Advisory Committee on Evidence Rules

Minutes of the Meeting of October 26, 2017
Boston College Law School
Newton Centre, Massachusetts

The Judicial Conference Advisory Committee on the Federal Rules of Evidence (the "Committee") met on October 26, 2017 at the Boston College Law School in Newton Centre, Massachusetts.

The following members of the Committee were present:

Hon. Debra Ann Livingston, Chair
Hon. James P. Bassett
Hon. J. Thomas Marten
Hon. Shelly D. Dick
Hon. Thomas D. Schroeder
Daniel P. Collins, Esq.
Traci L. Lovitt, Esq.
A.J. Kramer, Esq., Federal Public Defender
Robert K. Hur, Esq., Principal Associate Deputy Attorney General, Department of Justice

Also present were:

Hon. David G. Campbell, Chair of the Committee on Rules of Practice and Procedure
Hon. Jesse M. Furman, Liaison from Committee on Rules of Practice and Procedure (by phone)
Hon. Sara Lioi, Liaison from the Civil Rules Committee
Hon. James C. Dever III, Liaison from the Criminal Rules Committee
Hon. William K. Sessions III, Former Chair of the Committee
Hon. Paul W. Grimm
Elizabeth J. Shapiro, Esq., Department of Justice
Professor Daniel J. Capra, Reporter to the Committee
Professor Daniel R. Coquillette, Reporter to the Standing Committee
Professor Catherine T. Struve, Assistant Reporter to the Standing Committee (by phone)
Professor Liesa L. Richter, Academic Consultant to the Committee
Dr. Timothy Lau, Esq., Federal Judicial Center
Rebecca A. Womeldorf, Esq., Secretary, Committee on Rules of Practice and Procedure
Shelly Cox, Administrative Analyst, Committee on Rules of Practice and Procedure
Patrick Tighe, Esq., Rules Committee Law Clerk

I. Opening Business

Announcements

Judge Livingston opened her first meeting as Chair by noting the very special nature of the Advisory Committee on Evidence Rules, that draws experts hailing from diverse legal fields and parts of the country. She was happy to note that her excellent predecessor, Judge Sessions, was in

attendance for the Committee meeting, as well as for the symposium on forensic evidence, *Daubert* and Rule 702 planned for the following day.

Judge Livingston introduced two new members of the Evidence Advisory Committee. She welcomed Judge Shelly Dick, United States District Court Judge for the Middle District of Louisiana, and Judge Thomas Schroeder, United States District Court Judge for the Middle District of North Carolina, to the Committee. Judge Livingston described many notable contributions made by both during their distinguished careers and welcomed their participation on the Committee. Judge Livingston also welcomed two new liaison members to the Advisory Committee—Judge Jesse Furman, a member of the Standing Committee, and Judge Sara Lioi, a member of the Civil Rules Committee. Judge Livingston noted that both bring amazing experience to the Committee and will be a great resource to the Committee in its work. Finally, Judge Livingston welcomed Rob Hur, Principal Associate Deputy Attorney General, an *ex officio* member of the Advisory Committee.

Following introductions, Judge Livingston paid tribute to Judge Sessions' distinguished service as Chair of the Evidence Advisory Committee, noting that he helped shape the important work of the Advisory Committee with grace, intellect, and good sense. Judge Livingston noted Judge Sessions' many contributions to the Committee's work, including its close review of the hearsay rules leading to proposed amendments to the Ancient Documents and Residual exceptions, its work on electronic evidence and updates to the authentication provisions, and finally its equally important decisions *not* to propose amendments to other rules. Judge Livingston also emphasized the key role Judge Sessions played in bringing the consideration of *Daubert* and forensic evidence to the Committee and in developing the Rule 702 symposium.

Judge Sessions thanked Judge Livingston for her remarks and noted that the Evidence Advisory Committee is an excellent example of how government ought to function, with experts from various fields and with divergent viewpoints listening to one another with mutual respect.

Approval of Minutes

The minutes of the April 21, 2017 Advisory Committee meeting at the Thurgood Marshall Building in Washington DC were approved.

Standing Committee Meeting

Judge Sessions gave a brief report on the June meeting of the Standing Committee. The proposed amendment to the residual exception to the hearsay rule, Rule 807, was presented to the Standing Committee. The proposal received the unanimous support of the Standing Committee and was approved for public comment. The Standing Committee was also updated as to the remaining topics on the agenda of the Advisory Committee.

II. Proposal to Amend Rule 807

The Reporter noted that the Committee approved a proposal to amend Rule 807, the residual exception to the hearsay rule, at its April, 2017 meeting. Most importantly, the amendment would eliminate the "equivalence" standard in the existing rule in favor of a more direct focus on circumstantial guarantees of trustworthiness for proffered statements, taking into account the presence or absence of corroboration. In addition, the proposed amendment would eliminate the "materiality" and "interests of justice" requirements (as duplicative), while retaining the "more probative" requirement in the existing rule. Finally, the proposed amendment would update and clarify the notice provision in Rule 807. The proposed amendment to Rule 807 has been published for public comment, with the comment period officially closing on February 15, 2018. The Reporter noted that few comments had been received to date but that additional public comments are likely to come in the Spring. The Reporter observed that the few public comments received to date were positive and supportive of the proposed amendment. The Committee will consider all of the public comments at its April 2018 meeting in Washington DC.

III. Potential Amendment to Rule 801(d)(1)(A)

The Reporter explained that the Committee had been exploring the possibility of expanding the substantive admissibility of prior inconsistent statements made by testifying witnesses for the past several meetings, beginning with a symposium hosted by the Committee at the John Marshall Law School in the Fall of 2015. The working draft of a potential amendment would permit prior inconsistent statements of testifying witnesses that are recorded audio-visually and available for presentation at trial to be admitted for their truth. The Reporter explained that the Committee decided at its previous meeting to conduct additional pre-public comment research concerning the implications of such an expansion of Rule 801(d)(1)(A), prior to proceeding with a proposal to issue the Rule for public comment. The Reporter noted that this research would continue until the April 2018 Advisory Committee meeting, at which time the Committee will determine whether to propose an amendment to the Rule or to discontinue its examination of Rule 801(d)(1)(A) for the time being.

Request for input on Rule 801(d)(1)(A) to date has included pre-public comment publication of the working draft of the amendment on the uscourts.gov website, which generated comments only from groups already invited to provide input. In addition, the American Association of Justice, the NACDL, and the Innocence Project have responded to the Committee's invitation to comment with letters opining on the working draft. The Reporter stated that consideration of those letters would be saved for the April 2018 meeting when all research would be complete, although he noted that the AAJ review of the potential Amendment was largely positive (with a helpful suggestion to consider clarification of the definition of "audio visual recording") and that concerns raised by both the NACDL and the Innocence Project might be answered by the Committee's research and a proper understanding of the limited scope of the working draft of the amendment. The Reporter further informed the Committee that the ABA Section on Criminal Justice is planning to submit a report on the working draft for the Spring meeting.

The Reporter informed the Committee that Dr. Lau of the Federal Judicial Center had prepared surveys to collect feedback from judges and practicing lawyers concerning the potential amendment. Dr. Lau received input from the Chair and Reporter of the Advisory Committee in preparing the surveys. Dr. Lau informed the Committee that the surveys had already been circulated and that responses are due by November 17, 2017. Dr. Lau will report on the survey results at the April 2018 Advisory Committee meeting. Judge Campbell asked about questions in the surveys calling for respondents' perceptions of videos of interviews that they have encountered in the courtroom. Dr. Lau explained that those survey items were designed purely for informational purposes to get a sense of the experience of judges and lawyers with audio visual interviews. Judge Campbell emphasized that audio-visual statements admitted through an amended Rule 801(d)(1)(A) could include cell phone, dash cam, "GoPro" or other footage that does not occur in an interview setting and that the Advisory Committee should not base a decision about amending Rule 801(d)(1)(A) on the viewing experiences of survey respondents, but might consider the survey data purely for informational purposes. Another Committee member inquired whether additional surveys could be circulated to state court judges and practitioners in the many states that have expanded their counterparts to Rule 801(d)(1)(A) beyond the limited federal approach, to determine the experience of those states with broader substantive admissibility of prior inconsistent statements. The Reporter explained that the Committee had hosted two symposia (one at John Marshall Law School and another at Pepperdine School of Law) to study the effects of expanded substantive admissibility of prior inconsistent statements, where practitioners in Wisconsin and California described their very positive experience with broad substantive admissibility under their respective state provisions. In addition, the Reporter noted extensive independent research into state variations of Rule 801(d)(1)(A) that permit broader substantive admissibility. Thus, the Committee has already made significant enquiry into the state experience with broader substantive admissibility of prior inconsistent statements.

Although full consideration of an amendment to permit substantive admissibility of audio-visually recorded prior inconsistent statements available for presentation at trial will take place at the April 2018 Advisory Committee meeting, several Committee members made preliminary comments about the potential amendment. One Committee member noted that the primary impact of an amendment would not be at trial (because juries fail to comprehend the limiting instructions currently provided to prevent substantive consideration of prior inconsistent statements falling outside Rule 801(d)(1)(A)). Rather, the primary effect, as illustrated by the remarks of a California prosecutor at the Pepperdine symposium, would be in getting past a Rule 29 motion and getting to the jury with a recorded witness statement. The existence of substantively admissible recorded witness statements would also enable prosecutors to obtain plea bargains in cases where they otherwise might not. Another Committee member responded that there are mixed views about the potential change in the criminal defense community. On the one hand, allowing recorded statements allows defendants (who cannot put witnesses into the grand jury) to obtain substantive evidence from witnesses who may end up testifying favorably for the government at trial. On the other hand, defense counsel have concerns about recordings made of child victims, particularly on Native American reservations, that may be offered into evidence when the audio visual equipment may be turned on late to capture less than the full interview. Judge Livingston noted that the invited comment from the Innocence Project illuminated potential ramifications of an amendment at the plea bargaining stage, noting that a defendant could be persuaded to plead guilty based upon

an early recorded witness statement notwithstanding the possibility that the witness's testimony could change at trial. Judge Livingston further noted the benefits of putting witnesses into the grand jury, where law enforcement and prosecutors are required to interface, and where there are greater assurances of the reliability of pre-trial statements. Judge Campbell noted the heavy caseload arising on reservations in Arizona and the difficult position encountered by criminal defendants trying to refute testimony by polished and articulate FBI agents regarding the content of oral interviews between the agent and defendant. Judge Campbell suggested that any rule that would encourage more recording of interviews would be beneficial to defendants in countering such testimony. Mr. Hur noted that FBI regulations now contain a presumption that favors recording of all custodial interrogations. The Public Defender stated that the criminal defense bar strongly supports recording of statements by defendants, but has concerns about the recording of statements by prosecution witnesses.

The Reporter concluded the discussion of the potential amendment to Rule 801(d)(1)(A) by noting that concerns raised about the amendment by the Innocence Project and others could be fully vetted at the spring meeting when the Committee will make a final determination about whether to propose an amendment to Rule 801(d)(1)(A), but that additional studies advocated by some could take a decade to perform and interpret and would be ill-suited to the rule-making process.

IV. Rule 606(b) and *Pena-Rodriguez* Developments

At its April 2017 meeting, the Advisory Committee considered the possibility of amending Rule 606(b) to reflect the Supreme Court's 2017 holding in *Pena-Rodriguez v. Colorado*. The Reporter noted that the Committee had considered three possibilities for amending Rule 606(b) at its last meeting, including: 1) an amendment that would capture the precise exception to Rule 606(b), requiring admission of juror statements indicating clear racial or ethnic bias, as articulated in the *Pena-Rodriguez* opinion; 2) an amendment that would expand the *Pena-Rodriguez* exception to the Rule 606(b) prohibition on juror testimony to encompass all juror conduct implicating a party's constitutional rights; and 3) a generic "constitutional" exception to Rule 606(b) that would capture the *Pena-Rodriguez* holding for now, but that would adapt to any future expansion of that rule by the Supreme Court (akin to the constitutional exception found in Rule 412(b)(1)(C)). The Reporter explained that the Committee had declined to pursue any amendment for the time being due to concern that any amendment to Rule 606(b) to allow for juror testimony to protect constitutional rights could be read to expand the *Pena-Rodriguez* holding.

At its April 2017 meeting, the Committee asked the Reporter to monitor Rule 606(b) cases for any development or expansion that would alter the Committee's previous decision. The Reporter provided the Committee with recent Rule 606(b) cases and informed the Committee that federal courts had thus far rejected efforts to expand the *Pena-Rodriguez* exception to Rule 606(b) beyond the clear statements of racial animus at issue in that case.

Several Committee members expressed concern that there is no language in Rule 606(b) warning litigants and judges that the Rule is unconstitutional if applied to exclude post-verdict testimony relating clear juror statements of racial bias under *Pena-Rodriguez*. Committee

members noted that the point of the Evidence Rules is to allow judges and lawyers to rely on the Rules for a correct and complete set of principles upon which they may depend and that judges and lawyers should not have to consult treatises to learn that Rule 606(b)'s clear mandate cannot be constitutionally applied in certain circumstances. One Committee member suggested reconsideration of an amendment that would codify only the narrow holding of *Pena-Rodriguez* in rule text. The Reporter explained the difficulty in drafting language that would capture the *Pena-Rodriguez* holding without risking expansion to include other juror conduct that violates constitutional rights, such as jury consideration of a criminal defendant's failure to testify. Further, the Reporter explained the difficulty in characterizing even the *Pena-Rodriguez* holding in rule text with any precision—noting a recent Sixth Circuit case in which jurors made clearly racist statements about other jurors and their unwillingness to convict the accused. In that case, the majority distinguished *Pena-Rodriguez,* emphasizing that the juror in *Pena-Rodriguez* made racist statements specifically about the accused. Over a lengthy dissent, the majority applied Rule 606(b) to prohibit juror testimony about the racist remarks. Another Committee member suggested that the habeas standard requiring a violation of "clearly established law" might be employed to draft an amendment that would avoid expansion should the Committee consider possible amendments in the future.

The Reporter concluded the discussion of Rule 606(b) by promising to continue monitoring the Rule 606(b) case law for the Committee and to keep the Committee apprised of developments.

V. Rule 404(b)

The Reporter explained that the Committee had been discussing potential amendments to Rule 404(b) since the symposium the Committee hosted at Pepperdine in the Fall of 2016. The Committee's examination of Rule 404(b) was prompted by recent case law in some circuits demanding more rigor in the Rule 404(b) analysis in criminal cases. In particular, the Committee has explored three strands of recent precedent. First, the Seventh and Third Circuits (and at least one panel of the Fourth) have demanded that prosecutors and trial judges articulate with precision the chain of inferences leading from an uncharged crime, wrong, or other act to the purported proper purpose for admitting it. These Circuits have forbidden the admission of any act through Rule 404(b) that depends for its probative value on the defendant's propensity to behave in a certain way. In addition, these Circuits also have insisted upon "active contest" by a criminal defendant of the element to which the uncharged act is relevant, rejecting a simple plea of not guilty as demonstrating such an "active contest." Finally, several Circuits have eliminated or restricted the "inextricably intertwined" doctrine that allows uncharged acts purportedly connected with the charged offense in some way to be admitted without a Rule 404(b) analysis—these circuits appear to opt for a direct/indirect distinction, finding that Rule 404(b) is applicable whenever the bad act is offered as indirect evidence of the charged crime.

At the Spring meeting, Committee members inquired as to the level of care being taken in performing a Rule 404(b) analysis in criminal cases in other circuits. In particular, the DOJ representative suggested that courts were taking great care in policing the requirements of Rule 404(b) in criminal cases, particularly at the district court level. The Reporter explained that the agenda materials contained an examination of recent cases decided since the Spring meeting,

including all circuit court opinions and a representative sample of district court opinions to give the Committee a picture of the handling of Rule 404(b) at both the trial and appellate levels in all circuits.

The Reporter explained that the cases clearly revealed a split in authority at both the appellate and trial levels with respect to Rule 404(b) evidence. At the appellate level, opinions in the First, Second, Fourth, Fifth, Eighth, and Ninth Circuits recently admitted other acts evidence against criminal defendants to show intent and knowledge without any explanation of non-propensity inferences supporting admissibility. Several circuits continue to treat Rule 404(b) as a "rule of inclusion," with recent Eighth Circuit cases emphasizing that point and making admission of Rule 404(b) evidence almost automatic. Decisions in the Fifth, Eighth, and Eleventh Circuits broadly applied the inextricably intertwined doctrine to admit other acts evidence outside Rule 404(b). Conversely, recent opinions in the Third, Fourth, and Tenth Circuits approached Rule 404(b) evidence with caution and thorough analysis. District court opinions were similarly split, with some district court opinions taking great care in analyzing the admissibility of Rule 404(b) evidence and others taking none at all.

The Reporter also noted that the Committee had been provided with a memorandum prepared by Professor Richter, detailing state law variations on Rule 404(b). Professor Richter described the findings in that memo, explaining that several states have added protections to their Rule 404(b) counterparts, including procedural protections like enhanced notice and articulation requirements, as well as substantive protections like enhanced balancing tests that provide greater protection to criminal defendants. These additional protections appear to be operating well without unduly constraining the government's ability to admit bad act evidence for a proper purpose.

The Reporter noted the Committee's proper and essential role in resolving circuit splits with respect to Evidence Rules and emphasized the split between the various circuits, as well as within the Fourth Circuit. The Reporter explained that various amendments could be considered to resolve the split, but noted that no votes were to be taken at this meeting and that additional research and discussion were anticipated prior to any decision.

The Reporter noted that the Committee had decided at its last meeting to drop consideration of an "active contest" requirement as a potential amendment. The Committee was therefore continuing consideration of three possible amendments to the substantive provisions of Rule 404(b): (1) an amendment that would require precise articulation of the chain of inferences supporting admissibility of an uncharged act and a prohibition on acts that depend on propensity inferences; (2) an amendment to require all uncharged acts not "directly" proving the charged offense to proceed through a Rule 404(b) analysis; and/or (3) an amendment modifying the regular Rule 403 balancing test for criminal defendants to require that the probative value of an uncharged act outweigh unfair prejudice to the defendant. In addition the Committee was continuing to consider possible changes to the notice provision.

The Public Defender stated that he had conducted an informal survey of federal defenders on Rule 404(b), and that they were unanimously and vehemently opposed to the current application of Rule 404(b) in most of the circuits. In particular, he noted the difficulty judges and defendants

have in asking prosecutors to identify a proper Rule 404(b) purpose with any clarity. He lamented the circular nature of the reasoning attending Rule 404(b) arguments and rulings, i.e., that an act is admissible to prove intent because it shows intent and knowledge. The Public Defender emphasized the extreme prejudicial effect that bad act evidence has on the defendant and explained that the government often spends more time at trial presenting evidence of "other acts" than it does to present evidence of the charged offense. In sum, he concluded that Rule 404(b) is misused on a regular basis and that an amendment is necessary. He offered to prepare a memo collecting examples from federal defenders.

Thereafter, Mr. Hur, the DOJ representative, explained that the Department of Justice has very strong views on the subject of Rule 404(b). As a threshold matter, Mr. Hur noted that the DOJ does not agree that there is a problem with Rule 404(b) that needs to be fixed. The DOJ has taken the position in a Supreme Court filing that there is no circuit split with respect to Rule 404(b). He emphasized that anecdotal complaints about the Rule's application were not evidence of a problem and that he personally had as many anecdotes of being put through his paces by trial judges protecting against admission of Rule 404(b) evidence. While there may be cases where the analysis is not rigorous, DOJ can identify as many where trial courts are handling Rule 404(b) with care. Using the analysis of Rule 404(b) set forth by the Supreme Court in *Huddleston,* courts are doing what they do best—sorting the admissible from the inadmissible. The Reporter responded that the conflict between the circuits is clearly apparent in the decisions where some characterize Rule 404(b) as a "rule of inclusion" and maintain that intent is automatically at issue whenever a defendant pleads not guilty, and others treat the rule as one of exclusion and prohibit reliance on propensity inferences in any case. Mr. Hur replied that factual distinctions are crucial in Rule 404(b) cases and that the cases represent factual differences rather than a circuit spit.

Elizabeth Shapiro of the DOJ stated that Rule 404(b) issues were percolating in the courts and that courts should be allowed to continue working on Rule 404(b) issues. The Reporter expressed concern that Rule 404(b) issues had been percolating for a very long time and that uniformity in the courts could be a very long time coming, if it comes at all.

One Committee member articulated the concern that the Rule as currently drafted allows the prosecution to rely on a laundry list of purported proper purposes to make unsupported arguments for admission. With the amount of discretion vested in trial judges, appellate courts are reluctant to tinker in Rule 404(b) decision-making, leaving unsupported assertions of admissibility unchecked. An amendment that forces lawyers to articulate the proper purposes for admitting Rule 404(b) evidence will lead to better outcomes and create a better record for the appellate court. The Committee member stated that Rule 404(b) has been abused more than any other rule in criminal cases and the possibility of percolation in the Circuit courts does not absolve the Committee of responsibility for fixing it.

The Chair noted that evidence of extrinsic acts may be crucial to fact-finding and may be the only way to establish state of mind in some cases. The Chair then read the famous quote from Justice Jackson regarding American character evidence rules—codified now in Rules 404(a) and 405—highlighting the risk of pulling even one misshapen stone from the "grotesque structure" and emphasizing that all decisions regarding such evidence are moderated by discretionary authority

of the trial court.[1] The Chair noted that in her personal experience, it is not easy to have Rule 404(b) evidence admitted, and that she does not favor an amendment that focuses reviewing courts on the verbal formulations employed by district courts in explaining their decisions, as opposed to the soundness of their decisions. She noted at the appellate level there may be significant and searching discussion about a Rule 404(b) issue followed by a rather cursory ruling on the evidence. The Reporter responded that while an articulation requirement and a propensity ban might intrude on judicial discretion, a modification of the balancing test applicable to criminal defendants would not constitute the same type of intrusion on discretion—indeed it would preserve and promote judicial discretion.

Another Committee member noted concerns about the role of Rule 404(b) in plea bargaining. Where very few cases go to trial, defense expectations about the broad admissibility of other acts evidence may result in a decision to plead guilty. Rule 404(b) thus presents a larger issue than whether the jury hears other acts evidence in the few cases that go to trial.

Mr. Hur stated that prosecutors are required to give Rule 404(b) notice even in cases where defendants plead guilty. He argued that the influence of Rule 404(b) at the plea bargaining stage is a virtue rather than a flaw because defendants plead guilty fully aware of the evidence they would face at trial. Further, Mr. Hur noted that trial judges rarely rule on Rule 404(b) motions in advance of trial, preferring to monitor the evidence as it comes in, thus eliminating any concern that Rule 404(b) *in limine* rulings are causing defendants to plead guilty.

In response, the Federal Public Defender remarked that his experience was very different from that described by Mr. Hur. He explained that the government never gives detailed notice of Rule 404(b) evidence and that defense lawyers have to fight to obtain necessary information. He also noted that Rule 404(b) motions are almost always ruled upon prior to trial because the lawyers need to know what is coming in to prepare opening statements. Furthermore, he expressed the view that the real reason the government wants other acts evidence is for the prejudicial propensity purpose, and that the limiting instruction provided with Rule 404(b) evidence is incomprehensible to the jury. He opined that forty-plus years of percolation in the courts is too long to wait for improvement and stated that he favors the modification to the Rule 403 balancing test to make it more protective. Finally, he stated that knowing what is coming is not sufficient for a defendant when what is coming is often automatic admission of the defendant's bad acts.

The Chair argued that Rule 404(b) reversals are not infrequent and suggested that Rule 404(b) may be the most common ground for reversal in a criminal case. Other Committee members suggested that improper jury instructions could be more common bases for reversal and that Rule 404(b) reversals may be more numerous than other evidentiary reversals simply because the rule is utilized so often. Another Committee member emphasized that trial judges sometimes confront many motions prior to trial and may give Rule 404(b) careful consideration and then write a very brief order; district court opinions may not reflect the true consideration trial judges are

[1] *See* Michelson v. United States, 335 U.S. 469, 486 (1948) (discussing the rules on allowing the defendant to admit character evidence).

giving this evidence. Another Committee member suggested that an amendment to improve the notice in criminal cases could be quite helpful, stating that the government fails to give sufficiently detailed notice and that better notice would assist trial judges in giving thoughtful consideration to Rule 404(b) evidence at an earlier stage. The Reporter observed that an enhanced notice requirement, if violated, would not necessarily result in exclusion of the Rule 404(b) evidence.

A Committee member asked the DOJ representative for the Department's view on an amendment that would alter the balancing test to require the probative value of the Rule 404(b) evidence to outweigh the unfair prejudice to the defendant. Ms. Shapiro expressed the view that the Rule 404(b) balancing test should be less protective than the Rule 609(a)(1)(B) test because not all Rule 404(b) acts are convictions (though many are). She complained that less bad act evidence would be admitted if the balancing test were altered. Mr. Hur suggested that a modification of the balancing test was inconsistent with the will of Congress and the Supreme Court in *Huddleston*. The Reporter responded that the Rule 403 test was applied to Rule 404(b) evidence by the Supreme Court in *Huddleston* because it was the test that was applicable to all evidence under the Rules. Changing the balance under an amendment would thus not overrule *Huddleston*—any more than changing the ancient documents exception to the hearsay rule "overrules" judicial interpretations of the previous rule.

Judge Campbell asked two questions: (1) whether the modified balancing test would reverse the characterization of Rule 404(b) as a "rule of inclusion" as some circuits do, and (2) where the "rule of inclusion" characterization originated. The Reporter responded that the modified balancing test would eliminate the "rule of inclusion" characterization because it would require probative value to outweigh prejudice and would thus, slightly favor exclusion. He further explained the history of the "rule of inclusion" language as described in the Third Circuit *Caldwell* decision: because the enumerated list of proper purposes in Rule 404(b)(2) is not exhaustive or exclusive, it "includes" other potential proper purposes not specifically enumerated. Thus, the Rule was characterized as a rule of "inclusion." That characterization did not originally mean that the Rule favored admissibility of other acts evidence as many circuits now hold. Judge Campbell asked whether the modified balancing test would eliminate the concern about other acts evidence relying on propensity inferences. The Reporter explained that the balancing approach would not specifically outlaw propensity per se, but would counsel greater caution in admitting Rule 404(b) evidence that presents a risk of unfair propensity prejudice. So the effect on using propensity inferences would be indirect.

Judge Campbell then asked whether there was any way for the Committee to gather data about the frequency of exclusion of Rule 404(b) evidence, noting that appellate opinions provide a somewhat skewed sample of cases in which the evidence was admitted. Apart from a survey or a detailed multi-year study of district court docket entries, the Reporter explained that the reported opinions are the only basis for evaluating the operation of Rule 404(b). The Public Defender noted that exclusions of Rule 404(b) evidence would not necessarily demonstrate that courts are keeping the evidence out because the government often asks to admit five or six prior acts in a single case and trial courts often respond by allowing only a few. Mr. Hur expressed the view that this demonstrates the proper operation of Rule 404(b) because trial judges are carefully sorting and

allowing some prior acts, but excluding others. Others on the Committee suggested that partial admission suggested more of a "split the baby" approach than careful parsing of prior convictions.

At the conclusion of the discussion, the Committee resolved to continue consideration of: (1) a potential propensity ban/articulation requirement; (2) a modified balancing test that would require probative value of Rule 404(b) acts to outweigh unfair prejudice to a criminal defendant; and (3) language that would tie the coverage of Rule 404(b) to all bad act evidence that is offered as "indirect" evidence of the crime charged; and (4) enhanced notice requirements. Committee members commended the Reporter for the thorough and excellent preparation of materials and resolved to continue the study of potential amendments to Rule 404(b) at the Spring 2018 meeting.

VI. Rule 106 Rule of Completeness

The Honorable Paul W. Grimm, United States District Court Judge for the District of Maryland, presented a proposal to amend Rule 106 (governing completeness of writings or recordings) based upon the results of extensive research he conducted in drafting an opinion in *United States v. Bailey*, Crim No. PWG-16-0246 (D. Md. May 24, 2017). Judge Grimm explained that the rule of completeness constitutes an exception to the general principle that prevents a party from interrupting the trial presentation of an opponent and that requires parties to await their case to put in counter proof. Prior to the Evidence Rules, the common law allowed interruption by an opponent to prevent misleading the fact-finder with partial and distorted information. Specifically the common law doctrine allowed for completion of acts and oral conversations, as well as writings and recordings. It allowed such completion only when a proponent presented a selected portion of an act, conversation, or writing that would cause unfairness by misleading the jury as to the true nature of that act, conversation, or writing. It allowed completion with the remainder of the conversation, act, or writing regardless of whether it was independently admissible under the hearsay rule. Finally, the common law required acceleration of the presentation of the completing information, requiring the proponent of the act, conversation, or writing to admit the remaining portion necessary to avoid misleading the jury.

Judge Grimm noted that Federal Rule of Evidence 106 codified the common law only partially, allowing completion only of writings and recorded statements and omitting oral statements for unspecified "practical reasons." In addition, Rule 106 is silent on whether a writing or recorded statement may be used to complete a misleading portion of that statement when the completing portion is not independently admissible for its truth under the hearsay rules. Judge Grimm explained that the limited scope of Rule 106 causes particular concern in criminal cases. He gave an example of a case where the FBI conducted an oral interview of a criminal defendant and made a later record of that oral interview, documenting both inculpatory and exculpatory statements by the defendant. The government filed a motion *in limine* revealing its intention of calling the FBI agent who conducted the interview to testify to the defendant's inculpatory statements and asking the court to prevent the defense from seeking admission of the exculpatory portions of the same interview to place those inculpatory statements in context. Specifically, the government argued that it could present the defendant's inculpatory statements pursuant to the hearsay exception for party opponent statements, but that the defendant could not use that exception to admit his own exculpatory statements. On its face, Rule 106 does not help resolve

this situation because it does not cover oral statements and is silent about completing with information that is not independently admissible under the hearsay rules.

Judge Grimm noted the concerns about unfairness if a selective and misleading portion of a statement is admitted and a criminal defendant is either forced to wait until the defense case to correct it—or, more importantly, may be unable to correct it at all due to the hearsay rule, coupled with a decision not to testify. Judge Grimm explained that the federal courts are struggling with this issue and that the circuits handle it in conflicting ways. Some circuits exclude completing statements that are not independently admissible and that would constitute hearsay—even if they are necessary, in fairness, to complete an opponent's presentation. Other circuits allow statements necessary to complete on the theory that completing statements need not be admitted for their truth and may show context without being used substantively. Some courts allow completion of oral statements using the court's broad powers to control the mode and order of proof under Rule 611(a) and others use Rule 403 and the risk of distortion to foreclose use of incomplete statements altogether. Others find that common law standards continue to exist to supplement Rule 106. Judge Grimm therefore recommended that the Committee consider amending Rule 106 to cover oral statements and to allow completing statements necessary in fairness to prevent misleading the jury, regardless of whether those statements would be independently admissible under the hearsay rule.

The Reporter directed the Committee to a draft of a potential amendment to Rule 106 conforming to Judge Grimm's proposal, emphasizing that the draft rule was for purposes of discussion only and that no vote would be taken at this meeting concerning the proposal. The Reporter explained that the draft rule would add oral statements to Rule 106 and would allow statements necessary in fairness to complete to be admitted for their truth notwithstanding the absence of an applicable hearsay exception.

A discussion of the draft amendment to Rule 106 followed. One Committee member inquired whether hearsay exceptions other than Rule 801(d)(2)(A) covering party opponents' statements could create an issue where part of a single statement would fit the hearsay exception, but another part of the same statement would not. The Reporter noted that it was indeed possible for statements admitted through other hearsay exceptions to create a similar issue. For example, a portion of a 911 call could constitute an excited utterance, but a later portion of the same 911 call after excitement had waned might not satisfy the exception. The Committee member expressed concern about creating a new categorical hearsay exception for all completing statements under the auspices of Rule 106. Another Committee member noted the ubiquitous nature of long e-mail chains that a party could argue would have to be admitted in their entirety for their truth under an amended Rule 106. Judge Grimm responded that trial judges have to draw meaningful lines about how much of an e-mail chain would be necessary in fairness to complete the material originally offered and that the amendment would not make the entire chain admissible—it would not change the law on whether a completing portion is necessary. The Reporter noted that Rule 106 is anchored by the requirements that: 1) the portion of a statement originally presented must be misleading, and 2) the completing portion would clear up that misleading impression. Thus, the amendment would not authorize admission of all statements in their entirety. Nothing in the draft amendment would change the court's analysis of email strings.

The Chair queried whether it would be necessary to create a hearsay exception for completing portions of statements and suggested that allowing nonhearsay use of completing statements to provide context would be sufficient. Judge Grimm acknowledged that allowing use of the completing information for its truth would not be necessary to correct the misleading impression left by the original selective portion of the statement. The Reporter provided two reasons why allowing use of the completing information for its truth would be justified. First, if the original proponent has put in a portion of a statement for its truth in a manner that misleads and distorts the truth, there is a solid argument that the proponent does not deserve protection from the accurate portrayal of the information through a hearsay exception for the completing portion of a statement. Second, allowing the completing portion of the statement only for its nonhearsay contextual value would require a confusing limiting instruction that jurors are unlikely to follow. The Committee has endeavored to minimize such confusing and ineffective limiting instructions through amendments like the one to Rule 801(d)(1)(B). Affording full use of completing statements would be consistent with those efforts.

Committee members discussed the difficulty for trial judges attempting to apply the Rule to lengthy video recordings typical in FBI and DEA investigations. Committee members noted that there could be two hour recordings that a judge would have to view in order to apply Rule 106. Of course, the existing rule of completeness already covers recordings, and so these challenges are imposed under the existing Rule.

Ms. Shapiro opined that courts are handling completion of video recorded statements well under the existing Rule 106 and cautioned that an amendment specifically authorizing a hearsay exception for completing statements could be subject to abuse, with defendants constantly objecting to interrupt and hinder the prosecution's presentation thinking that a new hearsay exception should justify admission of video and other statements for their truth only in their entirety. She further expressed concern that the expansion of the Rule to cover oral statements could cause abuse, even though courts currently apply the completeness rule to oral statements under Rule 611(a). While Rule amendments have in the past been found necessary to rectify conflicts in the courts, Ms. Shapiro argued that this was unnecessary in the Rule 106 context, because only a few circuits are preventing completion of misleading statements by invoking the hearsay rule. Judge Grimm respectfully disagreed that the federal courts are handling the issue well given his extensive research on the subject, and opined that it was simply unfair to allow a party to introduce a misleading portion of a statement and then lodge a hearsay objection to prevent a necessary clarification. The Reporter opined that there was no such thing as a "small" circuit split; whenever there are different results among the circuits on an Evidence Rule, it undermines the basic reason for having Rules of Evidence—uniformity.

Committee members then discussed how disputes about the content of oral statements would be handled if the Rule were expanded to cover oral statements. Judge Grimm noted that courts would continue to enjoy discretion to require an opponent to wait until its case in chief to present evidence of completing oral statements in circumstances where there is a significant dispute about the content of the oral statements, so as to minimize the interruption of the proponent's case. The Reporter noted that trial judges enjoy considerable discretion under Rule 403 to handle disputes about whether oral statements have actually been made.

Judge Campbell suggested that proponents of incomplete statements will not risk misleading the jury due to the possibility of having the distortion revealed to the jury later in the case. The Reporter responded, however, that completing statements made by a criminal defendant would never be revealed to the jury except through Rule 106 if the court holds that they are inadmissible hearsay and the defendant does not testify.

At the conclusion of the discussion, the Committee members determined that the issue of Rule 106 deserved further consideration and resolved to continue discussion of a potential amendment to Rule 106 at the next meeting. The Reporter was asked to prepare a draft amendment that would allow for completion, but only for a nonhearsay contextual purpose and not for the truth of the completing statements.

VII. Rule 609(a)(1) Impeachment

The Reporter informed the Committee that the Hon. Timothy R. Rice, United States Magistrate Judge for the Eastern District of Pennsylvania and former member of the Criminal Rules Committee, had proposed that the Evidence Advisory Committee consider an amendment abrogating Rule 609(a)(1) of the Federal Rules of Evidence. Judge Rice's article proposing abrogation based upon principles of "restorative justice" was distributed to the Committee in preparation for the meeting. The Reporter summarized Rule 609(a)(1), which permits testifying witnesses to be impeached at trial by evidence of felony convictions that are less than ten years old at the time of trial, even though they are not for crimes involving dishonest acts or false statements. For a testifying criminal defendant, the Rule provides a more protective balancing test than that found in Rule 403—requiring the probative value of the conviction for impeaching the witness's character for truthfulness to outweigh the prejudicial effect. The Rule 403 balancing test applies to all other witnesses. Under Judge Rice's proposal, impeachment with convictions that do not involve dishonesty or false statement would be eliminated entirely. The proposal would retain automatic impeachment of all witnesses with convictions involving dishonest acts or false statements, regardless of severity, under Rule 609(a)(2).

The Reporter called the Committee's attention to the legislative history behind Rule 609(a)(1) set out in detail in the agenda materials, emphasizing that the admissibility of such felony convictions to impeach and the applicable balancing tests were the result of a compromise following extensive Congressional involvement in the drafting of Rule 609 as part of the original rulemaking process. The Reporter outlined the potential amendment options for the Committee:

- Abrogate Rule 609(a)(1), eliminating non-dishonesty felony conviction impeachment for all witnesses.

- Abrogate Rule 609(a)(1)(B), eliminating non-dishonesty felony conviction impeachment for testifying criminal defendants only.

- Maintain Rule 609(a)(1), but modify the balancing test to provide enhanced protection to testifying criminal defendants in particular.

The Reporter noted that it would be necessary to amend Rule 608(b) if Rule 609(a)(1) were abrogated in whole or in part, in order to prevent admission of the bad acts underlying inadmissible felony convictions from being used to impeach on cross-examination under the auspices of Rule 608 (instead of Rule 609).

Judge Campbell queried whether there is any data concerning the impact Rule 609(a)(1) has had on criminal defendants' decisions not to testify. The Reporter responded that studies provided no definitive answer to that question, but noted that data from the Innocence Project revealed that a high percentage of defendants who were proven innocent through DNA evidence had not testified in their own defense. He observed that it is impossible to determine with any precision whether Rule 609(a)(1) was involved in all of those decisions, but explained that there is some sense that Rule 609(a)(1) plays a role in defendants' decisions to stay off the stand. The Public Defender stated that it is anecdotally well-accepted that defense lawyers don't put defendants with felony convictions on the stand. He stated that there could be other reasons for keeping a defendant from testifying (such as a *Miranda*-barred statement that remains a permissible basis for impeachment), but that the most important reason to keep a defendant from testifying remains the existence of felony convictions. Another Committee member expressed an interest in paring down Rule 609, noting that it provides a distraction that lacks substance at trial.

The Chair acknowledged the effect that Rule 609(a)(1) plays in keeping criminal defendants from testifying, but expressed concern regarding any amendment that would disrupt one of the hardest-fought compromises of the original rule-making process—a compromise that has persisted for the past forty-plus years. She further noted that the "restorative justice" philosophy underscoring Judge Rice's proposal (one aimed at bringing convicted persons back into society) did not seem to be an appropriate basis for amending an evidence rule, emphasizing that evidence rules are designed to secure truth and that Congressional support for Rule 609(a)(1) impeachment arose from the philosophy that prior felony convictions reflect poorly on truthfulness as a testifying witness. The existing protective balancing test gives judges discretion to control the admissibility of felonies against testifying criminal defendants. The Chair also expressed concern about the Committee's workload and the appropriate sequencing of projects, noting the exhaustive consideration of Rule 702 expected to begin after the symposium on forensic evidence the following day.

The Reporter responded that workload and sequencing posed no obstacle to a potential Rule 609(a)(1) amendment, emphasizing that the Committee could decide to propose a modification quickly that could be transmitted to the Standing Committee before a multi-year project on forensic evidence began. The Reporter noted several problems with the application of the existing Rule, such as: 1) the questionable connection it draws between truthful testimony and non-dishonesty felony convictions; 2) its failure to account for the fact that the testifying criminal defendant is automatically impeached by his strong incentive to be acquitted; and 3) its application by courts to admit felony convictions very similar to the charged offense.

The Reporter also emphasized that the Committee could retain Rule 609(a)(1), but propose a more rigorous application of the balancing test applied to criminal defendant-witnesses, if it concluded that the existing test was failing to fulfill Congress's original protective intent. That

more limited amendment could be consistent with, rather than upending, the hard-fought congressional compromise, as that compromise was clearly intended to provide more protection for criminal defendant-witnesses. The Reporter highlighted a 2008 law review article by Professor Jeffrey Bellin in the U.C. Davis Law Review, which posits that the courts have thwarted the original congressional intent to protect criminal defendants with multi-factor tests favoring admissibility, and proposes a more targeted and cautious approach to the admissibility of felony convictions. The Reporter noted that an amendment consistent with Professor Bellin's proposal could be crafted in place of abrogation.

With respect to potential abrogation, several Committee members expressed reluctance to substitute the Committee's value judgment about the connection between non-dishonesty felonies and truthful testimony for the value judgment expressed in the congressional compromise currently embodied in the Rule.

One Committee member queried whether particular standards apply to a decision to abrogate a rule. Professor Coquillette responded that many rules are abrogated and that no specific standards govern. He agreed, however, that different degrees of caution are appropriate when Congress has been involved actively in rule-making, stating that a Committee should take a hands-off approach to rules like Rules 413-415 where Congress actually did the drafting, and should exercise some caution for rules like 609(a) where Congress was heavily involved in drafting. The Reporter acknowledged the importance of caution, but noted that: Congress in reality enacted all the Rules; circumstances and judicial interpretation of the Rules can change over time; and Congressional involvement does not mean that the Committee cannot explore amendments. He also pointed up that the Committee had only recently proposed abrogation of the ancient documents exception to the hearsay rule.

Judge Sessions commented that the Committee's role is to make the Evidence Rules fair, efficient, responsible and forward-looking and that, while any amendment must meet an appropriate threshold for change, the Committee should feel free to proceed with needed changes.

As the discussion continued, Committee members noted that Rule 609(a)(1) may work in a criminal defendant's favor, permitting impeachment of testifying government witnesses with non-dishonesty felonies. One Committee member observed that impeachment of government witnesses with felony convictions in federal gun and drug cases is commonplace. Another Committee member responded that non-dishonesty felonies have a very different prejudicial effect for testifying criminal defendants, who risk use of their convictions to prove the charges they are denying. Cooperating government witnesses often admit wrongdoing at trial but the only consequence is that their credibility is diminished.

The discussion then returned to a potential amendment that would retain impeachment with non-dishonesty felony convictions, but would enhance the balancing approach courts are currently taking to such convictions when offered against a criminal defendant-witness. Judge Campbell asked what evidence suggested that the existing balancing test was not being applied appropriately. The Reporter noted the cases in the Reporter's memo that showed: 1) the failure of courts to consider the criminal defendant's obvious impeaching bias in performing the balancing test; 2) the

cases in which non-dishonesty felonies very similar to the charged offense are admitted; and 3) the use of a balancing test that has factors that cancel each other out (e.g., considering the importance of obtaining the defendant's testimony as a factor against impeachment, and considering the importance of the defendant's credibility as a factor in favor). The Reporter also emphasized that the Supreme Court's opinion in the *Luce* case makes it impossible to review the cases in which the defendant stays off the stand to avoid anticipated impeachment with prior convictions. Committee members noted that it is also impossible to see how often such felonies are excluded under the existing balancing test and suggested that it would be important to gather more data before deciding that the current balancing test is broken. Other Committee members expressed a reluctance to micromanage trial judges with further refinements to the balancing test, stating that defense lawyers could use the existing balancing test to argue for better results. Another Committee member noted that an important goal of law review articles like Professor Bellin's is to influence the courts (and not just rule-makers) to apply the Rules appropriately. The Reporter acknowledged this, but queried whether it was realistic to hope for such an effect given that Professor Bellin's article sounded an alarm about Rule 609 in 2008 and no change in the case law could be detected.

The Committee concluded that Rule 609(a)(1) impeachment presents an important issue and resolved to continue its discussion of the Rule at its spring meeting. The Committee directed the Reporter to perform additional research regarding how Rule 609(a)(1) is being administered in the federal courts. Some Committee members noted that there should be a presumption against abrogation in the ensuing consideration of the Rule, given that Congress had carefully balanced competing interests in the existing Rule.

VIII. Closing Matters

Committee members agreed to postpone discussion of a proposed rule on "Illustrative Aids and the Treatment of 'Demonstrative Evidence'" until the Spring meeting.

In closing the Chair thanked the Boston College Law School for hosting the meeting, thanked the Committee members and all participants for their valuable commentary at the meeting, and noted the Symposium on "Forensic Expert Testimony, Rule 702, and *Daubert*" scheduled for the following day. The meeting was then adjourned.

IX. Next Meeting

The Spring meeting of the Evidence Rules Committee will be held in Washington D.C. on Thursday, April 26 and Friday, April 27, 2018.

Respectfully submitted,

Liesa L. Richter
Daniel J. Capra