Advisory Committee on Evidence Rules

Minutes of the Meeting of October 21, 2016

Los Angeles, California

The Judicial Conference Advisory Committee on the Federal Rules of Evidence (the "Committee") met on October 21, 2016 at Pepperdine University School of Law in Los Angeles, California.

The following members of the Committee were present:

Hon. William K. Sessions, III, Chair
Hon. James P. Bassett
Hon. Debra Ann Livingston
Hon. John T. Marten
Daniel P. Collins, Esq.
Traci Lovitt, Esq.
Elizabeth J. Shapiro, Esq., Department of Justice
A.J. Kramer, Esq., Public Defender

Also present were:

Hon. David G. Campbell, Chair of the Committee on Rules of Practice and Procedure
Hon. Solomon Oliver, Liaison from the Civil Rules Committee
Professor Daniel J. Capra, Reporter to the Committee
Professor Daniel Coquillette, Reporter to the Standing Committee
Timothy Lau, Federal Judicial Center
Rebecca A. Womeldorf, Chief, Rules Committee Support Office
Shelly Cox , Rules Committee Support Office
Michael Shepard, Hogan Lovells, American College of Trial Lawyers
Professor Liesa Richter, University of Oklahoma School of Law

I. Opening Business

Approval of Minutes

The minutes of the Spring, 2016 Committee meeting were approved.

June Meeting of the Standing Committee

Judge Sessions reported on the June, 2016 meeting of the Standing Committee. The Evidence Rules Committee had two action items at the meeting: 1) a proposal to limit the hearsay exception for ancient documents (Rule 803(16)) to documents prepared before January 1, 1998; and 2) a proposal to add two subdivisions to Rule 902 that would allow for authentication of certain electronic evidence by way of a certificate of a qualified person. Both those proposals were unanimously approved by the Standing Committee. Judge Sessions also reported to the Standing Committee about ongoing Committee projects, including proposals to expand substantive admissibility of prior inconsistent statements (Rule 801(d)(1)(A)); to amend the residual exception (Rule 807) to provide for more uniformity and to streamline the trustworthiness requirement; and to amend the notice provisions for Rules 404(b) and Rule 807 to provide for more uniformity.

Introduction of New Committee Members

Judge Sessions welcomed and introduced the two new Committee members: Justice James Bassett, who sits on the New Hampshire Supreme Court; and Traci Lovitt, a partner at Jones Day in Boston.

II. Conference on Rule 404(b), Rule 807 and Rule 801(d)(1)(B)

The morning of the meeting was devoted to a Conference ("the Conference") on the following topics: 1. New developments in regulating admissibility of bad act evidence under Rule 404(b); 2. The Committee's working draft of a proposal to amend Rule 807, the residual exception to the hearsay rule; and 3. The Committee's working draft of a proposal to amend Rule 801(d)(1)(A) to provide for somewhat broader substantive use of prior inconsistent statements.

The first topic, Rule 404(b), was chosen because the Committee has an obligation to monitor new developments in the law of evidence. Several circuits have recently made major efforts to clarify how Rule 404(b) should work, emphasizing that courts must be careful to assure that the probative value of a bad act for a proper purpose proceeds through non-propensity inferences. Moreover, review of Rule 404(b) is warranted because the Committee has already agreed, unanimously, to propose an amendment to the notice provision of Rule 404(b), that would eliminate the requirement that the defendant demand discovery of Rule 404(b)

material. Because the Committee will be proposing that change to the notice provision, there is an opportunity, and a responsibility, to examine whether the rule (and especially the notice provision) should be amended in any other respect. And the Conference can provide important assistance from experts in reviewing the operation of Rule 404(b) and in determining whether amendments are necessary.

The second and third topics were chosen so that the Committee could get advance comment from experts on whether the proposed rule changes to Rules 807 and 801(d)(1)(A) were workable.

The Committee invited a stellar group to participate in the Conference. Panelists included judges (Hamilton, Phillips, and Manella), and outstanding professors and practitioners from the Los Angeles area. The discussion was robust and incisive, and many helpful suggestions were made and debated. The transcript of the Conference will be published in the Fordham Law Review, along with accompanying articles by several of the participants.

At the Committee meeting, held after the Conference, Committee members discussed the many ideas and arguments raised by the participants. The Committee generally concluded that the Conference was excellent, and that it gave the Committee plenty to think about regarding Rule 404(b) and the proposed amendments to Rules 807 and 801(d)(1)(A).

Among the specific points raised by Committee members regarding Rule 404(b) were the following:[1]

● There is a new trend in certain courts to require the government to explain precisely how a bad act is probative for a not-for-character purpose, and requiring that the showing of probative value for such a purpose proceeds through a non-propensity chain of inferences. A careful analysis is particularly important in cases where the asserted proper purpose is intent. The distinction between intent and propensity is very thin, if it even exists at all. And the instruction that is given to the jury about the distinction between intent and propensity is difficult if not impossible to follow.

● There is a huge difference among the circuits in the treatment of Rule 404(b) evidence. While some circuits are beginning to require an articulation of non-propensity inferences, other circuits are not --- in these latter circuits it is usually enough for the government to say that the evidence is offered for intent and knowledge, and the court finds that these issues are in dispute simply because the defendant has pleaded not guilty.

● Committee members agreed that it is important that bad acts be excluded if they are probative for a "proper" purpose only by proceeding through a propensity inference. Committee members also agreed that at some point the prosecution should have to articulate, and the court should have to find, that the stated proper purpose is shown through non-propensity inferences. But Committee members were not in agreement about whether Rule 404(b) should be amended to implement a more careful procedure than is being employed currently in some courts. One member stated that the solution would be to allow courts to be influenced by the cases decided

[1] Conference discussions regarding Rule 807 and 801(d)(1)(B) are set forth under separate headings below.

by the Seventh and Third Circuits --- the two circuits in the forefront of requiring a more careful analysis under Rule 404(b). But another member stated that there was no assurance at all that other circuits would follow suit, and that any such process even were it to occur might take decades.

● Some members thought that a change should be made to the notice provision of Rule 404(b). That change would require the government to articulate specifically the purpose for which the bad act evidence is offered. That kind of notice might get trial judges to focus on evaluating the evidence for a proper purpose at the outset of the case. Judge Campbell responded that an expanded notice provision might not be effective in attuning the court to the issue, because the prosecution might articulate every possible purpose in order to avoid being precluded from some proper purpose at a later point. Thus the expanded notice provision might simply result in front-loaded makework. Another member noted that the real problem is not that the government fails to articulate a specific proper purpose, but rather that the purpose proffered is often dependent on an assumption that the defendant has a propensity. The Reporter stated that if the rule is to be amended to require a showing of non-propensity inferences, that might be accomplished by adding language as follows:

> This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. <u>The evidence may not be admitted for such purpose, however, if the probative value of the evidence for that purpose depends on a propensity inference.</u>

● One member argued that there is a tension between the two provisions in Rule 404(b). Subdivision (1) prohibits bad acts if offered to prove that a person acted in accordance with character, while Subdivision (2) states that evidence is admissible if offered for another purpose, even if it could also be used for propensity. The Reporter responded that this apparent tension is handled in two steps: the bad act is admissible for the proper purpose so long as the probative value of the bad act in proving that purpose (1) proceeds through a non-propensity inference (the Rule 404(b) question) and (2) is not substantially outweighed by the risk that the jury will use the evidence for propensity (the Rule 403 question).

● One member suggested a more comprehensive amendment that would delete the provision in Rule 404(b) that sets forth the proper purposes, and that would add the following to the notice provision:

> <u>If a prosecutor intends to use such evidence at trial, the prosecutor must:</u>
> <u>(A) provide reasonable notice of the evidence that the prosecutor intends to offer at trial;</u>
> <u>(B) do so at least two weeks before trial, unless the court, for good cause, excuses this requirement;</u>
> <u>(C) articulate in the notice the non-propensity purpose for which the prosecution intends to offer the evidence; and</u>
> <u>(D) articulate the chain of reasoning supporting the purpose for offering the evidence.</u>

Judge Campbell noted that an effort to move up the timing of the notice (as provided in the above proposal) could be useful because it would make the court aware of the necessity to focus on whether the asserted purpose for the evidence proceeds through a non-propensity inference. He suggested that such a change could be accompanied by a Committee Note explaining that the timing of the notice is moved up because it is important to discuss and evaluate the purpose for which the evidence is offered at an early point in the proceedings.

● A member of the Committee suggested that if the government were required to state the purpose for the evidence in the notice, there should be a good cause exception for situations in which a proper purpose comes to light at some later point.

● Another member stated that the current notice provision is problematic because it allows the government to give only a vague indication of the evidence it intends to offer. The rule currently states that the government must inform the defendant of the "general nature" of the Rule 404(b) evidence. This member argued that in many cases the disclosure is so vague that it is impossible for the defendant to prepare arguments about the proper purpose of the evidence, if any. He suggested that the notice provision be amended to delete the term "general nature"--- so that the government would be required to "provide reasonable notice of any such evidence." The Reporter noted that the Committee had already agreed on a description of what needed to be disclosed under a proposed amendment to Rule 807 --- the "substance" of the evidence. Perhaps using the term "substance" in Rule 404(b) would require more specificity than the current "general nature," and would also provide uniformity with the notice provision in Rule 807.

After this extensive discussion, the Reporter was directed to prepare a memo for the next meeting that would present several drafting alternatives for a possible amendment to Rule 404(b), in light of the issues raised at the Conference. These alternatives include:

● deleting the reference in the notice provision to the "general nature" of the evidence (and perhaps substituting the word "substance");

● accelerating the timing of notice;

● requiring the government to provide in the notice a statement of the proper purpose for the evidence and how the evidence is probative for that purpose by proceeding through non-propensity inferences.

● adding a clause to Rule 404(b)(2) that would specify that the probative value for the articulated proper purpose must proceed through a non-propensity inference.

III. Proposal to Amend the Residual Exception

At previous meetings the Committee has had some preliminary discussion on whether Rule 807 --- the residual exception to the hearsay rule --- should be amended. Part of the motivation for an amendment would be to expand its coverage, because a comprehensive review of the case law over the last ten years provides some indication that reliable hearsay has been excluded. Also, expanding the residual exception somewhat may make it easier to propose limits on some of the more dubious hearsay exceptions. And another reason for an amendment would be that the rule could be improved to make the court's task of assessing trustworthiness easier and more uniform, and to eliminate confusion and unnecessary effort by deleting superfluous language.

At previous meetings, the Committee, after substantial discussion, preliminarily agreed on the following principles regarding Rule 807:

- The requirement that the court find trustworthiness "equivalent" to the circumstantial guarantees in the Rule 803 and 804 exceptions should be deleted --- without regard to expansion of the residual exception. That standard is exceedingly difficult to apply, because there is no unitary standard of trustworthiness in the Rule 803 and 804 exceptions. It is common ground that statements falling within the Rule 804 exceptions are not as reliable as those admissible under Rule 803; and it is also clear that the bases of reliability differ from exception to exception. Moreover, one of the exceptions subject to "equivalence" review --- Rule 804(b)(6) forfeiture --- is not based on reliability at all. Given the difficulty of the "equivalence" standard, a better approach is simply to require the judge to find that the hearsay offered under Rule 807 is trustworthy. This is especially so because a review of the case law indicates that the "equivalence" standard has not fulfilled the intent of the drafters to limit the discretion of the trial court. Given the wide spectrum of reliability found in the hearsay exceptions, it is not difficult to find a statement reliable by comparing it to a weak exception, or to find it unreliable by comparing it to a strong one.

- Trustworthiness can best be defined in the rule as requiring an evaluation of both circumstantial guarantees and corroborating evidence. Most courts find corroborating evidence to be relevant to the reliability enquiry, but some do not. An amendment would be useful to provide uniformity in the approach to evaluating trustworthiness under the residual exception --- and substantively, that amendment should specifically allow the court to consider corroborating evidence, as corroboration is a typical source for assuring that a statement is reliable. Adding a requirement that the court consider corroboration is an improvement to the rule independent of any decision to expand the residual exception.

- The requirements in Rule 807 that the residual hearsay must be proof of a "material fact" and that admission of residual hearsay be in "the interests of justice" have not served any good purpose. The inclusion of the language "material fact" is in conflict with the studious avoidance of the term "materiality" in Rule 403 --- and that avoidance

was well-reasoned, because the term "material" is so fuzzy. The courts have essentially held that "material" means "relevant" --- and so nothing is added to Rule 807 by including it there. Likewise nothing is added to Rule 807 by referring to the interests of justice because that guidance is already provided by Rule 102. These provisions were added to the residual exception to emphasize that the exception was to be used only in truly exceptional situations. Deleting them might change the tone a bit, to signal that while hearsay must still be reliable to be admitted under Rule 807, there is no longer a requirement that the use must be rare and exceptional. And at any rate it is good rulemaking to delete superfluous and confusing language.

● The requirement in the residual exception that the hearsay statement must be "more probative than any other evidence that the proponent can obtain through reasonable efforts" should be retained. This will preserve the rule that proponents cannot use the residual exception unless they need it. And it will send a signal that the changes proposed are modest --- there is no attempt to allow the residual exception to swallow the categorical exceptions, or even to permit the use the residual exception if the categorical exceptions are available.

The Committee developed a working draft of an amendment to Rule 807 that was the subject of review at the Conference on the day of the meeting. The working draft is as follows (including amendments to the notice provision that have been previously approved by the Committee, but are being held back until any amendments to the other provisions of the rule are either proposed or rejected).

Rule 807. Residual Exception

(a) In General. Under the following circumstances, a hearsay statement is not excluded by the rule against hearsay even if the statement is not specifically covered by a hearsay exception in Rule 803 or 804:

(1) ~~the statement has equivalent circumstantial guarantees of trustworthiness~~ the court determines, after considering the pertinent circumstances and any corroborating evidence, that the statement is trustworthy.; and

~~**(2)** it is offered as evidence of a material fact;~~

(~~3~~ 2) it is more probative on the point for which it is offered than ~~any~~ other evidence that the proponent can obtain through reasonable efforts~~; and~~

~~**(4)** admitting it will best serve the purposes of these rules and the interests of justice~~.

(b) Notice. **(b) Notice.** The statement is admissible only if~~, before the trial or hearing~~ the proponent gives an adverse party reasonable written notice of ~~the~~ an intent to offer

the statement ~~and its particulars, including the declarant's name and address,~~ -- including its substance and the declarant's name -- so that the party has a fair opportunity to meet it. The notice must be provided before the trial or hearing -- or during trial or hearing if the court, for good cause, excuses a lack of earlier notice.

At the Conference, some concern was expressed about expanding the residual exceptions, and about the unintended consequences that might occur in the application of the categorical exceptions if the residual exception is expanded. Most of the participants approved of the proposed changes, however, and most of the comments were that the changes were salutary without respect to expansion or contraction of the residual exception. For example, rejecting the "equivalence" standard in favor of a more straightforward reliability inquiry was useful simply because it made the rule easier to apply. And deleting the standards of "material fact" and "interest of justice" was useful because they fulfilled no independent purpose.

At the Committee meeting, members discussed the commentary on the working draft of Rule 807 at the Conference. Members also discussed a proposal by the Reporter to delete the "more probative than any other evidence" language and substitute the milder requirement that the statement be more probative than any other statement that could be obtained *from the declarant.* The Reporter's rationale for such a change was that courts had used the existing "more probative" requirement to tell a party how to try its case, i.e., that the party should not use residual hearsay when there was some other evidence, from any source, that it could use to prove the point. The Reporter argued that it should be up to the party to determine which evidence is most persuasive, and so long as the hearsay is reliable, there is no good reason to exclude it simply because there is some other evidence that might be out there to prove the point. Moreover, the party should have the option to offer *both* the reliable hearsay and the other available evidence, because the whole of that presentation might well be greater than the sum of its parts --- the existing "more probative" requirement mandates that the party must use the other evidence even if the residual hearsay could add to that evidence for a stronger presentation.

The Committee's discussion about the residual exception raised the following points:

● Committee members were generally opposed to any change to the more probative requirement. Changing the mandated comparison from other available evidence to other statements of the declarant would generally mean that reliable hearsay would be admissible whenever the declarant was unavailable. That was the position taken by the original Advisory Committee, but Committee members determined that at this point it was not prudent to expand the residual exception to the Advisory Committee's original conception. Rather, the residual exception should be crafted to prohibit unjust and unnecessary exclusion of reliable hearsay, while also prohibiting overuse and unbridled judicial discretion. While that balance might be obtained by tweaking the trustworthiness language, it would not be obtained by the overuse that would be invited in changing the "more probative" requirement.

● At the Conference, one speaker suggested that it would be helpful to include a reference in the trustworthiness clause to "the totality of circumstances." This is a well-known standard and would emphasize that the trial court's review of trustworthiness should not be limited. Committee members agreed that the working draft of a proposed amendment to Rule 807 should be changed to incorporate the "totality of circumstances" standard.

● Judge Campbell expressed concern that there would be substantial negative public comment to any change to the residual exception, because any such change would increase judicial discretion in admitting hearsay. He suggested that changing the language that Congress added to the Advisory Committee proposal in 1972 might upset Congress. And he stated that the public might not be convinced that the case for expanding the residual exception had been made, even though the Committee has reviewed every reported case from the last ten years in which the residual exception was discussed.

● One Committee member suggested that the proposed changes could be justified simply as improvements to the rule, without regard to whether the residual exception should be expanded or not. For example, the changes to the trustworthiness clause make it easier to apply --- alleviating the difficult-to-apply requirement that the court find guarantees equivalent to the exceptions in Rules 803 and 804. Moreover, specifying that the court must consider corroborating evidence is an improvement because it resolves a conflict among the circuits, and helps to assure that the court will consider all relevant information to determine whether the hearsay is trustworthy. Finally, deleting the superfluous clauses (material fact and interest of just) will eliminate confusion, as well as the need for the court to say, in every case, that the standards are either met or not met when that decision is predetermined by other factors that the court has already considered.

Ultimately the Committee resolved to continue to consider the proposal to amend Rule 807 at the next meeting, focusing on changes that could be made to improve the trustworthiness clause, and deletion of the superfluous provisions regarding material fact and interest of justice. At the next meeting, the Committee will consider whether these changes can be supported as part of a good rulemaking effort, even if they do not result in expanding the residual exception.

IV. Proposal to Amend Rule 801(d)(1)(A)

Over the last several meetings, the Committee has been considering the possibility of expanding substantive admissibility of certain prior statements of testifying witnesses under Rule 801(d)(1) --- the rationale of that expansion being that unlike other forms of hearsay, the declarant who made the statement is subject to cross-examination about that statement. At the

Symposium on Hearsay in October, 2015, a panel was devoted to treatment of prior witness statements.

Since beginning its review of Rule 801(d)(1), the Committee has narrowed its focus. Here is a synopsis of the Committee's prior determinations:

● While there is a good argument that prior witness statements should not be treated as hearsay at all, amending the hearsay rule itself (Rule 801(a)-(c)) is not justified. That rule is iconic, and amending it to exclude prior witness statements will be difficult and awkward. Therefore any amendment should focus on broadening the exemption provided by Rule 801(d)(1).

● The focus on Rule 801(d)(1) should be narrowed further to the subdivision on prior inconsistent statements: Rule 801(d)(1)(A). The current provision on prior consistent statements --- Rule 801(d)(1)(B) --- was only recently amended, and that amendment properly captures the statements that should be admissible for their truth. Any expansion of Rule 801(d)(1)(B) would untether the rule from its grounding in rehabilitating the witness, and would allow parties to strategically create evidence for trial. Likewise, the current provision of prior statements of identification --- Rule 801(d)(1)(C) --- has worked well and is not controversial; there is no reason, or even a supporting theory, to expand admissibility of such statements.

● Currently Rule 801(d)(1)(A) provides for substantive admissibility only in unusual cases --- where the declarant made the prior statement under oath at a formal proceeding. Two possibilities for expansion are: 1) allowing for substantive admissibility of *all* prior inconsistent statements, as is the case in California, Wisconsin, and a number of other states; and 2) allowing substantive admissibility only when there is proof --- other than a witness's statement --- that the prior statement was actually made, as is the procedure in Connecticut, Illinois, and several other states. The Committee quickly determined that it would not propose an amendment that would provide for substantive admissibility of all prior inconsistent statements. The Committee was concerned about the possibility that a prior inconsistent statement could be used as critical substantive proof even if the witness denied ever making it and there was a substantial dispute about whether it was ever made. In such circumstances, it would be difficult to cross-examine the witness about a statement he denies making; and it would often be costly and distracting to have to prove whether a prior inconsistent statement was made if there is no reliable record of it.

● If the concern is whether the statement was ever made, a majority of Committee members have concluded that the concern could be answered by a requirement that the statement be videotaped. It was also noted that allowing substantive admissibility of videotaped inconsistent statements could lead to more statements being videotaped in expectation that they might be useful substantively--- which is a good result even beyond its evidentiary consequences. And it was further noted by some members that one of the major costs of the current rule is that a confounding limiting instruction must be given

whenever a prior inconsistent statement is admissible for impeachment purposes but not for its substantive effect. That cost may be justified when there is doubt that a prior statement was fairly made, but it may well be unjustified when the prior statement is on video --- as there is easy proof of the statement and its circumstances if the witness denies making it or tries to explain it away.

The Committee developed a working draft of an amendment that would allow substantive admissibility for videotaped prior inconsistent statements. A straw vote was taken at the Spring 2016 meeting, with five members in favor and three opposed. The working draft provides as follows:

Rule 801. Definitions That Apply to This Article; Exclusions from Hearsay

*** * ***

(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:

(A) is inconsistent with the declarant's testimony and ~~was~~:

(i) was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition; or

(ii) was recorded on video and is available for presentation at trial; or

(B) is consistent with the declarant's testimony and is offered:

(i) 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; or

(ii) to rehabilitate the declarant's credibility as a witness when attacked on another ground; or

(C) identifies a person as someone the declarant perceived earlier.

At the Conference before the Committee meeting, participants generally were in favor of expanding the substantive admissibility of prior inconsistent statements. One participant --- who served as a state prosecutor in California, a state where all prior inconsistent statements are substantively admissible --- stated that without that rule many prosecutions (especially gang prosecutions) could not be brought.

After the Conference, the Committee discussed the working draft. The Committee's discussion raised the following points:

● One Committee member argued that expanding the exception could lead to abuse. The stated scenario was that a criminal defendant could coerce a witness to make a video statement that would exculpate him. Then, when the witness testified to the defendant's guilt at the trial, the defendant could admit the prior videotape as substantive evidence. There does not appear to be any reported indication that this abuse is occurring in the states where prior inconsistent statements are substantively admissible, but the Reporter stated that he would check the practice in those states for signs of abuse.

● Judge Campbell stated that it was a good idea to provide incentives for videotaping witness statements. But he feared that expanding substantive admissibility would also provide incentives to create video. He also expressed concern that with the increasing use and distribution of video, e.g., on YouTube and Facebook Live, an expanded rule would lead to broad use of such video, and this might be a problem.

● Another Committee member observed that given all the statements that are now being recorded, many might not be reliable --- though arguably that concern about reliability would be handled by the fact that the witness who made the statement would be subject to cross-examination about it. The member wondered whether there would be a category of cases that would be particularly affected by the change.

● Committee members generally agreed that if the amendment is to go forward, the language "recorded on video" should be changed because it is subject to becoming outmoded by technological change. Committee members suggested the term "audiovisual" --- which is the same term used in Civil Rule 30.

The Committee resolved to further consider the possible amendment to Rule 801(d)(1)(A) at the next meeting.

IV. Best Practices Manual on Authentication of Electronic Evidence

The Committee has determined that courts and litigants can use assistance in negotiating the difficulties of authenticating electronic evidence --- and that such assistance can be provided by publishing and distributing a best practices manual. The Reporter worked on preparing such a

manual with Greg Joseph and Judge Paul Grimm. The pamphlet, in final form, was reviewed and well-received by the Committee at a prior meeting, and also favorably reviewed at a Standing Committee meeting. The pamphlet is not a work of the Advisory Committee. It is a work of the three authors.

The Reporter informed the Committee that the best practices manual was submitted to the Federal Judicial Center, but the FJC declined to publish it in the form submitted, stating that it did not accord with the FJC template. The Reporter then negotiated to have the manual published by WestAcademic. West Academic published the pamphlet, and Greg Joseph provided his own funds to have the pamphlet distributed to every federal judge. The Reporter also obtained an agreement from WestAcademic to publish the best practices manual as an appendix to the yearly Federal Rules of Evidence book that WestAcademic publishes. Accordingly, the best practices manual will be updated every year.

The Committee congratulated the Reporter and his co-authors for arranging for maximum exposure of the best practices manual.

V. Consideration of a Proposed Amendment to Rule 702; Possible Symposium on Expert Evidence.

A law professor and another member of the public wrote an article asserting that courts are not following certain provisions of the 2000 amendment to Rule 702. That amendment provides that the trial court must find that an expert's opinion is based on sufficient facts or data (subdivision (b)); that the expert is using reliable methods (subdivision (c)); and that the methods are reliably applied (subdivision (d)). The article concludes that many courts are treating the questions of sufficient facts or data and reliable application as questions of weight and not admissibility.

The Reporter's memorandum to the Committee concluded that the article was essentially correct --- many courts are treating sufficiency of facts or data and reliable application as questions of weight. And this is directly contrary to Rules 702(b) and 702(d), which treat these questions as ones that the judge must decide under Rule 104(a). The question is, what to do about the reluctance of some courts to follow the rule as it is written. The Reporter suggested that any addition of words to the rule would be in the nature of "we really mean it" --- and if courts did not follow the rule before, there is no guarantee that they would follow it after such an amendment.

One member suggested that the rule might be amended to state specifically that the factual disputes over sufficiency of facts or data and reliable application were to be resolved under Rule 104(a). But another responded that this point was already evident in the Rule, because those factors are set forth as admissibility requirements. Moreover, to add specific language about Rule 104(a) to Rule 702 would raise questions about why such references are not included for admissibility requirements set forth in other rules.

A Committee member observed that while an amendment to solve the problem highlighted was unlikely to be successful, this did not mean that consideration of amendments to Rule 702 should be off the table. Committee members briefly considered the possibility of a project that would evaluate whether Rule 702 should be amended to take account of all of the questions that have recently been raised about the reliability of certain forensic evidence, such as ballistics and handwriting identification. These challenges can be found in the case law, as well as in important reports issued by the National Academy of Science and, most recently, the President's Council of Advisors on Science and Technology.

The Committee then discussed the possibility of sponsoring a Symposium on the subject of forensic evidence and the challenges of admitting that evidence under Rule 702. That Symposium could be held on the morning of the Fall, 2017 Committee meeting. The Chair suggested that the Symposium could cover not only the challenges to forensic expert testimony, but also whether changes should be made more generally to assure that courts are undertaking the gatekeeping function established by *Daubert* and the 2000 amendment to Rule 702. The Committee resolved to revisit the question of possible amendments to Rule 702, and the possibility of a Symposium on expert testimony, at its next meeting.

VI. Recent Perceptions (eHearsay)

The Committee has decided not to proceed on a proposal that would add a hearsay exception to address the phenomenon of electronic communication by way of text message, tweet, Facebook post, etc. The primary reason stated for the proposed exception is that these kinds of electronic communications are an ill-fit for the standard hearsay exceptions, and that without the exception reliable electronic communications will be either 1) excluded, or 2) admitted but only by improper application of the existing exceptions. The exception proposed was for "recent perceptions" of an unavailable declarant.

The Committee's decision not to proceed with the recent perceptions exception was mainly out of the concern that the exception would lead to the admission of unreliable evidence. That decision received support from the study conducted by the FJC representative on social science research. The studies indicate that lies are more likely to be made when outside another person's presence --- for example, by a tweet or Facebook post.

The Committee did, however, resolve to continue to monitor the practice and case law on electronic evidence and the hearsay rule, in order to determine whether there is a real problem of reliable hearsay either being excluded or improperly admitted by misapplying the existing exceptions.

For the Fall meeting, the Reporter submitted, for the Committee's information, a short outline on federal case law involving eHearsay. Nothing in the outline to date indicates that reliable eHearsay is being routinely excluded, nor that it is being admitted by misapplying the

existing exceptions. Most eHearsay seems to be properly admitted as party-opponent statements, excited utterances, or state of mind statements. And many statements that are texted or tweeted are properly found to be not hearsay at all. At most there was only one or two reported cases in which hearsay was excluded that might have been admitted under a recent perceptions exception.

The reporter will continue to monitor cases involving eHearsay and will keep the Committee apprised of developments.

VII. *Crawford* Developments

The Reporter provided the Committee with a case digest and commentary on all federal circuit cases discussing *Crawford v. Washington* and its progeny. The cases are 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 Reporter's memorandum noted that the law of Confrontation continues to remain in flux. And the fact that a new appointment to the Court (if any) might affect the development of the law of confrontation is a strong reason for adopting a wait-and-see approach. The Committee resolved to continue monitoring developments on the relationship between the Federal Rules of Evidence and the accused's right to confrontation.

VIII. Next Meeting

The Spring, 2017 meeting of the Evidence Rules Committee will be held in Washington, D.C., on Friday, April 21.

Respectfully submitted,

Daniel J. Capra