductory Matters

Judge Fitzwater, the Chair of the Committee, welcomed the members.

Dean Fitts of Penn Law School welcomed the Committee and stated that he was honored to have the Committee meeting at the Law School.

The minutes of the Fall 2010 Committee meeting were approved.

Judge Fitzwater noted with regret that it was the last meeting for two valued members of the Committee — Judge Joan Ericksen and Judge Joseph Anderson. He expressed the Committee's thanks and gratitude for all their fine work, and observed that they would receive a formal tribute at the next Committee meeting.

The Reporter noted for the record that this would be the first Evidence Rules Committee meeting without the stellar assistance of John Rabiej, who has taken an important position at the Sedona Conference. The Reporter stated that John's presence would be sorely missed at this meeting and in the future.

Restyling: Supreme Court Review

The Restyled Rules of Evidence were approved by the Judicial Conference in the Fall of 2010 and were sent to the Supreme Court. The Court notified Judge Rosenthal that it was considering four changes to the Restyled Rules. After a dialog with Judge Rosenthal and the Chair and Reporter of the Evidence Rules Committee, the Supreme Court withdrew its suggestions for change to two of the Rules ---- Rule 405(b) (the suggestion being to drop the word "relevant" from the rule), and Rule 801(a) (the suggestion being to specify that the intent requirement applies only to conduct and not to written or verbal assertions).

Judge Rosenthal, the Chair and the Reporter agreed with the changes suggested by the Court with respect to two rules: Rules 408 and 804(b)(4). Both changes restored language from the existing rule. Those changes, shown in blackline form, are as follows:

Rule 408:

(a) Prohibited uses. Evidence of the following is not admissible on behalf of any party, when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction: **(1)** furnishing or offering or promising to furnish—or accepting or offering or promising to accept—a valuable consideration in compromising or attempting to compromise the claim; and	**(a) Prohibited Uses.** Evidence of the following is not admissible — on behalf of any party — either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction: **(1)** furnishing, promising, or offering — or accepting, promising to accept, or offering to accept — a valuable consideration ~~in order to compromise~~ in compromising or attempting to compromise the claim; and

Rule 804(b)(4):

(4) Statement of personal or family history. (A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.	**(4)** ***Statement of Personal or Family History.*** A statement about: **(A)** the declarant's own birth, adoption, legitimacy, ancestry, marriage, divorce, relationship by blood, adoption or marriage, or similar facts of personal or family history, even though the declarant had no way of acquiring personal knowledge about that fact; or **(B)** another person concerning any of these facts, as well as death, if the declarant was related to the person by blood, adoption, or marriage or was so intimately associated with the person's family that the declarant's information is likely to be accurate.

In sum, the proposed changes restored "in compromising or attempting to compromise a claim" to Rule 408 and "adoption" to Rule 804(b)(4). In response to these suggestions, Judge

Rosenthal contacted Judge Sentelle, the Chair of the Executive Committee of the Judicial Conference, and asked for approval of the changes proposed by the Supreme Court. The Executive Committee approved the changes on an expedited basis. The changes were then presented to the Court as a recommendation of the Judicial Conference.

At the Advisory Committee meeting, the Committee discussed the two changes proposed by the Supreme Court. Committee members noted that the Court had obviously reviewed the Restyled Rules with significant care and detail. Committee members expressed pride in the fact that out of the hundreds of changes made in the restyling, the Supreme Court found only two small revisions to be advisable. After discussion of those proposed changes, the Committee voted unanimously to ratify the changes to Rules 408 and Rule 804(b)(4)

The Committee expressed its gratitude to Judge Rosenthal and to Andrea Kuperman, Chief of the Rules Committee Support Office for their outstanding work under considerable time pressure in effectuating the changes raised by the Supreme Court. The Chair thanked the Reporter for his quick responses on the legal questions raised by the Supreme Court proposals.

Restyling Project: Legal Writing Award

Judge Rosenthal informed the Committee that the Restyled Rules have been awarded a legal writing award from the Center for Plain Language. The award will be given at an award ceremony at the National Press Club. Judge Hinkle, who chaired the Evidence Rules Committee during the restyling project, will accept the award on behalf of the Standing Committee and the Evidence Rules Committee.

II. Proposed Amendment to Rule 803(10)

In *Melendez-Diaz v. Massachusetts*, the Supreme Court held that certificates reporting the results of forensic tests conducted by analysts were "testimonial" and therefore the admission of such certificates (in lieu of testimony) violated the accused's right to confrontation. The Court reasoned that the certificates were prepared exclusively for use in a criminal trial, as substitutes for trial testimony, and so were testimonial within the meaning of the Confrontation Clause as construed by *Crawford v. Washington.*

At the last meeting, the Reporter prepared a memorandum for the Committee on the effect of *Melendez-Diaz* on the constitutionality, as applied, of the hearsay exceptions that cover records in the Federal Rules of Evidence. The memorandum made the following tentative conclusions:

1) Records fitting within the business records exception are unlikely to be testimonial, and addressing any uncertainty about the constitutional admissibility of business records in certain unusual cases should await more case law development.

2) Records admissible under the public records exception are unlikely to be testimonial, because to be admissible under that exception the record cannot be prepared with the primary motivation of use in a criminal prosecution.

3) Authenticating business and public records by certificate under various provisions in Rule 902 is unlikely to raise constitutional concerns, because the Court in *Melendez-Diaz* found an exception to testimoniality for certificates that did nothing but authenticate a document. That exception has already been invoked by lower federal courts to uphold Rule 902 authentications against confrontation challenges.

4) *Melendez-Diaz* appears to bar the admission of certificates offered to prove the absence of a public record under Rule 803(10). Like the certificates at issue in *Melendez-Diaz,* a certificate proving up the absence of a public record is ordinarily prepared with the sole motivation that it will be used at trial — as a substitute for live testimony. Lower courts after *Melendez-Diaz* have recognized that admitting a certificate of absence of public record under Rule 803(10), where the certificate is prepared for use in court, violates the accused's right to confrontation after *Melendez-Diaz.*

In light of the above, the Committee at its Fall 2010 meeting discussed the possibility of an amendment to Rule 803(10) that would correct the constitutional problem raised by *Melendez-Diaz.* The possible fix suggested in the Reporter's memo was to add a "notice-and-demand" procedure to the Rule: requiring production of the person who prepared the certificate only if after receiving notice from the government of intent to introduce a certificate, the defendant makes a timely pretrial demand for production of the witness. The Court in *Melendez-Diaz* specifically approved a state version of a notice-and-demand procedure, and the Reporter's draft added the language from that state version to the existing Rule 803(10).

The Committee unanimously resolved to consider a proposed amendment to Rule 803(10) at the Spring meeting. The Reporter was directed to work with the Justice Department to review all the possible viable alternatives for a notice-and-demand procedure, including ones that add procedural details such as providing for continuances.

After consulting with the DOJ, the Reporter prepared a proposed amendment to Rule 803(10) that provided as follows:

(10) Absence of a Public Record. Testimony — or a certification under Rule 902 — that a diligent search failed to disclose a public record or statement if ~~the testimony or certification is admitted to prove that~~:

(A) the testimony or certification is admitted to prove that

(~~A~~ i) the record or statement does not exist; or

(~~B~~ ii) a matter did not occur or exist, if a public office regularly kept a record or statement for a matter of that kind; and

(B) if the prosecutor in a criminal case intends to offer a certification, the prosecutor provides written notice of that intent at least 14 days before trial, and the defendant does not object in writing within 7 days of receiving the notice — unless the court, for good cause, sets a different time for the notice or the objection.

In drafting this proposed amendment, the Reporter relied on the following considerations:

1. The basic Texas rule, approved by the Supreme Court in *Melendez-Diaz*, serves as a good template for a notice-and-demand provision.

2. The rule should contain specific time periods.

3. The time for demand should be measured from the date of receipt of notice, rather than the number of days before trial.

4. A good cause provision should be added.

5. The amendment need not address such details as continuance, waiver, and testimony by an expert.

6. The amendment should not provide that if the defendant makes a proper demand, the government must produce the person who prepared the certificate.

In discussion on the proposal, the Committee agreed with all the above principles but for one. A number of members argued against a good cause provision on two grounds: 1) it would undermine the predictability of the rule, as a prosecutor could never be sure that even if a timely demand is not made, the court might still find good cause and then the government would have to produce the witness; 2) good cause would be applied in the context of the confrontation rights found in *Melendez-Diaz* and it is unclear how that might work in practice; and 3) the Court in *Melendez-Diaz* approved a notice-and-demand statute that did not contain a good cause requirement.

One member suggested that a good cause requirement was necessary because of unforeseen circumstances such as phones being out, computers crashing, and the like. But other members responded in two ways: 1) all the defendant has to do is make a demand within seven days of receiving the notice — there is no requirement of a substantial production or significant effort that would be forestalled by an emergency event; and 2) if the defendant truly has a justification for failing to timely comply, a court is likely to grant relief even without good cause language in the Rule.

The Committee then considered whether, if good cause language were cut from the proposal, the rule should still provide that the court could set a different time for the notice and demand.

Members generally agreed that it would be useful to retain such a provision. It was noted that many of the Civil and Criminal Rules provide specifically that a court can set a different time than the period provided by a particular rule. Moreover, courts may want to provide time periods at the outset of a case to require the government to provide notice before the time required by the rule.

Finally, the Committee considered whether the procedural fix of a notice-and-demand statute should be placed somewhere other than Rule 803(10). One member pointed out that certain excited utterances might be testimonial — though this is far less likely after the Supreme Court's decision in *Michigan v. Bryant* — or that other hearsay exceptions might encompass testimonial hearsay. But other members responded that it was only Rule 803(10) that authorizes admission of hearsay that will almost always be testimonial — because certificates of the absence of public record are almost always prepared with the primary motivation that they would be used in a criminal prosecution. It would make no sense to impose notice and demand provisions on other hearsay exceptions that rarely if ever embrace testimonial hearsay. The effect of a notice and demand provision is to require the government to produce a witness in lieu of a hearsay statement, and that effect is not justified unless the hearsay is testimonial.

After significant discussion, the Committee unanimously approved the following amendment to the text of Rule 803(10), to be transmitted to the Standing Committee with the recommendation that it be approved for public comment:

> **(10) Absence of a Public Record.** Testimony — or a certification under Rule 902 — that a diligent search failed to disclose a public record or statement if ~~the testimony or certification is admitted to prove that~~:
>
> (A) the testimony or certification is admitted to prove that
>
> (~~A~~ i) the record or statement does not exist; or
>
> (~~B~~ ii) a matter did not occur or exist, if a public office regularly kept a record or statement for a matter of that kind; and
>
> (B) if the prosecutor in a criminal case intends to offer a certification, the prosecutor provides written notice of that intent at least 14 days before trial, and the defendant does not object in writing within 7 days of receiving the notice — unless the court sets a different time for the notice or the objection.

The Committee unanimously approved a Committee Note to accompany the proposed amendment to Rule 803(10). That Note provides as follows:

Committee Note

Rule 803(10) has been amended in response to *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527 (2009). The *Melendez-Diaz* Court declared that a testimonial certificate could be admitted if the accused is given advance notice and an opportunity to demand the presence of the official who prepared the certificate. The amendment incorporates, with minor variations, a "notice-and-demand" procedure that was approved by the *Melendez-Diaz* Court. See Tex. Code Crim. P. Ann., art. 38.41.

The proposed amendment and Committee Note, in proper format, are attached as an appendix to Judge Fitzwater's report to the Standing Committee.

III. Possible Amendments to Rules 803(6)-(8)

The restyling project uncovered an ambiguity in Rules 803(6)-(8), the hearsay exceptions for business records, absence of business records, and public records. Those exceptions in current form set forth admissibility requirements and then provide that a record meeting those requirements is admissible despite the fact it is hearsay "unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness." The rules do not specifically state which party has the burden of showing trustworthiness or untrustworthiness.

The restyling sought to clarify the ambiguity by providing that a record fitting the other admissibility requirements would satisfy the exception if "the opponent does not show that" the source of information, etc., indicate a lack of trustworthiness. But the Committee did not submit this proposal as part of restyling because research into the case law indicated that the change would be substantive. While most courts impose the burden of proving untrustworthiness on the opponent, a few courts require the proponent to prove that the record is trustworthy. Thus the proposal would have changed the law in at least one court, and so was substantive under the restyling protocol.

When the Standing Committee approved the Restyled Rules, several members suggested that the Evidence Rules Committee consider making the minor substantive change that would clarify what is implicit in Rules 803(6)-(8) — that the opponent has the burden of showing untrustworthiness. Those members believed that allocating the burden to the opponent made sense for a number of reasons, including: 1) the Rules' reference to a "lack of trustworthiness" suggests strongly that the burden is on the opponent, as it is the opponent who would want to prove the lack of trustworthiness; 2) almost all the case law imposes the burden on the opponent; and 3) if the other admissibility requirements are met, the qualifying record is entitled to a presumption of trustworthiness, and adding an additional requirement of proving trustworthiness would unduly limit these records-based exceptions.

At the Fall 2010 meeting, the Advisory Committee was dubious about the need for an amendment that would clarify the burden of proof as to trustworthiness. Some members suggested

that the determination of trustworthiness might be a process and a court may decide that a record is untrustworthy even if the opponent does not provide any evidence or argument on that subject. Others noted that almost all courts impose the burden on the opponent and so there was really no serious problem worth addressing. Ultimately the Committee directed the Reporter to check with representatives of the ABA Litigation Section, the American College of Trial Lawyers, and other interested parties to determine whether it would be helpful to propose an amendment that would clarify that the burden of showing untrustworthiness is on the opponent. The Committee determined that it would revisit the question of a possible amendment at the Spring meeting.

The Reporter sought input from the American College, the Litigation Section, and the Department of Justice. All came out in favor of an amendment to clarify that the opponent has the burden of showing untrustworthiness of business and public records. Those organizations thought the amendment would provide a useful clarification and would assist courts and litigants in structuring arguments and admissibility determinations for business and public records.

But at the Spring meeting, Committee members were opposed to any amendment to the trustworthiness language of Rules 803(6)-(8). Members stated that any problem in the application in the rule was caused by a few wayward cases; that an amendment could simply invite parties to raise trustworthiness arguments that would not otherwise be raised; that courts need flexibility to deal with trustworthiness arguments; that parties understand that the burden of proving untrustworthiness is on the opponent; and that the restyling did nothing to change that basic understanding.

The Committee noted for the record that the burden of proving untrustworthiness is on the opponent and that this is clear enough in the existing language of the rule, so that clarification is unnecessary.

A motion was made against publishing an amendment to the trustworthiness clauses of Rules 803(6)-(8). Eight members voted in favor of the motion. One member abstained.

IV. Possible Amendment to Rule 801(d)(1)(B)

At the Spring meeting the Committee considered a proposed amendment that had been tabled a number of years earlier when the Committee was involved in Rule 502 and then restyling. The proposal — made by Judge Bullock, then a member of the Standing Committee — was to amend Evidence Rule 801(d)(1)(B). That is the hearsay exemption for certain prior consistent statements. Judge Bullock proposed that Rule 801(d)(1)(B) be amended to provide that prior consistent statements are admissible under the hearsay exception whenever they would be admissible to rehabilitate the witness's credibility. The justification for the amendment is that there is no meaningful distinction between substantive and rehabilitative use of prior consistent statements.

Under the current rule, some prior consistent statements offered to rehabilitate a witness's credibility — specifically those that rebut a charge of recent fabrication or improper motive — are

also admissible substantively under the hearsay exemption. But other rehabilitative statements — such as those which explain a prior inconsistency or rebut a charge of bad memory — are not admissible under the hearsay exception but only for rehabilitation. There are two basic practical problems in the distinction between substantive and credibility use as applied to prior consistent statements. First, as Judge Bullock noted, the necessary jury instruction is almost impossible for jurors to follow. The prior consistent statement is of little or no use for credibility unless the jury believes it to be true. Second, and for similar reasons, the distinction between substantive and impeachment use of prior consistent statements has little, if any, practical effect. The proponent has already presented the witness's trial testimony, so the prior consistent statement adds no real substantive effect to the proponent's case.

The Committee unanimously agreed with Judge Bullock's argument that the current distinction between substantive and impeachment use of prior consistent statements is impossible for jurors to follow and makes no practical difference. But some members were concerned that any expansion of the hearsay exemption to cover all prior consistent statements admissible for rehabilitation might be taken as a signal that the Rules were taking a more liberal attitude toward admitting prior consistent statements. Parties might seek to use the exemption as a means to bolster the credibility of their witnesses. The Committee was cognizant of the Supreme Court's concern in *Tome v. United States*, 513 U.S. 150 (1995): that under an expansive treatment of prior consistent statements "the whole emphasis of the trial could shift to the out-of-court statements, not the in-court ones."

One member agreed with the point that the current rule was problematic in treating some rehabilitative prior consistent statements differently from others, but suggested that the proper result is that *none* of them should be admissible substantively — i.e., the Committee should propose deleting Rule 801(d)(1)(B). But this suggestion was rejected by other Committee members, who found no good reason for upsetting the current practice in this way. The Department of Justice member was also opposed to any proposal to limit the current substantive admissibility of prior consistent statements.

Both the Department of Justice representative and the Public Defender representative noted that they had not yet had the opportunity to vet the proposed amendment with their interested parties. Committee members also noted that it might be useful to determine how the practice has gone under the states that already have a rule that is similar to the possible amendment.

Accordingly, after extensive discussion, the Committee resolved to further consider the proposal to amend Rule 801(d)(1)(B) at the next meeting. The working language for the proposed amendment is as follows:

> **(d) Statements That Are Not Hearsay.** A statement that meets the following conditions is not hearsay:
>
> > **(1)** ***A Declarant-Witness's Prior Statement.*** The declarant testifies and is subject to cross-examination about a prior statement, and the statement:

* * *

(B) is consistent with the declarant's testimony and ~~is offered to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying~~ rehabilitates the declarant's credibility as a witness;

The Committee requested the Department of Justice representative and the Public Defender representative to solicit the views of their interested parties. The Reporter was directed to research the practice in the states with similar rules. And Justice Appel offered to solicit the views of other state supreme court justices.

V. Proposed Amendment to Rule 806

In 2001, the Evidence Rules Committee directed the Reporter to review all the Evidence Rules and report on which rules were the subject of a conflict in interpretation in the courts. The goal of the project was to allow the Committee to consider whether to propose an amendment to any such rule in order to rectify the conflict. One rule subject to such a conflict was and is Rule 806 — the rule allowing impeachment of hearsay declarants. The Reporter prepared a memorandum discussing the conflict and providing language for a possible amendment. But by the time the Committee considered the conflict regarding Rule 806, it had become involved in developing Rule 502, and then restyling, and so consideration of a possible amendment was tabled.

At the Spring meeting, the Committee considered the possibility of two separate changes to Rule 806. One change addressed the conflict in the case law over whether a hearsay declarant may be impeached by extrinsic evidence of bad acts bearing on character for truthfulness. If the declarant were to testify as a witness, he could be questioned about pertinent bad acts, but Rule 608(b) would prohibit extrinsic evidence of those acts. Rule 806 is designed to allow an opponent to impeach a hearsay declarant in the same way that he could be impeached on the stand. But the problem is that a hearsay declarant ordinarily cannot be asked about bad acts — so the only way to raise the act would be through extrinsic evidence. Rule 806 currently does not provide for an exception to Rule 608(b), but at least one court has read such an exception into the Rule, in order to allow the opponent a means of attacking the credibility of a hearsay declarant through bad acts. The rationale of that court is that the goal of Rule 806 is to allow the opponent to impeach the declarant as fully as if he were on the stand. Other courts, however, read the rule literally and refuse to add an extrinsic evidence exception that is not in the text.

The possible amendment to the Rule — considered by the Committee at the Spring meeting — would have provided that "the court may admit extrinsic evidence of the declarant's conduct when offered to attack or support the declarant's character for truthfulness."

Committee members discussed the proposal and unanimously determined that the amendment should not proceed. Members noted that it is impossible to treat impeachment with bad

acts exactly the same when the person to be impeached is a hearsay declarant. That is because extrinsic evidence would have to be admitted, where it would be barred if the declarant were to testify. Given that impossibility of exactly equal treatment, the Committee considered whether it was good policy to allow extrinsic evidence of bad acts to impeach a hearsay declarant. It concluded that the policy of barring extrinsic evidence was a good one, as it prevented minitrials on collateral bad acts — minitrials that would require discovery by the parties. Because impeachment of witnesses and impeachment of hearsay declarants can never be exactly the same, the Committee saw no need to open up the costs of admitting extrinsic evidence to impeach hearsay declarants.

The other possible amendment to Rule 806 would deal with a narrow issue. Under the rule, a criminal defendant in a multi-defendant trial could end up being impeached with a prior conviction even if he never took the stand. This could occur when his hearsay statement is admitted against himself and his co-defendants (e.g., as a co-conspirator statement), and the co-defendants seek to attack the declarant's credibility. Some have argued that Rule 806 should be amended to prohibit the impeachment of an accused whose hearsay statements are admitted in a multiple defendant trial where the declarant-defendant does not testify. But the Committee determined that the solution to the problem of impeaching an accused who does not testify does not lie in the rules of evidence but rather in the law of severance. The Committee also noted that there was no easy answer to whether such impeachment should be permitted — while the declarant/defendant's rights are obviously at stake, so are the rights of the impeaching party to challenge the credibility of a hearsay declarant. The Committee unanimously determined that the proper resolution to these problems should be left to the trial judge considering the circumstances of the particular case, with the possible remedy of severance.

The Committee unanimously determined that there was no sentiment to move forward with any amendment to Rule 806.

VI. *Crawford* Developments

The Reporter provided the Committee with a case digest of all federal circuit cases discussing *Crawford v. Washington* and its progeny. The digest was grouped by subject matter. The goal of the digest is to allow the Committee to keep apprised of developments in the law of confrontation as they might affect the constitutionality of the Federal Rules hearsay exceptions.

The Committee reviewed the memo and the Reporter noted that — with the exception of Rule 803(10), discussed supra — nothing in the developing case law mandated an amendment to the Evidence Rules at this time. The digest contained an extensive discussion of the Supreme Court's recent decision in *Michigan v. Bryant*, which considered whether a hearsay statement admitted as an excited utterance was testimonial. The Court's decision in *Bryant* makes it very unlikely that a statement admitted under Rule 803(2) — the Federal Rules hearsay exception for excited utterances — will be found testimonial. The Reporter observed that the Supreme Court is currently considering the case of *Bullcoming v. New Mexico*, in which it will address whether lab results can be introduced by a witness other than the person who conducted the test. The Court's

decision in *Bullcoming* may have an effect on the application of Rule 703. The Committee resolved to continue monitoring developments on the relationship between the Federal Rules of Evidence and the accused's right to confrontation.

VII. Privilege Project

Several years ago the Committee voted to undertake a project to publish a pamphlet that would describe the federal common law on evidentiary privileges. The Committee determined that it would not be advisable to propose an actual codification of all the evidentiary privileges to Congress. But it concluded that it could perform a valuable service to the bench and bar by setting forth in text and commentary the privileges that exist under federal common law. Professor Broun had prepared drafts of a number of privileges, but the project was put on hold given the time and resources required for Rule 502 and the restyling project.

At the Spring meeting, Professor Broun submitted materials on the attorney-client privilege and the psychotherapist-patient privilege. Committee members praised his work and predicted that the final product, when published, would be extremely useful to the bench and bar. The Committee resolved unanimously that the privilege project should be continued.

Professor Broun stated that the goal of the project was to provide a textual "restatement" of the federal law of privilege, with an explanatory section setting forth the case law. Professor Broun sought guidance on which privileges should be addressed as the project goes forward. After discussion, the Committee determined that the project should cover the basic privileges: attorney-client; interspousal; psychotherapist; clergy; journalist; informant; deliberative process; and other governmental privileges. In addition, the Committee agreed with Professor Broun's suggestion that there should be a separate section on waiver — analogous to the separate rule on waiver proposed by the original Advisory Committee.

Committee members stated for the record that the project was intended only as a restatement of the federal common law of privilege — a published product that would assist the bench and bar. Members emphasized that the Committee has no intent to propose codification of privileges or to intrude on Congress's role in enacting privilege rules.

At the suggestion of the Chair, Judge Rosenthal agreed to check on whether the American Law Institute might be working on any project involving privileges.

Professor Broun stated that at the next meeting he would provide materials on the attorney-client privilege and the interspousal privileges.

VIII. Restyling Symposium

The Chair reported to the Committee on plans being made for a Symposium on the Restyled Rules of Evidence, to take place on the morning before the scheduled Fall meeting of the

Committee. The Symposium and the Committee meeting will take place at William and Mary Law School on Friday October 28, 2011.

The Chair explained that the Fall meeting will be an opportune moment for the Committee to take pride in the restyling effort, as the Restyled Rules are scheduled to go into effect on December 1, 2011 (if all goes well). The Chair and the Reporter have begun to put together two panels for the Symposium. One is a retrospective panel that will look at the process and protocol of restyling, problems encountered by the Committee, and how those problems were addressed in the Restyled Rules. The second panel will discuss how the Restyled Rules are likely to be received by the bench and bar; any questions about meaning that may exist; and what problems if any there might be in applying the Restyled Rules.

The proceedings of the Symposium will be published. Standing Committee members are enthusiastically invited to attend. Members of the William and Mary community will also be invited to attend.

The following people have agreed to make a presentation at the symposium — with subject matter of each presentation to be determined:

- Judge Robert Hinkle, Chair of the Committee during the restyling effort
- Professor Joe Kimble, style consultant
- Judge James Teilborg, Chair of the Style Subcommittee of the Standing Committee
- Judge Marilyn Huff, Member of the Style Subcommittee of the Standing Committee
- Professor Steve Saltzburg (Litigation Section representative on the restyling project).
- Judge Reena Raggi (Standing Committee member who provided very helpful comments on restyling)
- Judge Harris Hartz (former Standing Committee member who provided very helpful comments on restyling)
- Justice Andy Hurwitz, member of the Committee during restyling
- Judge Joan Ericksen, member of the Committee during restyling
- Professor Deborah Merritt, Ohio State (comment on Rule 1101)
- Professor Roger Park, Hastings (provided public comment)
- Judge S. Allan Alexander, Federal Magistrate Judges' Association
- Professor Katherine Schaffzin, Memphis (provided public comment)
- A representative from the National Center for State Courts.

The Chair invited Committee members to suggest any other individuals who should be invited to make a presentation, and to propose any other topics that might be covered by the panels.

IX. Next Meeting

The Fall 2011 meeting of the Committee is scheduled for Friday, October 28 in Williamsburg. It will take place after the Restyling Symposium.

Respectfully submitted,

Daniel J. Capra
Reporter