ADVISORY COMMITTEE
ON
EVIDENCE RULES

May 2, 2025

ADVISORY COMMITTEE ON EVIDENCE RULES

AGENDA FOR COMMITTEE MEETING

May 2, 2025

Washington, D.C.

I. Committee Meeting --- Opening Business

Opening business includes:

- Approval of the minutes of the Spring, 2024 meeting.
- Report on the June 2024 meeting of the Standing Committee.

II. Proposal to Expand the Hearsay Exemption in Rule 801(d)(1)(A) for Prior Inconsistent Statements of Testifying Witnesses

The Committee proposed an amendment to Rule 801(d)(1)(A) to allow all prior inconsistent statements of a witness subject to cross-examination to be admissible for their truth as well as for impeachment. The proposal was approved unanimously by the Standing Committee, with the exception of an abstention by the Department of Justice. The proposal was released for public comment on August 15, 2024, and public comment ended on February 16, 2025. At this meeting, the Committee must decide whether to give final approval to the proposal.

The Reporter's memorandum on the proposed amendment is behind Tab II.

III. Artificial Intelligence and Machine-Learning

At its last four meetings, the Committee has been working on possible amendments to address the evidentiary challenges raised by artificial intelligence. Broadly speaking, the problems are two: 1) whether changes to the authenticity rules are necessary to deal with "deepfakes"; and 2) whether a change is needed to Article 7 to give courts authority to regulate evidence that is the product of machine learning when no expert witness on the machine learning is proffered to testify.

Behind Tab III is a memorandum from the Reporter providing updates on these two topics and presenting drafts of possible amendments. Also included in the memorandum is a new proposal from Professor Rebecca Delfino.

IV. Proposal to Amend Rule 609(a)(1)(B)

At its Spring 2024 meeting, the Committee rejected a proposal to eliminate Rule 609(a)(1), the rule allowing impeachment of witnesses with prior convictions that do not involve dishonesty or false statement. Members agreed, however, to consider a proposal that provides more protection for criminal defendants, by requiring the probative value of such convictions to *substantially* outweigh their prejudicial effect. Behind Tab IV is the Reporter's memo on Rule 609(a)(1)(B). Also behind Tab IV is a case digest.

V. Proposal for Style Change to Rule 801(d)(2)(E)

Sai, a member of the public, has submitted a suggestion for a stylistic change to the text of Rule 801(d)(2)(E). Behind Tab V is a short memo from Professor Richter on the proposed change.

VI. Rule 902(1) and Indian Tribes

At the last meeting the Committee considered a proposal to add federally-recognized Indian Tribes to the list of public entities whose records would be self-authenticating under Rule 902(1). The Committee's resolution at the last meeting is indicated in the Minutes:

> The Chair noted there were two issues for consideration: (1) whether an amendment would open a can of worms due to the record-keeping variation among federally recognized Indian tribes and (2) whether a proposal to amend Rule 902(1) represents a solution in search of a problem due to the ease of authentication under evidentiary provisions already in existence. The Reporter suggested the Committee would benefit from a memo on both issues from the Department of Justice, as well as from Federal Defenders. The Federal Defender reiterated that the variation in record-keeping among federally recognized tribes is enormous and stated that the Federal Defenders would welcome the opportunity to submit a memorandum on the issue.
>
> The Chair closed the discussion by recognizing that the ball is in the Department of Justice's court on the issue of amending Rule 902(1). He suggested that the Committee consider a submission from the Department at its Spring 2025 meeting. If the Department recommends no amendment at that time, the Chair noted the discussion of the issue would be brief. If, however, the Department recommends proceeding with an amendment, there would be issues for the Committee to sort through. The Chair suggested that the Committee could turn to the Federal Defenders for their input at or after the Spring 2025 meeting if the Department recommends action that merits further inquiry.

On March 28, 2025, the Chair and Reporter received a letter from the Department of Justice advocating an amendment to Rule 902(1). The release of the agenda book was delayed to allow the Federal Public Defender to provide a response.

Behind Tab VI is the Department of Justice letter and the Federal Public Defender's response. There is no Reporter's memo, given the lack of time between receipt of the letters and the date for sending out the agenda book. But the Department of Justice's proposed change comes from a draft alternative prepared by the Reporter.

VII. Discussion of Rule 706

Samantha C. Smith, a Supreme Court Fellow, will be making a presentation to the Committee about the work that she has been doing on Rule 706, the rule providing for court appointment of expert witnesses.

RULES COMMITTEES — CHAIRS AND REPORTERS

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(Standing Committee)

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Secretary to the Standing Committee

Carolyn A. Dubay, Esq.
Administrative Office of the U.S. Courts
Office of the General Counsel – Rules Committee Staff
Washington, DC

Advisory Committee on Appellate Rules

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Advisory Committee on Bankruptcy Rules

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Associate Reporter

Professor Laura B. Bartell
Wayne State University Law School
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	Professor Andrew Bradt University of California, Berkeley Berkeley, CA

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Advisory Committee on Evidence Rules

Chair	Reporter
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ADVISORY COMMITTEE ON EVIDENCE RULES

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Honorable Mark S. Massa Indiana Supreme Court Indianapolis, IN	Honorable Edmund A. Sargus, Jr. United States District Court Columbus, OH
John S. Siffert, Esq. Lankler Siffert & Wohl LLP New York, NY	Honorable Richard J. Sullivan United States Court of Appeals New York, NY
Rene L. Valladares, Esq. Office of the Federal Public Defender Las Vegas, NV	TBD Principal Associate Deputy Attorney General (ex officio) United States Department of Justice Washington, DC

Consultant

Professor Liesa Richter
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Liaisons

Honorable Michael W. Mosman (*Criminal*) United States District Court Portland, OR	Honorable Edward M. Mansfield (*Standing*) Iowa Supreme Court Des Moines, IA
Honorable M. Hannah Lauck (*Civil*) United States District Court Richmond, VA	

Advisory Committee on Evidence Rules

Members	Position	District/Circuit	Start Date	End Date
Jesse M. Furman Chair	D	New York (Southern)	Member: 2024 Chair: 2024	---- 2027
Valerie E. Caproni	D	New York (Southern)	2023	2026
James P. Cooney III	ESQ	North Carolina	2022	2025
Mark S. Massa	JUST	Indiana	2022	2025
Edmund A. Sargus, Jr.	D	Ohio (Southern)	2023	2026
John S. Siffert	ESQ	New York	2023	2026
Richard J. Sullivan	C	Second Circuit	2021	2026
TBD*	DOJ	Washington, DC	----	Open
Rene Valladares	FPD	Nevada	2022	2027
Daniel J. Capra Reporter	ACAD	New York	1996	Open

Rules Committee Staff: Bridget Healy, 202-502-1820

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Liaison for the Advisory Committee on Bankruptcy Rules	Dean Troy A. McKenzie *(Standing)*
Liaisons for the Advisory Committee on Civil Rules	Hon. D. Brooks Smith (*Standing*) Hon. Catherine P. McEwen *(Bankruptcy)*
Liaison for the Advisory Committee on Criminal Rules	Hon. Paul J. Barbadoro (*Standing*)
Liaisons for the Advisory Committee on Evidence Rules	Hon. Michael W. Mosman (*Criminal*) Hon. Edward M. Mansfield *(Standing)* Hon. M. Hannah Lauck (*Civil*)

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Elizabeth Wiggins, Ph.D., J.D.
Division Director

Evidence Rules Committee
Elizabeth Wiggins, Ph.D., J.D.
Division Director

Timothy Lau, Ph.D., J.D. (alternate)
Research Associate

Standing Committee
Tim Reagan, Ph.D., J.D.
Senior Research Associate

TAB 1

TAB 1A

Advisory Committee on Evidence Rules
Minutes of the Meeting of November 8, 2024
NYU Law School – Furman Hall
New York, NY

The Judicial Conference Advisory Committee on the Federal Rules of Evidence (the "Committee") met on November 8, 2024 in Furman Hall at the NYU School of Law in New York.

The following members of the Committee were present:
Hon. Jesse Furman, Chair
Hon. Valerie E. Caproni
Hon. Mark S. Massa
Hon. Richard J. Sullivan
Hon. Edmund A. Sargus, Jr.
John S. Siffert, Esq.
Rene L. Valladares, Esq., Federal Public Defender
Elizabeth J. Shapiro, Esq., Department of Justice

Also present were:
Hon. John D. Bates, Chair of the Committee on Rules of Practice and Procedure
Professor Catherine T. Struve, Reporter to the Standing Committee
Hon. Edward M. Mansfield, Liaison from the Standing Committee
Hon. Hannah Lauck, Liaison from the Civil Rules Committee
Hon. Michael Mosman, Liaison from the Criminal Rules Committee
Hon. Robert Conrad, Jr., Director, Administrative Office of the United States Courts
Professor Daniel J. Capra, Reporter to the Committee
Professor Liesa L. Richter, Academic Consultant to the Committee
Finnuala Tessier, Esq., Department of Justice
Beth Wiggins, Esq., Federal Judicial Center
Tim Reagan, Esq., Federal Judicial Center
Thomas Byron III, Esq., Chief Counsel, Rules Committee
Bridget M. Healy, Esq., Counsel, Rules Committee Staff
Rakita Johnson, Administrative Analyst, Rules Committee Staff
Kyle Brinker, Esq., Rules Law Clerk
Alex Alekri, NYU Law student
Claire Rothschild, NYU Law student
Dionis Jahjaga, Fordham Law student
Harshita Garg, NYU Law student
John Hawkinson, Journalist
John McCarthy, Smith, Gambrell & Russell, LLP
Jonah Harwood, NYU Law student
Kahaari Kenyatta, NYU Law student
Lex Uttamsingh, NYU Law student
Liam Hofmeister, NYU Law student
Mariana Gusdorf, NYU Law student

Micah Musser, NYU Law student
Milan Sani, NYU Law student
Miles Plusford, NYU Law student
Morgan Brandewie, NYU Law student
Raymond Valerio, NYU Law student
Sarah Mihm, NYU Law student
Sam Sinutko, Fordham Law student
Nate Raymond, Reuters
Noami Biale, Sher Tremonte LLP
Sue Steinman, American Association for Justice
Christopher Flood, Federal Defenders of New York, Inc.

Present Via Microsoft Teams
Professor Daniel R. Coquillette, Consultant to the Standing Committee
Alex Dahl, Lawyers for Civil Justice
Daniel Steen, Lawyers for Civil Justice
Audrey Mitchell, NYU Law student
Avalon Zoppo, National Law Journal
Carly Giffin, Federal Judicial Center
Crystal Williams
Jacqueline Thomsen, Bloomberg Law
Jeffrey Overley, Law 360
Kaiya Lyons, American Association for Justice
Leah Lorber, GSK
Margaret Williams, Federal Judicial Center
Timothy Lau, Federal Judicial Center
Hon. Paul Grimm, Duke University
Samantha Smith, Supreme Court Fellow, Federal Judicial Center
Sandi Johnson, RAINN

I. Welcome and Opening Business

Judge Furman welcomed everyone to the meeting and introduced himself as the new Chair of the Advisory Committee on Evidence Rules. He thanked Judge Schiltz for his stellar service to the Committee and then invited meeting participants to introduce themselves. Judge Furman offered a special welcome to Judge Conrad, Director of the Administrative Office of the United States courts and thanked him for his dedication to Rules Committee work. Judge Furman also welcomed Kyle Brinker, the Rules Law Clerk to his first Committee meeting and noted that Rene Valladares had been reappointed to another three-year term on the Committee. Finally, Judge Furman thanked the NYU law students and other members of the public for attending the meeting and commended their interest in rulemaking. He extended thanks to the NYU Law School for hosting the meeting as well. The Chair then recognized the U.S. Marshals' Service to make a security announcement.

The Reporter gave a report on the June meeting of the Standing Committee. He explained that the Evidence Rules Committee had only one action item to present to the Standing

Committee, the proposed publication for notice and comment of an amendment to Federal Rule of Evidence 801(d)(1)(A) to allow substantive admissibility of all witness inconsistent statements (even if those statements were not given under oath at a prior proceeding as required by the current provision). The Reporter explained that the Standing Committee asked a few questions about the proposal but approved it unanimously, with one abstention by the Department of Justice.

The Chair then asked for a motion to approve the minutes of the Committee's Spring 2024 meeting. A motion was made, seconded, and unanimously approved.

Before turning to the agenda, Thomas Byron, Chief Counsel, offered a brief update on the status of the amendments to the Federal Rules of Evidence already approved by the Committee. He explained that new Federal Rule of Evidence 107 and amendments to Evidence Rules 613(b), 801(d)(2), 804(b)(3), and 1006 are on track to take effect on December 1, 2024, absent action by Congress. He explained that the amendment to Rule 801(d)(1)(A) regarding substantive admissibility of prior inconsistent statements had been published for public comment and that the Committee would review the public comment at its Spring 2025 meeting in Washington DC. The Reporter noted that the Committee had received only one comment to date and would wait to review comments until the close of the comment period in February 2025. The Chair alerted the Committee that there was little legislative activity of relevance to the Evidence Rules Committee, with the exception of one recent proposal which would be discussed in connection with an agenda item later on.

II. Potential Amendment to Federal Rule of Evidence 609

The Reporter introduced the discussion of Rule 609 by reminding the Committee that Professor Jeff Bellin had made a presentation to the Committee at its Fall 2023 meeting in which he proposed the repeal of Federal Rule of Evidence 609 – the Rule that authorizes the impeachment of witnesses with their prior convictions. The Reporter explained that the Committee had not expressed interest in repealing Rule 609 altogether but had expressed interest in exploring modifications to Rule 609(a)(1) – the provision that allows impeachment of testifying witnesses with prior felony convictions subject to balancing.

The Reporter reminded the Committee that Rule 609(a)(1) contains a balancing test adopted by Congress at the time that the Federal Rules of Evidence were initially enacted to protect the rights of testifying criminal defendants who are subject to unique prejudice when their prior felony convictions are revealed to the jury. The current test requires the probative value of the conviction to outweigh the prejudicial effect. The Reporter also reminded the Committee that it had agreed to consider an amendment to Rule 609(a)(1)(B) that would strengthen the existing balancing test applicable to felony convictions offered to impeach criminal defendants by requiring the probative value of an impeaching conviction to "substantially" outweigh any unfair prejudice to the defendant. He explained that the Committee at its last meeting had posed an empirical question as to whether the admissibility of convictions actually deters criminal defendants from testifying when they would otherwise take the stand. He noted that the question for the Committee would be whether to move forward with an amendment to Rule 609(a)(1)(B).

The Reporter opined that the proposed amendment to Rule 609(a)(1)(B) on page 134 of the agenda materials possibly would be the shortest amendment to rule text ever because it would involve adding only the modifier "substantially" to the existing balancing test. He explained that the lengthier draft Committee note on pages 134-136 of the agenda materials would offer instruction to trial judges as to how to properly apply the balancing test to the felony convictions of criminal defendants. The Reporter noted that the proposed amendment to strengthen the balancing test would restore Congressional intent in enacting the original rule to avoid deterring criminal defendants from testifying.

He acknowledged that many federal courts apply Rule 609(a)(1)(B) correctly but explained that a significant number of courts interpret the existing balancing test in a manner that allows defendants' convictions for very similar and very inflammatory crimes to be admitted to impeach them. The Reporter explained that many federal courts permit such convictions even though they lack probative value as to a defendant's honesty. He opined that adding the modifier "substantially" to the Rule 609(a)(1)(B) balancing test would restore congressional intent to protect testifying defendants and would signal to trial courts that they should be careful in admitting felony convictions to impeach criminal defendants who wish to testify.

The Reporter explained that the agenda memo concerning the amendment attempted to respond to the Committee's concern from the Spring meeting that criminal defendants never take the stand in any event and that a reduction in felony conviction impeachment would not materially change the incentives for criminal defendants considering whether to testify. The Reporter thanked Tim Lau of the Federal Judicial Center for his excellent assistance in evaluating the data regarding defendant testimony. He explained that the data shows that 25% of defendants already testify and that, although the data set he examined was not statistically significant, it suggested that defendants would be more likely to testify if more of their felony convictions were excluded. He also noted that simple common sense suggests that more criminal defendants would take the stand if their convictions could not be admitted to impeach them. The Reporter explained that many evidentiary principles are supported by common sense rather than conclusive empirical data. For example, he noted that the attorney client privilege has never been justified through empirical findings but that it is well accepted as a matter of common-sense principles. He suggested that common sense similarly suggests that an accused impeached with a conviction is less likely to testify than one who is not. The Reporter noted that obtaining conclusive empirical evidence to show that Rule 609 has a material effect on criminal defendants' decisions not to testify could be challenging, if not impossible.

Tim Reagan of the Federal Judicial Center (FJC) discussed possible research avenues for exploring Rule 609's impact on defendant decisions regarding testimony and outcomes but opined that obtaining needed data could prove difficult due to the confidentiality of certain information and the incompleteness of available information. Even with all necessary data, additional empirical research could demonstrate only correlation between Rule 609 and defendant testimony, rather than true causation. Mr. Reagan suggested that the most fruitful research that the FJC could perform would be a more comprehensive survey of criminal defense lawyers regarding the factors that influence defendant decisions regarding testimony. He estimated that such a survey would take two years to complete.

The Chair then asked the Committee whether it wanted to move forward with consideration of an amendment to Rule 609. He explained that he was not seeking any vote on the specific proposal to add the word "substantially" to the Rule 609(a)(1)(B) balancing test but that he wanted to get a sense of whether Committee members wanted to move forward with a Rule 609 proposal and whether they thought that a comprehensive FJC survey of criminal defense lawyers would be helpful. The Reporter also noted that he would welcome Committee comments on the draft Committee note included in the agenda materials.

The Federal Public Defender expressed support for moving forward with an amendment to Rule 609(a)(1)(B). He noted that the project began with first-rate academics suggesting the repeal of Rule 609 altogether, that the Committee then discussed repeal only of Rule 609(a)(1) that allows impeachment with felony convictions (that do not qualify as dishonesty convictions), and that those good suggestions had already been rejected by the Committee. He noted that the Committee was now only looking at adding a single word to the balancing test applicable to testifying criminal defendants and that common sense and experience shows that felony conviction impeachment affects testimony. He opined that a defendant's prior convictions are one of the most significant issues for a defense lawyer to consider and that the whole defense community is closely monitoring the Committee's work on Rule 609. He urged the Committee to move forward with the very modest proposal to add the word "substantially" to the Rule 609(a)(1)(B) balancing test. He opined that the Committee should move forward without waiting two more years for an FJC survey, though he said he welcomed more study of the issue if the Committee wanted such data.

Another Committee member agreed that the Committee should keep the proposal on the agenda. Though he noted that defendants should be subject to cross-examination on some convictions, he opined that balancing probative value against unfair prejudice is certainly the appropriate method for determining which convictions are fair game. Where the cases show that appropriate balancing is not being done, he suggested that a simple and elegant addition of the single word "substantially" should be considered to improve operation of the test. He opined that any miscarriage of justice with respect to a defendant's right to testify should not be tolerated and that even the Department of Justice should be fine with the addition of the single word.

Ms. Shapiro responded that the Justice Department was not "fine" with the proposal because prosecutors report that it is extremely difficult to admit a defendant's prior convictions for impeachment purposes under the existing provision. She reported that trial judges are very diligent in parsing the admissibility of a defendant's convictions under Rule 609 as it stands now. She explained that the Reporter's case digest captures only appellate opinions in cases where convictions were admitted and fails to reflect the many cases in which the trial judge excludes the defendant's convictions. Ms. Shapiro emphasized that the memorandum prepared by Marshall Miller (in connection with the earlier proposal to eliminate Rule 609 in whole or in part) demonstrates the significant probative value of prior felonies. She further emphasized that the existing balancing test created as a result of congressional debate on this issue already favors exclusion and protects criminal defendants. She queried whether the multi-factor tests established by Circuit court precedent for evaluating the admissibility of felony convictions would be wiped out by an amendment to the balancing test.

The Reporter explained that the same factors currently utilized by the courts to evaluate admissibility would continue to control. The amendment would simply require a slightly different balance among those factors to justify admission of a testifying criminal defendant's felony convictions. He also explained that there is no denying that many federal judges evaluate Rule 609 appropriately. The question, the Reporter explained, is whether a sufficient number of federal judges are applying the balancing test improperly to justify a modest tweak to improve the Rule. The Reporter opined that the addition of a single word to rule text would not produce a radical change to the provision and that the longer Committee note accompanying the amendment would tell the courts that are misapplying the Rule to put a thumb on the scale against admitting these felony convictions.

Ms. Shapiro replied that if the amendment proposal were to advance, the Committee note should be pared back significantly to a few lines and should not tell the majority of trial judges already balancing properly to always exclude a defendant's felony convictions. The Reporter responded that he was open to alterations to the Committee note. He explained that the draft note included in the agenda materials was designed to be a first attempt that could be edited. Judge Bates opined that the draft note was particularly hefty in comparison to a tiny textual amendment and that some parts of the draft note tell judges how to rule. He suggested that a Committee note should not go so far as to tell judges how they ought to rule on admissibility. The Reporter agreed that the paragraph of the draft note on page 135 of the agenda materials that begins with: "The strict balancing test" could be dropped. The Reporter invited further feedback on the draft Committee note.

Another participant asked how the amendment would impact a defendant who takes the stand and testifies falsely to having a clean record after a trial judge has ruled that he may not be impeached with a prior felony conviction. The Reporter explained that an *in limine* ruling excluding the conviction would not bind the trial judge and that a defendant's felony conviction could be admitted to contradict his direct testimony (rather than under Rule 609 to show general untrustworthiness) if he were to offer testimony about a clean record. Another Committee member agreed that a defendant's testimony to a clean record would "open the door" to felony conviction impeachment regardless of the amendment.

Another Committee member noted that the Reporter had described the amendment as a "signal" to trial judges to exercise caution in admitting a criminal defendant's felony convictions. The Committee member opined that the proposal would constitute more than a "signal" where it would change the balancing standard from one that favors admission to one that disfavors admission. The member suggested that the Committee should not change the standard to get a different admissibility outcome and suggested that perhaps judicial education was a superior answer to misapplication. The Committee member also expressed a desire to have the FJC perform a survey to determine the extent of a problem with Rule 609. Another Committee member agreed, suggesting that most trial judges get Rule 609 rulings right and that the problem with trial judges who misapply the Rule is not the rule text itself, but rather the fact that *in limine* Rule 609 decisions are not reviewable. The Committee member noted that an amendment would not fix the problem of reviewability and suggested that it would likely lead trial judges who are already applying Rule 609 correctly to be even more exclusive but would not meaningfully change the practice of those judges who allow defendants' convictions to be admitted under the

current standard. The Committee member opined that the amendment would put a thumb on the scale against impeachment and would let criminal defendants testify free from impeachment, leading jurors to assume that testifying defendants have a clean record. The Reporter agreed that reviewability is a significant problem with Rule 609 application due to the Supreme Court's decision in *Luce* but noted that there is nothing that the Advisory Committee can do to make Rule 609 decisions reviewable. The Reporter explained that the Committee could improve the situation by proposing a more protective standard for criminal defendants.

Ms. Shapiro suggested that many factors go into a criminal defendant's decision to testify and that it would be impossible to parse all of those factors and to isolate the effect of Rule 609. She further suggested that congressional intent to allow defendants to testify has been fulfilled given that the Reporter's research shows that 25% of defendants already choose to testify under the existing Rule 609(a)(1)(B) standard. The Reporter suggested that the data regarding rates of testimony presents something of a Catch-22 and should not be used to undermine the need for an amendment. If case studies showed that criminal defendants *never testify*, then it could be argued that changing Rule 609 would be unlikely to make a difference. If a significant percentage of criminal defendants are already testifying, it can be argued that Rule 609 is not improperly deterring them.

The Federal Public Defender recognized that there are a number of factors that can influence a decision about defendant testimony but emphasized that Rule 609 is undoubtedly the main factor for consideration. He explained that the Supreme Court's opinions in *Luce* and *Ohler* compound the problem for the defense and that Rule 609 needs to be addressed. He argued that the Committee does not need a two-year survey to know what criminal defense lawyers will say about Rule 609 impeachment. Another Committee member opined that he supported the addition of the word "substantially" to the Rule 609(a)(1)(B) balancing test, arguing that it flags the concern for trial judges and would encourage them to think harder about admissibility. The Committee member also explained that he would favor trimming the draft Committee note accompanying the amendment but expressed support for the note discussion regarding sanitized convictions. Another Committee member expressed support for the proposal, opining that any concern that trial judges will always exclude felony convictions notwithstanding strong probative value could be addressed through the Committee note. Another participant expressed support for the proposal, noting that testifying defendants already face a sentencing enhancement if they are convicted which discourages testimony and that amending Rule 609 could alleviate at least one disincentive to testifying.

The Chair explained that he favored the simple and elegant addition of the word "substantially" to the Rule 609(a)(1)(B) balancing test. He opined that the Committee should do what it can to ensure fair application of the test in the trial court given the lack of reviewability of Rule 609 decisions. The Chair shared concerns about the extensive draft Committee note and suggested that the note would need to be cut back to avoid telling judges how to come out on Rule 609 rulings. In sum, he explained that the amendment would be a modest, salutary change and asked for a straw poll of the Committee regarding moving forward with consideration of the amendment and with edits to the draft Committee note, as well as interest in further FJC study. The Reporter suggested that a delay for further study would not aid the inquiry.

The straw poll suggested that Committee members were evenly divided against, and in favor of considering the amendment to Rule 609(a)(1)(B). The Chair questioned whether edits to the draft Committee note would alter any positions with respect to the proposal. Committee members who opposed the proposal explained that their opposition was to the heightened balancing test and not simply to the note. The Chair noted that it would not make sense to move forward with a proposal to amend Rule 609 if there was no chance of a proposal being approved by a majority of the Committee. He noted that one Committee member was absent and that he would check with that Committee member to solicit his input on a Rule 609 amendment. The Chair stated that he did not see the necessity of a two-year long study by the FJC. He suggested that it may make sense to develop a concrete proposal to amend Rule 609 and an edited draft Committee note for consideration if the absent Committee member is open to the possibility of an amendment. The Reporter again encouraged Committee members to communicate with him about proposed edits to the draft Committee note.

III. Potential Amendments to Evidence Rules to Address Artificial Intelligence and Other Machine-Generated Output

The Chair next called the Committee's attention to Tab 4 of the agenda and to the admissibility of audiovisual material in the era of deepfakes, as well as to the admissibility of machine-generated output. He noted that there were no action items or concrete proposals on the Committee's agenda and explained that the question for the Committee was whether to proceed to develop concrete proposals to address authenticity in the age of artificial intelligence ("AI") and to address the reliability of machine-generated output. The Chair opined that AI creates significant issues for the Evidence Rules and that it is beneficial for the Committee to take a close look at issues of admissibility. He noted that, while technology develops at a lightning speed, rulemaking does not proceed as rapidly and there is always a risk that detailed rules changes addressing technological shifts will be moot by the time they are enacted and that generalized proposals that evade mootness will prove unhelpful. The Chair noted it could make sense for the Committee to start developing concrete amendment proposals to address AI and machine-generated output as soon as possible so that the Committee is in a position to act quickly when technology requires a rules change. The Chair also noted criticisms of the Reporter and the Committee's approach to AI in an article described in the agenda materials, describing them as off-base and inappropriate.

A. The Deepfake Problem

The Reporter acknowledged increased scrutiny of rulemaking by the public as a factor for the Committee to consider. He first addressed the problem of easily generated deepfake audiovisual evidence. He explained that the authenticity of audiovisual evidence currently is determined under Rule 104(b) which requires only prima facie proof that the proffered evidence is genuine. Because deepfakes are increasingly difficult to detect, the Reporter explained that this authenticity standard could be viewed as insufficiently protective against deepfake evidence. He stated that the first question for the Committee was whether to propose any amendments regarding authenticity of AI and the risk of deepfakes at all. Even if the Committee were inclined to amend the authenticity rules to deal with the possibility of deepfake evidence, the Reporter suggested that the opponent of audiovisual evidence would have to make some initial showing to

trigger a deepfake inquiry to avoid an extended deepfake inquiry for every item of audiovisual evidence offered at trial. Finally, he explained that the Committee would need to determine the appropriate standard for showing authenticity of challenged evidence once that trigger has been met.

On the final point, the Reporter called the Committee's attention to the draft proposal to add a new Rule 901(c) on page 241 of the agenda materials. That proposal would require the trial judge to balance the probative value and prejudicial effect of "computer-generated or other electronic evidence" that a reasonable jury could find to have been "altered or fabricated" by AI. He noted that he was mystified by weighing the "probative value" of potentially fabricated evidence, arguing that fabricated evidence has no probative value. He opined that a Rule 403 balancing approach is ill-suited to possible deepfakes and called the Committee's attention to the proposal on page 269 of the agenda book. That proposal would require the trial judge to find a proffered item of evidence authentic by a preponderance of the evidence under Rule 104(a) once the opponent has shown that a reasonable jury could find it to be altered under Rule 104(b). Once the opponent triggers a deepfake concern, the Reporter suggested the opponent has earned the right to a finding of authenticity by the trial judge. The Reporter acknowledged that this would create a higher Rule 104(a) standard of authenticity for possible deepfakes.

The Chair thanked the Reporter and queried whether the existing standards of authenticity are up to the task of regulating AI evidence. The Reporter acknowledged that the Committee faced similar issues with the emergence of electronic evidence and social media and that the Committee declined to propose specific standards regulating social media and that courts have adapted well using existing evidentiary standards. That said, the Reporter suggested that AI may present a problem that is different in kind that may require rulemaking to address. Without an amendment, courts would have to adapt to AI on a case-by-case basis and could not apply a heightened Rule 104(a) standard of proof that is inconsistent with current rules.

Judge Bates queried whether audiovisual evidence found to have been fabricated or altered would necessarily be excluded under the Reporter's proposed Rule 104(a) finding of authenticity by the trial judge. He noted that altered evidence might be admissible in some cases under the Rule 403 balancing standard suggested on page 241 of the agenda materials. Judge Bates asked whether a slightly altered video could ever be admitted under the Rule 104(a) standard or whether any alteration would require its exclusion as inauthentic. The Reporter responded that a court could admit evidence that it found to have been altered in some way so long as the alteration did not render the evidence inauthentic.

The Reporter next called the Committee's attention to the proposal by Professor Delfino on page 257 of the agenda materials, explaining that this proposal would require the trial judge to determine the authenticity of all "audiovisual evidence" by a preponderance of the evidence pursuant to Rule 104(a) without the need for the opponent to trigger a special inquiry or concern about deepfake evidence. He noted that this proposal would take the question of authenticity of audiovisual evidence away from the jury entirely in every case and would involve an instruction to the jury that they *must* find audiovisual evidence authentic once the trial judge found it to be genuine under Rule 104(a). The Reporter explained that this proposal is unworkable because it applies automatically to all audiovisual evidence without any showing to trigger a special inquiry

into deepfakes. He noted that a jury instruction directing the jury to find audiovisual evidence authentic was misguided where jurors will necessarily consider authenticity in evaluating the proof. A Committee member noted that an instruction to the jury that they *must* find prosecution evidence to be genuine in a criminal case would pose a constitutional problem as well.

The Reporter also called the Committee's attention to a proposal by Professor Lamonica on page 260 of the agenda materials that would allow parties to "request a hearing requiring the proponent to corroborate the source of information by additional sources" before "photographic evidence" is admitted. The Reporter explained that this proposal would allow the opponent to demand a hearing before any piece of photographic evidence is admitted without any threshold showing of deepfake concern. Further, he noted that this proposal would not alter the standard for authenticity currently in the Federal Rules, but merely authorized a hearing to determine admissibility under existing standards. The Chair added that the proposal could exacerbate the problem of the "liar's dividend" whereby parties may levy attacks on authentic materials that a jury might accept. He explained to the Committee that the question for consideration is whether the Committee should consider an amendment to the Federal Rules of Evidence to address the concern of deepfake evidence generated by advancing AI.

One Committee member asked whether the problem of deepfake evidence could be handled adequately under the Rule 403 balancing test without the addition of new evidence rules. The Reporter replied that deepfake evidence that is not authentic has no probative value such that Rule 403 balancing would not seem to address the concern that deepfake evidence presents. The Chair agreed, noting that Rule 403 would have a role to play in evaluating audiovisual evidence that had been artificially enhanced in some way, but would not control for fake videos. Another Committee member opined that the greatest protection against lawyers presenting deepfake evidence in court is the threat of disbarment. He expressed skepticism that a tsunami of deepfake evidence was heading for federal courtrooms and noted that the existing Federal Rules of Evidence are sufficiently flexible to handle any threats that do arise. The Reporter noted that ethical standards would not serve to discourage lawyers from presenting deepfake evidence in good faith that was given to them by their clients and that the lawyers are unable to detect as inauthentic. The Committee member responded that the courts have had to grapple with the possibility of forgeries for centuries and that deepfakes are simply contemporary forgeries that courts can address using time-honored standards. The Reporter acknowledged the longstanding handling of forgeries and reminded the Committee that Professor Rebecca Wexler had made a presentation at the spring 2024 meeting in which she made the same point and argued that existing evidentiary standards are well equipped to handle deepfakes just as they have handled forgeries. But the Reporter explained that deepfakes may be harder to detect than a traditional forgery due to the sophisticated technology that produces them.

A Committee member expressed concern that courts will have to address deepfake issues whenever a party levies a deepfake charge. Another participant commented that the general possibility of deepfakes should not be enough to trigger a special inquiry and asked what showing should be required before a trial judge has to mount a deepfake inquiry. The Reporter replied that any detectable anomaly in the evidence, such as a twisted or missing finger on a hand, would trigger an inquiry. He noted that witness testimony undermining a video or evidence

that otherwise contradicts it, such as records demonstrating that a particular person was not in the location where a video places them would likewise be sufficient to trigger an inquiry.

Professor Coquillette complimented the Reporter's agenda memo on AI, characterizing it as a tour de force that would serve as a helpful reference for trial lawyers and judges alike. He noted the phenomenon of the vanishing trial, commenting that trials were disappearing in criminal cases as well as in civil cases. He emphasized that the trial process is designed to test evidence and would be the place where deepfakes are exposed but that the vast majority of both criminal and civil cases are disposed of without trial and depend upon only the intense discovery process for resolution. He noted that the possibility of deepfakes presented outside the trial process constitutes a concern that the evidence rules may not fully address. A Committee member agreed that lawyers would be dealing with much of the evidence that presents a deepfake concern without court oversight. Professor Coquillette concurred and emphasized the importance of lawyers regulating themselves with respect to AI and evidence.

A Committee member opined that the proposed new Rule 901(c) on page 269 of the agenda materials looks like a sensible solution to the problem of deepfake evidence. He queried whether there was anything in proposed new Rule 901(c) that existing caselaw does not already compel. The Reporter replied that the first step in the proposed rule that requires the opponent of the evidence to make some showing of *inauthenticity* to trigger an inquiry is part of existing caselaw with respect to social media and other electronic evidence. But he explained that the second part of the proposed standard requiring the trial judge to find authenticity by a preponderance of the evidence is not supported by existing rules and standards because authenticity is currently a Rule 104(b) issue of conditional relevance for the jury.

The Chair noted that Committee members had raised the fact that courts have long handled the possibility of forgeries under existing evidentiary standards. He asked how courts currently address claims of forgery. The Reporter explained that a court currently would hold a hearing to examine evidence after a showing by the opponent suggesting that it could be a forgery. If the court, after a hearing, finds that there is sufficient evidence from which a reasonable jury could find the challenged evidence to be authentic, the court then allows the evidence to be admitted. The parties then rehash the forgery arguments before the jury and the jury ultimately decides whether the challenged evidence is authentic under Federal Rule of Evidence 104(b). A Committee member asked whether proposed Rule 901(c) would shift the burden of proof on authenticity. The Reporter explained that it would shift the burden of production to the opponent who would have to make the requisite showing of alteration or fakery to justify the court's consideration of the evidence under Rule 104(a). The Chair noted that significant definitional issues surround any potential amendment to address AI evidence, querying whether all videos would be subject to scrutiny and asking how the Committee would define the AI evidence to which a proposal applies.

A Committee member opined that the Committee was doing the right thing by exploring potential amendments to address AI because the issue is a hot one that will not go away. He suggested that the Committee was not yet in a position to make concrete proposals to regulate AI evidence, but posited that the Committee should keep issues of AI evidence front and center and should continue to examine potential alternatives while moving cautiously. The Reporter noted

that it could be useful for the Committee to at least weed out proposals that it does not find helpful. Another Committee member explained that the issue of AI evidence and deepfakery had not arisen in her courtroom and that she did not foresee a looming problem of sufficient magnitude to justify rulemaking. That said, the Committee member objected to any proposal that requires heightened scrutiny of all audiovisual evidence given that 99% of evidence presented is genuine. The Reporter agreed that any viable amendment proposal would include some trigger that must be met to justify heightened scrutiny of audiovisual evidence.

Judge Bates asked how an amendment would handle composite video evidence created by automated systems. For example, he noted that videos that combined several different incidents or that compressed conduct over a much longer period of time and that omitted events depicted on the original video were very important in the January 6 prosecutions. He explained that the videos were captured by authorities, by media, and by individuals and later compressed. Judge Bates questioned how an amended standard of authenticity would treat such computer altered composite evidence. The Reporter responded that composite evidence would not be considered inauthentic or fake. Rather, he explained that the question would be whether the combination of the genuine videos altered the evidence in some material way. Judge Bates asked whether a new Rule 901(c) would apply to composite video evidence of the kind utilized in the January 6 trials.

The Chair noted that many similar issues, such as drawing circles around people or places in genuine videos or otherwise highlighting particular portions of a video, would require careful consideration. But he explained that such issues were secondary to whether the Committee wished to move forward at all with consideration of a proposal to address AI evidence. The Chair identified three alternative approaches to AI evidence that the Committee could adopt. First, he explained that the Committee could move forward with a concrete proposal to amend the Rules to address AI evidence. Second, the Committee could develop language for a potential amendment to be ready to enter the rulemaking process if problems with deepfakes start to emerge in federal courts. Third, the Committee could simply monitor cases concerning AI evidence to stay abreast of developments without working on any potential amendment language until concrete problems arise. The Chair solicited Committee members' preferences regarding the approach to pursue. The Reporter suggested that it would be helpful for the Committee to accept or reject the proposals submitted by Judge Grimm and Professor Grossman, and by Professors Delfino and Lamonica. He suggested that if those proposals, as submitted, were rejected by the Committee, he could work on developing a proposed Rule 901(c) along the lines illustrated on page 269 of the agenda memo which would be ready to go if the Committee felt the need to act on AI evidence. He noted that any such proposal could be tweaked or ultimately rejected by the Committee but that it could be helpful to develop a proposal that could be in the bullpen while the Committee monitors AI developments. The Chair agreed that this was a good strategy. Committee members agreed.

Ms. Shapiro reiterated the many compliments to the Reporter's memo on AI and expressed support for the idea of developing a proposal to keep in the bullpen in case the Committee decides to move forward with an AI amendment in the future. She noted that similar issues were raised with the advent of electronic evidence and that the technology moves so rapidly that there is a real risk that we will live in a completely different AI world one year from now. She noted that if the Committee ultimately chose to move forward on an AI amendment, the Department of

Justice would want to ensure that any proposed rule contains a sufficient standard for triggering an AI inquiry so that resource-draining collateral proceedings are not necessary to admit every piece of audiovisual evidence.

The Chair noted that Committee members were inclined to reject the proposals, as submitted to the Committee, but that Committee members were open to the Reporter working on an alternative new Rule 901(c) to have a concrete concept in waiting as the Committee monitors AI developments. He predicted that additional academic AI proposals would also be forthcoming. The Reporter agreed to continue work on a proposal, highlighting the definitional issues surrounding AI evidence and inviting Committee member input regarding an appropriate definition of AI evidence.

B. Machine-Generated Output

The Chair next turned the Committee's attention to the question of how to assess the reliability of evidence that is generated by a computer tool. He noted the possibility of a voluminous data set being evaluated by a software tool to identify patterns. He explained that when such evidence is admitted through an expert witness, Rule 702 acts as a gatekeeper and ensures reliability but that there is no similar guarantee of reliability for machine-generated output that is admitted without an accompanying expert. He explained that the Committee had received proposals regarding admissibility standards for machine-generated evidence and that some proposals treat the issue as one of authentication under Article 9 of the Federal Rules while other proposals address such evidence under Article 7 through *Daubert*-like standards.

The Reporter noted that the reliability of machine-generated evidence is fundamentally not a question of authenticity or genuineness which is governed by the low Rule 104(b) conditional relevance standard, and that the Committee should look to addressing any concerns under Article 7. He noted one proposal to amend Rule 702 to add requirements for admissibility of machine-generated evidence. The Reporter opined that it would be a mistake to add new, lengthy requirements to Rule 702 and that it would be inappropriate to amend Rule 702 again so soon after the recent amendment that took effect on December 1, 2023. Instead, the Reporter suggested that the Committee should focus on a possible new Rule of Evidence specifically tailored to machine-generated evidence like the draft proposed Rule 707 on page 270 of the agenda materials. A new Rule 707 would basically import the Rule 702 sufficiency and reliability requirements to screen machine-generated evidence. He noted that one proposal received by the Committee suggested adding requirements regarding access to source code to the Evidence Rules as well, but that such a proposal was problematic, as it relates more to discovery which is outside the Committee's jurisdiction and touches on a highly controversial and debated issue which could derail any helpful rulemaking. Everyone might agree, he suggested, that importing the Rule 702 criteria to the admissibility of machine-generated evidence would be beneficial.

The Chair explained that the first question for the Committee was whether the Rules needed to be amended at all to address machine-generated evidence. If so, the Committee would need to decide whether an amendment is best included in Article 7 or Article 9. Finally, the Committee would need to determine the specific standards to be added to regulate machine-generated

evidence. One Committee member suggested that the Committee should continue to study machine-generated evidence, and that Article 7 would seem to be the superior place to add a provision. The Reporter noted that some state courts that had encountered the issue were already taking an Article 7 approach and holding *Frye* hearings to evaluate admissibility of machine-generated output. Another Committee member agreed that there was even more need for a provision regulating machine-generated evidence than for deepfakes. He noted that technology is reaching a point where no human witness may be able to explain how a machine is generating output which could prevent it from being admitted and that is important for the Committee to explore standards for this evidence which is only increasing in importance. This Committee member opined that a new Rule 707 would be a logical place for such a provision. Another Committee member agreed.

Ms. Shapiro noted that the draft proposal to add a new Rule 707 on page 270 of the agenda materials included an exception for "the output of basic scientific instruments or routinely relied upon commercial software." She suggested that such a carve-out should also apply to routinely relied upon government software. The Chair opined that there are several issues that the Committee would need to address in crafting any specific proposal. He explained that the Rule 702 requirements which were fashioned to regulate expert opinion testimony are not a perfect fit for machine-generated testimony and that the Committee would need to address which basic scientific instruments are excluded from coverage. Still, he noted that judges and lawyers are very familiar with the Rule 702 requirements which could militate in favor of applying them to machine-generated evidence. Judge Bates suggested that a new provision would essentially separate consideration of machine-generated evidence into three categories: (1) circumstances in which an expert witness testifies to the machine-generated output thus triggering Rule 702; (2) circumstances in which parties introduce the output of basic scientific instruments not covered by Rule 702 or a new Rule 707; and (3) other machine-generated evidence that would be regulated by Rule 707. He queried whether adding a new Rule 707 would discourage lawyers from calling expert witnesses if they can admit machine-generated output under the new provision without them. The Reporter responded that a new Rule 707 would increase regulation of machine-generated output because a party who does not call an expert witness now to admit the evidence will rely only upon basic relevance under Rules 401 and 402.

The Chair then invited Committee members to share their preferences regarding development of a concrete amendment proposal regarding machine-generated evidence as opposed to working on a concept that could be kept waiting in the bullpen depending on problems arising in federal cases with respect to such evidence. Several Committee members opined that Article 7 should have a provision regulating machine-generated output and that development of a standard should remain on the Committee's agenda. One Committee member suggested that a Committee note describing the new provision could specifically state that the rule is not intended to alleviate the need to call an expert in appropriate cases to address Judge Bates' concern about discouraging use of expert witnesses. Ms. Shapiro agreed that the Committee should move forward with a proposal but cautioned that "basic scientific instruments'" and other software exempt from the provision would have to be defined. The Reporter suggested that examples of such basic scientific instruments and software could be included in a Committee note and that the definition of exempted instruments would require more work and thought.

The Chair then noted the Committee consensus to work up a proposal on deepfakes to hold for future publication, if necessary, and to develop a concrete proposal to advance through rulemaking regarding machine-generated evidence. He further noted the Committee consensus to eliminate any discussion in the Committee note about access to source code, suggesting that the issue of source code discovery could be referred to the Criminal and Civil Rules Committees for consideration.

Finally, the Reporter noted a proposal by Professor Andrea Roth to amend Rule 806 on pages 254-255 of the agenda materials to permit impeachment of machine-generated evidence through methods currently available to impeach hearsay declarants. The Reporter suggested that this proposed amendment was unnecessary, both because the methods for impeaching hearsay declarants do not all translate to machines and because Rules 402 and 403 are capable of admitting evidence necessary to undermine machine-generated evidence. Committee members agreed that an amendment to Rule 806 should not be pursued and voted to remove the proposal from the Committee's agenda going forward. The Reporter thanked Professor Roth for all her assistance to the Committee on the topic of machine-generated evidence, and particularly for her ideas on a new Rule 707.

IV. Potential New Federal Rule of Evidence Governing an Alleged Victim's Prior False Accusations

The Chair next explained that the Committee had been exploring the possibility of an amendment to the Federal Rules of Evidence to admit prior false accusations made by alleged victims. He recognized Academic Consultant, Professor Richter, to give a report on the Committee's consideration of the issue.

Professor Richter reminded the Committee that Professor Erin Murphy had recommended adoption of a new Federal Rule of Evidence 416 to admit prior false accusations made by alleged victims at a scholarly symposium hosted by the Committee during the Fall 2023 meeting and that the Committee had authorized further study of the issue. Professor Richter explained that she had drafted a memorandum regarding the admissibility of prior false accusations under the Federal Rules of Evidence for the Spring 2024 meeting, noting that such evidence is almost exclusively offered in sex offense prosecutions and that her previous memo on admissibility in federal court was included for the Committee's reference behind Tab 5b of the agenda materials. She explained that prior false accusations could be admitted through the Federal Rules of Evidence and under constitutional frameworks in federal court in compelling cases but acknowledged that the proponent of such evidence would have to chart a rather tortured path through the Federal Rules to admit it. Professor Richter explained that she had cautioned the Committee at the Spring 2024 meeting to examine the admissibility of such evidence in state and military courts, where the vast majority of sex offense cases are tried, before proceeding to consider a new Federal Rule of Evidence. Professor Richter explained that the memo behind Tab 5a of the agenda materials reflected her survey of state and military standards for admitting prior false accusations evidence.

Professor Richter summarized her findings that most jurisdictions permit defendants to offer prior false accusations evidence in appropriate circumstances. Professor Richter explained that almost all jurisdictions require the defense to prove that a victim's prior accusation was

made and that it was more likely than not false or "demonstrably false" before offering such evidence. She noted that a few jurisdictions require "clear and convincing evidence" of falsity and that a few allow the defense to present such evidence once it has shown evidence from which a reasonable jury could find falsity under Rule 104(b). Because state and military courts rigorously enforce the defense burden of proving falsity, Professor Richter explained that proffered prior false accusations are routinely excluded. She explained that courts reject defense evidence that the prior perpetrator has denied the allegations, that charges were not pursued, or that the prior alleged perpetrator was acquitted after charges were brought. Courts have rejected evidence that witnesses to the prior incident deny any sexual assault and even evidence that the victim recanted a prior accusation where she now contends that an assault occurred. In sum, while most jurisdictions authorize admission of prior false accusation evidence, they almost always exclude it.

Professor Richter further noted that the vast majority of state jurisdictions admit such evidence through general evidentiary provisions modeled on the Federal Rules of Evidence or pursuant to constitutional frameworks when they do permit its admission, and that only a handful of jurisdictions have a specialized evidentiary provision directed to prior false accusation evidence. She explained that the jurisdictions that do have special provisions for prior false accusation evidence include those provisions within their rape shield statutes or in their counterpart to Federal Rule 608(b) governing cross-examination with a witness's prior dishonest acts. No state has a free-standing evidence rule dedicated to prior false accusations evidence.

Professor Richter directed the Committee's attention to pages 284-286 of the agenda memo behind Tab 5a and drafting alternatives for a new federal evidentiary provision covering an alleged victim's prior false accusations based upon state treatment of such evidence. But she ultimately counseled against any proposal to add a false accusations provision to the Federal Rules of Evidence for several reasons. First, she emphasized that such evidence is proffered almost exclusively in sex offense prosecutions, which are overwhelmingly handled in state and military courts. She noted that only 2.2% of federal sentencings for 2023 involved sex offense cases, undermining any need for a federal provision to handle false accusation evidence, especially where existing standards are capable of admitting it in appropriate cases. She suggested that the states have well-developed standards for admitting such evidence and need no federal model to guide their admissibility determinations. Furthermore, she noted that the states had been processing prior false accusations evidence for many decades and were unlikely to adopt a new federal model. Finally, Professor Richter highlighted the unintended consequences that could flow from federal rulemaking targeted at prior false accusations evidence, including the risk of discouraging victims in sex offense cases from reporting or from participating in prosecutions, as well as the expenditure of federal resources to make routine pretrial determinations regarding admissibility. She emphasized that federal rulemaking around prior false accusations evidence would be unlikely to yield any corresponding benefit to defendants due to the high standards of proof required to admit such evidence.

The Chair then explained that there had been recent legislative activity relevant to the Committee's consideration of false accusations evidence and recognized Rules Law Clerk, Kyle Brinker, to provide a report. Mr. Brinker told the Committee that the "Rape Shield Enhancement Act of 2024" had been introduced the week before the meeting. The Act would require a report

from the Judicial Conference on Rule 412 and would limit inquiries into a victim's sexual history unless directly relevant to a case. It would further establish additional protections for alleged victims of sexual assault.

The Chair thanked Mr. Brinker for his report and solicited the views of Committee members regarding the amendment of the Federal Rules of Evidence to add a provision governing admissibility of a victim's prior false accusations. One Committee member stated that he agreed with the suggestion to remove the proposal from the agenda but noted that he appreciated the Committee's thorough research into the topic. The Reporter expressed his gratitude to Professor Erin Murphy for her excellent proposal, noting that it was a worthy topic for the Committee's study. The Federal Public Defender agreed that the Committee should not advance a proposal regarding prior false accusations but noted that the Committee could revisit the issue in the future should prosecution of sex offenses increase substantially in federal court due to the Supreme Court's *McGirt v. Oklahoma* decision. Another Committee member agreed that the Committee should not proceed with a rule on prior false accusations, noting that a specialized provision in the Federal Rules of Evidence might somehow suggest inaccurately that victim false accusations are an epidemic. The Chair agreed, also noting that a false accusations rule could be seen as inconsistent with the recently introduced legislation aimed at enhancing protections for victims. All agreed to remove prior false accusations from the Committee's agenda.

V. Amending Federal Rule of Evidence 404(b)

The Reporter next called the Committee's attention to Tab 6 of the agenda materials and a discussion of Rule 404(b). He reminded the Committee that Professor Hillel Bavli had recommended an amendment to Rule 404(b) to exclude evidence of other crimes, wrongs, or acts that depend upon inferences about propensity for their relevance at the symposium hosted by the Committee during its Fall 2023 meeting. The Reporter noted that the Committee had rejected the suggestion to explore amendments to Rule 404(b) at that time because the provision had been studied and amended in 2020 to add a new notice provision requiring articulation of the non-propensity reasoning supporting admissibility of other acts evidence. He explained that continuous tinkering with a rule through repeated amendments is to be discouraged and that the Committee wanted to wait to determine whether the 2020 notice amendment had a positive impact on Rule 404(b) rulings. The Reporter explained that Rule 404(b) was back on the Committee's agenda because he and Professor Bavli had conducted a case survey showing that federal courts continue to admit evidence through Rule 404(b) that depends for its relevance on inferences about a defendant's propensities notwithstanding the 2020 amendment to the notice requirement. The Reporter noted that the Committee had considered substantive amendments to Rule 404(b) when it proposed the amendment to the notice provision and that the cases studied at that time had also demonstrated that propensity-based evidence was being admitted through Rule 404(b). For these reasons, the Reporter suggested that the Committee should consider whether to propose an amendment to Rule 404(b) along the lines suggested on page 330 of the agenda materials to prohibit the admission of other acts evidence that depends upon propensity inferences.

One Committee member asked whether a better solution would be prosecutor education about proper use of other acts evidence. The Reporter replied that prosecutors are educated about the evidence they may seek to admit under existing law and that, where propensity evidence is commonly admitted under existing precedent, prosecutors are likely educated to utilize all such evidence consistent with that precedent. Therefore, prosecutorial education is unlikely to reduce the use of propensity evidence unless the federal courts stop admitting it. Ms. Shapiro explained that prosecutors were trained to articulate a "non-propensity" purpose for the evidence they were proffering under Rule 404(b) after the 2020 notice amendment took effect and that the expanded notice provision and training were designed to produce better Rule 404(b) decisions. She also noted a fundamental disagreement with the Reporter's suggestion that Rule 404(b) should prohibit *all* propensity inferences. She explained that other acts evidence may be admissible under Rule 404(b) even if it depends to some extent on propensity inferences so long as it is admitted for *another* purpose in the case – to show knowledge or motive, etc. She recalled the *Henthorn* case out of the Tenth Circuit in which the court approved evidence that the defendant had killed and made attempts to kill his wife on other occasions to demonstrate that he killed his wife on the occasion in question and that her death was not an accident. She noted that the prior attempts could show the defendant's propensity to kill his wife but that they were properly admitted because they also showed the absence of mistake or accident.

The Chair noted that Rule 404(b) evidence is commonly admitted in more typical drug cases where a defendant denies knowledge of drugs or the intent to distribute them. He explained that a defendant's other drug offenses arguably depend for their relevance on some propensity inference but that they are routinely admitted. He questioned how an amendment outlawing propensity inferences would affect such common cases. The Reporter explained that adding a reverse balancing test to Rule 404(b) to protect criminal defendants is the optimal fix for Rule 404(b) because it would not foreclose all reliance on propensity inferences but would require courts to decide that the probative value of a defendant's other crime, wrong, or act for a permitted purpose outweighs any prejudicial propensity use.

The Federal Public Defender suggested that the Committee should continue exploring amendments to Rule 404(b) at its Spring 2025 meeting. He opined that Professor Bavli is correct and that Rule 404(b) evidence is admitted improperly in far too many cases and that the proposed amendment could remedy the situation. He acknowledged that the Committee needed to consider whether there had been sufficient time since the 2020 amendment to justify renewed consideration of Rule 404(b). Still, he argued that the current proposal to amend the admissibility standard in Rule 404(b) would be distinct from the 2020 amendment that addressed only notice and further that approximately seven years would have passed since the prior amendment if the Committee were to propose a new Rule 404(b) amendment.

Ms. Shapiro pointed out that the Committee engaged in the exact same debate with respect to the 2020 amendment about the propriety of propensity inferences under Rule 404(b), considered substantive amendment proposals, and reached a compromise with the amendment to the notice requirement. She opined that the Rule 404(b) debate had ended in a good place not long ago and that, were the Committee to revive that debate, the Justice Department would take issue with several of Professor Bavli's characterizations of Rule 404(b) cases as wrongly decided. She noted that there would be a fundamental disagreement about the proper role of Rule 404(b).

Another Committee member also took issue with Professor Bavli's characterization of the percentage of cases decided incorrectly under Rule 404(b), arguing that most of the reported opinions ruled correctly on Rule 404(b). This Committee member urged the Committee to leave Rule 404(b) alone. The Federal Public Defender noted that reasonable minds might disagree about the extent of the problem with Rule 404(b) but that the cases clearly reveal that there is a problem that the Committee should consider. The Reporter suggested that there are some Rule 404(b) purposes that courts get wrong but that it would not make sense to waste time looking at Rule 404(b) again if the Committee could not potentially come to some consensus about a remedy. Ms. Shapiro replied that the Committee should not revisit Rule 404(b) again so soon after a recent amendment and that the Department would strongly oppose a proposal to alter the Rule 404(b) admissibility standard. Judge Bates agreed that it was very soon to reconsider Rule 404(b) where the notice amendment took effect less than four years ago.

Another Committee member agreed that the Committee should not keep Rule 404(b) on the agenda if there was no chance of reaching consensus about amendment but noted concerns that other acts evidence should not be admitted in the government's case in chief and should be used only in rebuttal if appropriate. The Chair explained that Rule 404(b) should be taken off the Committee's formal agenda where there was no groundswell of support for revisiting the provision so soon. He noted that the Reporter would certainly bring the issue back up if the federal cases were to reveal concerns about Rule 404(b) rulings going forward. The Federal Public Defender objected to removing Rule 404(b) from the agenda, but a majority of the Committee agreed to remove it for the time being.

VI. Rule 702 Suggestion Regarding Peer Review

The Chair next directed the Committee's attention to Tab 7 of the agenda materials and a proposal from two lawyers to amend Rule 702 to address specifically in rule text the relevance of peer review to a court's *Daubert* analysis. The Reporter explained that the two lawyers expressed concern that peer review should not be important to the Rule 702 analysis, particularly because many peer-reviewed studies cannot be replicated. Although the lawyers did not propose a concrete amendment to address this concern, they suggested that Rule 702 should be amended to reflect the problems with peer review.

The Reporter opined that it would not be prudent to amend Rule 702 to address peer review specifically for a few reasons. First, he noted that Rule 702 had been amended effective December 1, 2023, and apropos of the Committee's Rule 404(b) discussion, it would be far too soon to tinker with Rule 702 again. Furthermore, he offered that peer review is simply one of many *Daubert* factors that courts may consider and that it would be anomalous to include a specific reference to only one of many factors in rule text. Finally, he noted that courts have ample discretion to evaluate which of the *Daubert* factors they utilize in a given case and that courts can and have taken various views of peer review. In short, the Reporter explained that he did not see any problem with the peer review factor that would justify a Rule 702 amendment. The Committee unanimously rejected any proposal to amend Rule 702 to address peer review.

VII. Supreme Court Updates

The Chair explained that the next two items on the agenda were updates on recent Supreme Court opinions relevant to the Federal Rules of Evidence. He recognized Professor Richter and the Reporter to give updates on *Diaz v. United States* and on *Smith v. Arizona*.

A. Diaz v. United States

Professor Richter explained that the Supreme Court had interpreted Federal Rule of Evidence 704(b) in *Diaz v. United States*, 602 S. Ct. 1727 (June 20, 2024). She reminded that Committee that Rule 704(b) prohibits expert opinion testimony in a criminal case "about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense" because those matters are "for the trier of fact alone."

She explained that *Diaz* was a prosecution of a defendant for transporting illegal drugs into the United States after the defendant was arrested driving a vehicle with over 54 pounds of methamphetamine hidden in door and trunk panels across the border. To secure a conviction, the prosecution had to prove that the defendant "knowingly" transported the drugs. The defendant asserted a "blind mule" defense, arguing that she did not know the drugs were hidden in her vehicle. Over a defense Rule 704(b) objection, the prosecution was permitted to offer expert opinion testimony concerning drug distribution networks, explaining the risks to the operation and the contraband with the use of blind mules. The expert was permitted to testify that "most drug couriers know" what they are transporting. Following her conviction, Diaz appealed arguing that the expert erroneously testified about whether she had the requisite state of mind required to convict. The Ninth Circuit found no Rule 704(b) error and Diaz sought a writ of certiorari in the Supreme Court, which was granted.

Professor Richter explained that the majority affirmed Diaz's conviction, finding no Rule 704(b) error. The majority interpreted Rule 704(b) narrowly to prohibit only expert testimony that draws the final inference regarding a defendant's state of mind, explaining that testimony that "Diaz knew" what she was transporting or that "all drug couriers know" what they are transporting would violate the Rule 704(b) prohibition. Where the prosecution expert testified only that "most" drug couriers know what they are carrying and acknowledged on cross-examination that some drug couriers are blind mules who do not know what they are transporting, the expert left the final inference about Diaz's state of mind for the jury to draw and the testimony did not violate Rule 704(b). Professor Richter explained that Justice Jackson wrote a concurrence to emphasize that Rule 704(b) should be interpreted narrowly because it applies equally to the prosecution and defense and that a broader prohibition could foreclose important expert opinion testimony offered by the defense. She noted that Diaz had offered an automotive expert who testified that occupants of her vehicle "would not know" drugs were hidden inside that could also be excluded by a broader interpretation of the Rule 704(b) prohibition. Justice Jackson also emphasized that Rules 402, 403, and 702 operate to limit improvident expert opinion testimony without a broad exclusionary interpretation of Rule 704(b). Professor Richter explained that Justice Gorsuch was joined by Justices Kagan and Sotomayor in a vigorous dissent. Justice Gorsuch interpreted Rule 704(b) as foreclosing expert testimony "regarding" or

"in relation to" the defendant's *mens rea* and argued that the government's testimony that "most drug couriers know" ran afoul of that prohibition.

Notwithstanding the conflict on the Court regarding the proper interpretation of Rule 704(b), Professor Richter suggested that there was no need for an amendment to the provision. She explained that the majority's narrow interpretation of Rule 704(b) was consistent with the majority of Circuit precedent and that Rules 402, 403, and 702 can regulate expert opinion testimony without expanding the scope of Rule 704(b). She noted that a more expansive interpretation would affect criminal defendants, as well as prosecutors, as noted by Justice Jackson. Finally, Professor Richter explained that it would be very difficult to amend Rule 704(b) in a manner that would foreclose the prosecution testimony in *Diaz* that would not also capture and exclude much helpful testimony about a criminal defendant's mental state, symptoms, and diagnoses that have long been well-accepted.

The Chair agreed that Rules 402, 403, and 702 regulate expert opinion testimony well without an expansive interpretation of Rule 704(b). The Reporter also agreed that there was no need to amend Rule 704(b), opining that the majority opinion offered a mild improvement for criminal defendants with respect to the provision. The Federal Public Defender agreed that there was no need to consider an amendment to Rule 704(b) in response to the Supreme Court's interpretation. He opined that Justice Jackson's suggestion that Rule 704(b) affects the prosecution and defense equally may be unduly optimistic and that the Court's narrow interpretation of Rule 704(b) may ultimately play to the prosecution's advantage. But he concluded that the Committee could revisit Rule 704(b) if the cases started to show government overreach. The Chair noted the Committee's consensus that there is no current need to amend Rule 704(b) and explained that the issue would be removed from the Committee's agenda.

B. Smith v. Arizona

The Reporter next discussed *Smith v. Arizona*, explaining that the prosecution in a state drug case offered the expert opinion testimony of a substitute forensic expert after the original forensic analyst who tested the contraband confiscated from the defendant became unavailable. The testifying expert based his opinion that the defendant possessed illegal drugs exclusively on the notes and report made by the unavailable testing forensic analyst. The testifying expert relayed to the jury in detail the contents of the unavailable analyst's notes and report as the "basis" for his opinion. The defendant objected that the revelation of this testimonial hearsay to the jury violated his Sixth Amendment right to confront his accusers. The prosecution argued that the defendant's confrontation rights were not violated because the expert revealed the underlying notes and report only as "basis" for the testifying expert's opinion and not for their truth.

The Supreme Court disagreed. The majority assumed that the notes and report constituted testimonial hearsay and examined whether revealing them to the jury only as "basis" avoids a confrontation violation. The Court held that testimonial hearsay revealed to the jury as basis for the expert's opinion does violate the defendant's Sixth Amendment rights when the underlying information only supports the testifying expert's opinion if it is true. In that circumstance, the

"basis" information is offered for its truth and violates the defendant's right to confront the unavailable analyst.

The Reporter explained that this holding could have an impact on Federal Rule of Evidence 703 depending upon how broadly it is interpreted. He explained that if the opinion in *Smith v. Arizona* is interpreted only as foreclosing the *revelation* of inadmissible basis information by an expert, it is completely consistent with Rule 703 because that Rule also prohibits revelation of inadmissible basis information by a testifying expert without satisfaction of an onerous reverse balancing test that requires the probative value of the inadmissible information to show the basis for the expert's opinion to substantially outweigh the prejudicial risk that it will be used substantively. Interpreted in that way, both the Supreme Court and Rule 703 prohibit disclosure to the jury of inadmissible basis information. If, however, *Smith v. Arizona* is read to prohibit a testifying expert from *relying* on inadmissible testimonial hearsay (even without disclosure to the jury), that interpretation would create a conflict with Rule 703 because Rule 703 specifically authorizes expert witnesses to rely upon inadmissible basis information in forming trial opinions so long as the information is of a type upon which other experts in the field would reasonably rely. The Reporter noted that this interpretation would have a huge impact on federal cases because experts on drug distribution networks or gang operation frequently rely upon inadmissible, testimonial hearsay to develop trial opinions.

The Reporter explained that, while the Supreme Court's opinion was not crystal clear with respect to the disclosure/reliance distinction, it could be fairly read as foreclosing only disclosure of inadmissible basis information and as consistent with Rule 703. In that case, the Committee would not need to propose any amendment to Rule 703 to conform the Rule to the holding. He noted, however, that Circuit opinions subsequent to *Smith v. Arizona* appeared to interpret the holding more broadly to prohibit expert reliance of testimonial hearsay – even if not disclosed to the jury during testimony. The Reporter suggested that the Committee should monitor the cases regarding expert reliance on inadmissible basis information and should revisit the need to amend Rule 703 if the appellate opinions start to foreclose reliance on inadmissible information and conflict with the Rule.

Ms. Shapiro informed the Committee that the United States had filed an amicus brief in *Smith* supporting neither party but conceding that the prosecution had violated the defendant's Sixth Amendment rights in the case. Based upon the colloquy in the oral argument, Ms. Shapiro explained that it was clear that the Court's concern was the disclosure of the inadmissible basis information and not any expert reliance on inadmissible information. She noted that the Department of Justice takes the position that government experts can rely on testimonial hearsay so long as they do not disclose it to the jury at trial. She explained that the Department takes the position that *Smith* forecloses disclosure only and not reliance and that Rule 703 is consistent with the holding. The Federal Public Defender noted disagreement with the Department's interpretation of *Smith*. The Reporter explained that he would monitor the federal cases interpreting *Smith* and would bring the issue back to the Committee if a conflict with Rule 703 develops. The Chair thanked the Reporter and suggested that there was no need to bring the issue back to the Committee until a conflict with Rule 703 does materialize.

VIII. Self-Authentication of the Records of Federally Recognized Indian Tribes

The Reporter stated that the Committee had received a recommendation from Judge Frizzell from the Northern District of Oklahoma just two weeks before the meeting to amend Federal Rule of Evidence 902(1) to add the records of federally recognized Indian Tribes to those that may be self-authenticated. The Reporter noted problems with authenticating the records of Indian tribes in two recent circuit court cases that found the purported authentication to be insufficient and reversed the convictions in those cases. Those cases are *United States v. Harper,* 2024 WL 4376127 (10th Cir.) and *United States v. Wood,* 109 F.4th 1253 (10th Cir 2024)

The Reporter explained that the Committee had considered this very issue previously and had declined to add federally recognized tribes to Rule 902(1). He noted that the Supreme Court's decision in *McGirt v. Oklahoma* was an intervening development that requires federal prosecutors in many cases to prove that a defendant has Indian blood and is a member of an Indian tribe to acquire criminal jurisdiction and that this development could impact the Committee's interest in amending Rule 902. The Reporter opined that the problems in the two recent cases resulted from the government's failure to properly authenticate business records that could easily be resolved under the existing rules.

The Federal Public Defender informed the Committee that he had conferred with the offices that had handled the problematic cases and that those offices reported that there was no defect within the Federal Rules of Evidence that caused jurisdictional issues and that the problems that arose in those cases could easily have been remedied by proper prosecutorial handling of the evidence. Accordingly, he suggested there is no problem with the Rules that needs to be remedied. The Reporter agreed and added that it might be problematic to add the records of all federally recognized tribes to Rule 902(1) because some tribes may not have record-keeping practices akin to other governmental entities recognized by the Rule. The Chair asked whether the records of small towns that are currently self-authenticating under Rule 902(1) might present similar concerns of inconsistent reliability. The Reporter replied that if such reliability issues exist, they are not litigated because small locality records are automatically authenticated without a reliability inquiry due to their inclusion in Rule 902(1).

Another Committee member queried whether the Committee has the power to declare records self-authenticating that have jurisdictional consequences, asking whether the question of authenticity and reliability is a political question beyond the Committee's ken. Another participant explained that there is a much wider variation in the record-keeping of Indian tribes than there is among state and local governments. He noted that the tribes admit the inability to ensure consistent and reliable record-keeping in many cases. He suggested that the jurisdictional problem in federal prosecutions is very easy to resolve using existing authentication standards and that it would be problematic for the Committee to recognize the reliability of tribal records that the tribes concede they do not possess.

The Chair queried whether the authentication problem identified by Judge Frizzell was a Federal Rules of Evidence problem or a prosecutor problem. Ms. Shapiro responded that she could not speak to what happened in the two specific cases but that she had conferred with the Office of Tribal Justice on this issue and that the Office explained that a number of federally

recognized tribes issue sophisticated identification cards that are recognized as travel documents for crossing the Canadian and Mexican borders. She explained that adding federally recognized tribes to Rule 902(1) could serve an important dignity interest. Because the issue was added to the Committee's agenda only two weeks before the meeting, Ms. Shapiro explained that the Department was interested in keeping the proposal on the Committee's agenda to allow for more in-depth review of the issue. The Reporter noted that an identification card that was sufficient for border crossing would be very easy to authenticate under Rule 901. He asked whether the Department of Justice wanted to submit a memo to the Committee for the Spring 2025 meeting regarding tribal record-keeping practices and variations among tribes.

The Chair noted there were two issues for consideration: (1) whether an amendment would open a can of worms due to the record-keeping variation among federally recognized Indian tribes and (2) whether a proposal to amend Rule 902(1) represents a solution in search of a problem due to the ease of authentication under evidentiary provisions already in existence. The Reporter suggested the Committee would benefit from a memo on both issues from the Department of Justice, as well as from Federal Public Defenders. The Federal Public Defender reiterated that the variation in record-keeping among federally recognized tribes is enormous and stated that the Federal Public Defenders would welcome the opportunity to submit a memorandum on the issue.

The Chair closed the discussion by recognizing that the ball is in the Department of Justice's court on the issue of amending Rule 902(1). He suggested that the Committee consider a submission from the Department at its Spring 2025 meeting. If the Department recommends no amendment at that time, the Chair noted the discussion of the issue would be brief. If, however, the Department recommends proceeding with an amendment, there would be issues for the Committee to sort through. The Chair suggested that the Committee could turn to the Federal Public Defenders for their input at or after the Spring 2025 meeting if the Department recommends action that merits further inquiry.

IX. Closing Matters

The Chair closed the meeting by thanking everyone for attending and for their helpful input. He thanked the Rules Committee staff for their support and thanked NYU Law for hosting the meeting. The Chair informed the Committee that the next meeting will be held on May 2, 2025, in Washington DC.

Respectfully submitted,
Liesa L. Richter

TAB 1B

MINUTES
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

January 7, 2025

The Judicial Conference Committee on Rules of Practice and Procedure (the Standing Committee) met in a hybrid in-person and virtual session in San Diego, California, on January 7, 2025. The following members attended:

Judge John D. Bates, Chair
Judge Paul J. Barbadoro
Elizabeth J. Cabraser, Esq.
Louis A. Chaiten, Esq.
Judge Stephen Higginson
Justice Edward M. Mansfield
Dean Troy A. McKenzie
Judge Patricia A. Millett
Hon. Lisa O. Monaco, Esq.*
Andrew J. Pincus, Esq.
Judge D. Brooks Smith
Kosta Stojilkovic, Esq.
Judge Jennifer G. Zipps

The following attended on behalf of the Advisory Committees:

Advisory Committee on Appellate Rules –
Judge Allison H. Eid, Chair
Professor Edward Hartnett, Reporter

Advisory Committee on Bankruptcy Rules –
Judge Rebecca B. Connelly, Chair
Professor S. Elizabeth Gibson, Reporter
Professor Laura B. Bartell, Associate Reporter

Advisory Committee on Civil Rules –
Judge Robin L. Rosenberg, Chair
Professor Richard L. Marcus, Reporter
Professor Andrew Bradt, Associate Reporter
Professor Edward H. Cooper, Consultant

Advisory Committee on Criminal Rules –
Judge James C. Dever III, Chair
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Associate Reporter

Advisory Committee on Evidence Rules –
Judge Jesse M. Furman, Chair
Professor Daniel J. Capra, Reporter

Others who provided support to the Standing Committee, in person or remotely, included Professor Catherine T. Struve, the Standing Committee's Reporter; Professor Daniel R. Coquillette, Professor Bryan A. Garner, and Professor Joseph Kimble, consultants to the Standing Committee; H. Thomas Byron III, Esq., Secretary to the Standing Committee; Bridget M. Healy, Esq., Rules Committee Staff Counsel; Shelly Cox and Rakita Johnson, Rules Committee Staff; Kyle Brinker, Law Clerk to the Standing Committee; John S. Cooke, Director, Federal Judicial Center (FJC); and Dr. Tim Reagan, Senior Research Associate, FJC.

* Elizabeth J. Shapiro, Deputy Director, Federal Programs Branch, Civil Division, represented the Department of Justice (DOJ) on behalf of Deputy Attorney General Lisa O. Monaco.

OPENING BUSINESS

Judge John D. Bates, Chair of the Standing Committee, called the meeting to order and welcomed everyone, including Standing and advisory committee members, reporters, and consultants who were attending remotely. Judge Bates gave a special welcome to Judges Stephen Higginson and Joan Ericksen as the new Standing Committee members, although Judge Ericksen was unable to attend the meeting due to a scheduling conflict. Judge Bates also noted that Lisa Monaco was unable to attend the meeting.

Judge Bates informed the Committee that Thomas Byron, Secretary to the Standing Committee, would soon leave his position for a new career opportunity and thanked him for his invaluable contributions that helped guide the rules process over the prior several years. Professor Catherine Struve, reporter to the Standing Committee, also thanked Mr. Byron for his excellence as Secretary and recalled his dedication, insight, and collegiality when he served as the Department of Justice (DOJ) representative to the Appellate Rules Committee.

Judge Bates notified the Committee that Professors Bryan Garner and Joseph Kimble, consultants to the Standing Committee, authored a new book entitled Essentials for Drafting Clear Legal Rules. The book reflects lessons from the rules restyling project over the last 30 years and is an update on Professor Garner's previous publication on the same subject. The book is available for free download from the Rules Committees' style resources page on the uscourts.gov website, and the Administrative Office printed copies for the use of the Rules Committee members and reporters. Judge Bates added that Professors Garner and Kimble provided essential counsel to the rules committees during the restyling project as did Joseph Spaniol, who previously served as Secretary to the Standing Committee and as Deputy Director of the Administrative Office and Secretary of the Judicial Conference before his appointment as Clerk of the Supreme Court. Mr. Spaniol retired as Clerk in 1991 but has served as consultant to the rules committees.

Judge Bates also welcomed members of the public and press who were observing the meeting in person or remotely.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee approved the minutes of the June 4, 2024, meeting** with a correction that deleted the words "conducted a survey and" on page 23 of the minutes.

Mr. Byron reported that the latest set of proposed rule amendments took effect on December 1, 2024. A list of the rule amendments is included in the agenda book beginning on page 50. Mr. Byron also reported that the latest proposed rule amendments approved in the Standing Committee's June meeting are pending before the Supreme Court and, if approved, will be transmitted to Congress. Those amendments are on track to take effect on December 1, 2025, in the absence of congressional action. A list of the proposed rule amendments is included in the agenda book beginning on page 52.

Judge Bates noted that a December 2024 report on FJC research projects begins on page 79 of the agenda book. Dr. Tim Reagan explained that the FJC in November 2023 restarted its reports to the rules committees about work the FJC does. Because he has heard during meetings that education can be a useful alternative to rule amendments, these periodic reports now include

information about education as well as research conducted by the FJC. He also explained that the report does not discuss ongoing research for other Judicial Conference committees, but descriptions of such research will be included once the FJC completes the research and publishes the findings. Judge Bates thanked Dr. Reagan for the FJC's excellent work.

JOINT COMMITTEE BUSINESS

Electronic Filing by Self-Represented Litigants

Professor Struve reported on this item and explained that the item has two parts.

The first part relates to paper service by a self-represented litigant. The current rules appear to say that self-represented litigants who file documents in paper form must effect traditional service of those papers on others in the case even if the other litigants also receive electronic copies through CM/ECF or its equivalent. The point of this first part would be to eliminate this duplicative and burdensome requirement for papers subsequent to the complaint.

The second part relates to access to a court's electronic filing system by self-represented litigants. The rules currently set a presumption that self-represented litigants lack access to the court's system unless the court acts to provide it. This part of the project would increase access for self-represented litigants by flipping the presumption: allowing self-represented litigants access unless the court acts to prohibit access. The proposal would also require a court to provide a reasonable alternative if the court acts in a general way to prohibit self-represented litigants from accessing the court's electronic-filing system. The proposal would allow a court to set reasonable exceptions and conditions on access.

Professor Struve noted that the Standing and advisory committees had been discussing this item for several meetings. The Appellate, Civil, and Criminal Rules Committees appeared open to proceeding toward recommending both parts for publication for public comment. On the other hand, the Bankruptcy Rules Committee supported the goals of the project but was skeptical about proceeding forward. One reason was that access for self-represented litigants to electronic filing systems is currently least prevalent in bankruptcy courts. Regarding the service component, bankruptcy practice is more likely to feature multiple self-represented litigants in one matter than practice in other levels of court. Self-represented litigants in bankruptcy court may include the debtor, small creditors, and some Chapter 5 trustees.

When there are multiple self-represented litigants, a self-represented filer who is not on the electronic filing system or receiving electronic notices will not be able to know which other litigants are also not receiving electronic notices and therefore require paper service. Because practice before district courts and courts of appeals is much less likely to feature multiple self-represented litigants in the same matter, this problem is not likely to afflict these courts. Accordingly, Professor Struve suggested that it might be prudent for the Bankruptcy Rules to take a different approach than the Appellate, Civil, and Criminal Rules. She asked the Standing Committee if it would be open to approving publication of a package of amendments to the Appellate, Civil, and Criminal Rules without similar proposals for amending the Bankruptcy Rules. Professor Struve noted that if this approach were taken, a question would arise as to how

courts would treat self-represented litigants when a bankruptcy matter is appealed to a district court or court of appeals.

Judge Connelly stated that the Bankruptcy Rules Committee supported the project's goals but that it had practical concerns. She indicated that if the other rules committees further explored the item, it could provide the Bankruptcy Rules Committee valuable guidance for future discussion.

Judge Bates asked whether the Committee would support approving publication of an amendment package that would effect these changes for the Appellate, Civil, and Criminal Rules without changing the service and filing approaches for self-represented litigants under the Bankruptcy Rules. He also asked whether it was necessary to discuss how to handle service and filing issues for self-represented litigants in bankruptcy appeals.

Professor Struve observed that some courts in bankruptcy appeals already allow self-represented litigants to access their electronic filing systems and exempt them from effecting paper service. She said that it does not appear that the courts in these instances are experiencing substantial difficulty, and if there are problems, the Committee has several options to resolve them.

Judge Bates commented that the Committee could set aside the bankruptcy appeals question and asked Professor Struve if a vote by the Standing Committee was needed. Professor Struve responded that she would like to hear any concerns that Committee members may have with the project.

A judge member thought that the Bankruptcy Rules taking a separate path did not raise a significant issue. He had discussed the proposal with the clerk of his court, who highlighted two features of the proposed amendments as crucial—namely, the provision permitting a court to use alternative means of providing electronic access for self-represented litigants and the provision recognizing the court's authority to withdraw a person's access to the electronic filing system. The clerk also pointed out the potential cost savings by eliminating the need to mail thousands of hardcopy letters to self-represented litigants. And he observed that as a court provides greater electronic access for self-represented litigants, the court's help desk grows in importance. The judge member turned the Committee's attention to draft Civil Rule 5(b)(3)(E)'s statement that electronic service under that provision is not effective if the sender learns that it did not reach the person to be served, and asked if this provision would require the sender to monitor the court's site.

Professor Struve commented that the member's question is a larger one that applies to the current rule. She observed that current Rule 5(b)(3)(E) is the provision that allows users of the court's electronic-filing system to rely on that system for making service, and that the provision seems to be working.

The judge member also pointed out that draft Rule 5(d)(3)(B)(iv) (authorizing the court to withdraw a person's access to the electronic filing system) appeared to be limited to self-represented litigants, and asked whether that was intended to suggest that the court lacked authority to withdraw a noncompliant lawyer's access to the system. Professor Struve acknowledged that subsection (B) is about self-represented litigants but stated that there was no intent to limit the

court's authority to withdraw a noncompliant lawyer's access; she noted that the working group could discuss ways to ensure that this provision did not give rise to a negative inference.

The judge member identified the National Center for State Courts as a source of helpful information about access to justice for self-represented litigants. Professor Struve agreed about the NCSC's expertise and invited Committee members to let her know if they thought that the NCSC should be consulted while the rule is in the development stage rather than waiting until the public comment period.

A judge member said that she supported moving forward with a proposed change to the Appellate, Civil, and Criminal Rules for the reasons previously stated.

Professor King asked whether the discussion of a different approach for the Bankruptcy Rules assumed that total uniformity (concerning service and filing) would be imposed as between the Civil and Criminal Rules. Professor Struve assured her that the project was not intended to achieve total uniformity among the service and filing provisions in the Civil, Criminal, and Appellate Rules; differences already exist among those provisions, and this project does not seek to eliminate them. Rather, the goal in preparing for the spring advisory committee meetings will be to transpose the key features shown in the Civil Rule 5 sketch into the relevant Appellate and Criminal Rules. Professor Marcus highlighted the question of how to treat appeals from a bankruptcy court. Professor Struve observed that appeals from bankruptcy courts to district courts are currently addressed by Bankruptcy Rule 8011, and she also noted that technical amendments to the Bankruptcy Rules will be required if the draft Civil Rule 5 is approved.

Joint Subcommittee on Attorney Admission

Professor Struve reported on this item, the report for which begins on page 113 of the agenda book. Professor Struve recalled that this item originated from an observation by Dean Alan Morrison and others that the district courts have varying approaches to attorney admission. To be admitted to the district court, some districts require attorneys to be admitted to the bar of the state that encompasses the district, and some of those states require attorneys to take their bar exam in order to be admitted to the state bar. The Subcommittee has been discussing possible ways to address this issue. One possible solution would be to follow the approach in Appellate Rule 46, which does not require admission to the bar of a state within the relevant circuit.

The Subcommittee has also heard a number of concerns from the Standing Committee and advisory committees. District courts regulate admission to protect the quality of practice in their districts, which is linked to concerns about protecting the interests of clients. State bar authorities and state courts might also have concerns with a national rule along these lines. In addition, the Subcommittee has discussed how a rule might interact with local counsel requirements.

Professor Struve thanked Professor Coquillette and Dr. Reagan for their research and expertise. She noted that a survey of circuit clerks was recently completed, which found that the clerks generally feel that Appellate Rule 46 works well for the courts of appeals. Professor Struve recognized, however, that practice before the courts of appeals differs from practice before the district courts. A request for input was posted on the website of the National Organization of Bar Counsel, but the Subcommittee did not receive any responses.

Professor Struve said that the Subcommittee was proposing a research program based on what Subcommittee members said would be helpful going forward, including consultation with chief district judges in select districts. One type of district on which these inquiries would focus would be districts that require admission to the bar of the encompassing state. Possible questions may include: why do you have this approach? How would you react to a national rule setting a more permissive standard for admission? And are there other measures that could address barriers to access? Inquiries to district courts that do not require in-state bar admission might ask whether their approach to attorney admission has caused any problems. Dean Morrison suggested also inquiring of judges who have handled multidistrict litigation (MDL) proceedings. Outreach to state bar authorities and practitioners could also be helpful.

Professor Coquillette recalled the history of the Standing Committee's study of a DOJ proposal for national rules governing attorney conduct in federal courts. After a question was raised about whether such a project would exceed the existing rulemaking authority under the Rules Enabling Act, Senator Leahy proposed a bill to give the Standing Committee the authority to promulgate rules of attorney conduct. State bar authorities opposed the idea of such national rules, and the Standing Committee decided not to promulgate rules of attorney conduct (other than rules like Civil Rule 11). Judge Bates commented that, consistent with Professor Coquillette's observations, the Committee likely will need to research its authority to regulate attorney admission.

A practitioner member recommended speaking to districts that require attorneys (even some attorneys who are admitted to the district court's bar) to associate with local counsel; such requirements, this member observed, may undermine a national admission rule. The member also recommended researching the Committee's authority to craft a rule regarding local counsel requirements. Professor Struve responded that the Subcommittee shared this concern and would continue to consider whether it could draft an effective admission rule without also addressing local counsel requirements.

A judge member commented that a Military Spouse J.D. Network analysis found that state bar rule changes have made it somewhat easier for military spouses to become state bar members. But the member cautioned that the provisions for military spouses vary widely among states and some rules are difficult to navigate. The member also identified fees as a barrier to access for military spouses because they relocate and join bar associations at a higher rate than other lawyers. The member wondered whether the Committee could make suggestions or provide guidance concerning measures such as fee waivers if it determines that it does not have authority to regulate attorney admission.

Judge Bates responded that the judiciary could offer suggestions, but the Judicial Conference would be better equipped and able to provide suggestions or guidance to district courts generally. The district courts may then adopt or not adopt a suggestion offered. Professor Struve observed that informal suggestions historically have varied by committee. For example, the chair of the Appellate Rules Committee has sent letters to chief circuit judges with some success. However, Professor Struve noted that this would likely be more difficult at the district level.

A judge member questioned whether the Committee should proceed any further on this item without first determining the Committee's rulemaking authority. Judge Bates responded that

the initial suggestion that gave rise to this item sketched multiple approaches, some broad and some narrow. Because a narrow approach might raise fewer rulemaking questions, the thinking was first to determine which approaches were potentially desirable before considering the question of authority to adopt those approaches. Professor Struve agreed that if the Subcommittee were to decide not to recommend rulemaking, it would obviate the need to delve into the question of the Committee's rulemaking authority.

Professor Coquillette noted that almost all district courts have already adopted rules governing attorney conduct (often by incorporating by reference the attorney conduct rules of the state in which the district court is located). Professor Struve observed that while Civil Rule 83 *cabins* local rulemaking authority, the local rules are adopted pursuant to a separate statutory provision (28 U.S.C. § 2071), such that an analysis of the authority for making national rules under 28 U.S.C. § 2072 would not necessarily call into question local rules regulating attorney conduct. Professor Coquillette agreed. Professor Bradt commented that research on the question of rulemaking authority is ongoing.

A judge member thought that the considerations differ depending on the area of law. For example, an attorney handling a federal criminal case need not know state law. In contrast, a civil attorney admitted to a federal district court but not the state encompassing that district court might have an incentive to steer the case toward federal court. He also raised concern about situations where a state-law claim is asserted in federal court (for example, in supplemental jurisdiction) but then dismissed (for instance, if the federal claim that supported subject-matter jurisdiction was dismissed); if the claimant's lawyer is not admitted to practice in the relevant state, then the federal-court dismissal leaves the client without a lawyer. Lastly, the member pointed out that the states fund their bar regulators by means of fees paid by the lawyers who are admitted to the state bar. Admitting out-of-state lawyers to practice in federal district courts within the state could increase the workload of state regulators without providing the funding to sustain that work. The member recommended reaching out to the Conference of Chief Justices or a similar body to receive the views of state regulatory authorities.

A practitioner member asked if input has been sought from MDL transferee judges, whose perspective could be beneficial because they frequently see lawyers from elsewhere who are not required to have local counsel and often are not admitted pro hac vice. Judge Bates agreed that the Subcommittee should consider making inquiries to MDL transferee judges; he observed that issues of attorney admission may differ as between leadership counsel and non-leadership counsel.

A judge member observed that federal district courts regularly refer attorney discipline issues to state bar authorities, and it would be important to receive the views of chief judges about this relationship.

Professor Marcus pointed out that the motivation and effect of the proposals currently under consideration differed in an important way from the ill-fated project on national rules of attorney conduct. In the national rules on attorney conduct project, the DOJ was seeking adoption of national rules that would override particular state attorney-conduct obligations in criminal cases that the DOJ did not like. The proposals currently being considered would not do that, and this distinction sheds important light on the question of rulemaking authority and illustrates the types of things that the rulemakers should stay away from. Professor Coquillette agreed.

Judge Bates thanked the Subcommittee and reporters for their work.

Potential Issues Related to the Privacy Rules

Mr. Byron reported on several privacy issues, the materials for which begin on page 150 in the agenda book. The project began in 2022 following a suggestion by Senator Ron Wyden to require the redaction of the complete social security number in public filings rather than only the redaction of the first five digits. A sketch of a proposed amendment (to Civil Rule 5.2) implementing this suggestion appears on page 155 of the agenda book. That potential amendment has been held pending consideration of additional privacy-related suggestions pending before the advisory committees.

Mr. Byron, working with the reporters, had also discussed other possible privacy-related issues (which had been identified based on a review of the history and functioning of the privacy rules). These issues included possible ambiguity and overlap in exemptions, the scope of waivers by self-represented litigants who fail to comply with redaction requirements, additional categories of protected information that could be subjected to redaction, and possible protection of other sensitive information. The working group's recommendation—that no rule amendments were warranted with respect to these other topics—was discussed at the fall 2024 meetings of the Bankruptcy, Civil, Criminal, and Appellate Rules Committees. The advisory committees generally thought that the issues did not raise a real-world problem demanding a rule amendment. Accordingly, the advisory committees determined not to add any of these issues to their agendas. In the fall 2024 Appellate Rules Committee meeting, however, the question was raised whether rulemaking should always be reactive or whether it should sometimes be preventive—that is, whether rulemaking is sometimes warranted to prevent real-world harm from ever occurring, in instances where the harm in question would be sufficiently serious to warrant the preventive approach.

A practitioner member observed that filings by self-represented litigants often include information that should not be on a public docket, such as their own social security numbers. This member suggested that there should be coordination between broadening access to electronic filing systems for self-represented litigants and protecting the privacy of personal information because self-represented litigants may unintentionally disclose their own personal information. Professor Struve asked if, currently, court staff screen paper filings submitted by self-represented litigants before the court staff uploads the filings into the electronic system. The member did not know whether court staff screen paper filings, but has seen filings several times this year that include personal information.

Returning to the question that had been voiced in the Appellate Rules Committee, Professor Hartnett noted that most rules concern the processing of cases and so the focus is on how the rules affect litigation itself. In these circumstances, it makes sense to be generally reluctant to amend the rules if courts and parties are able to resolve issues under the current rules. But the privacy rules are about avoiding collateral harm from the litigation system. For that reason, perhaps the mindset should be different regarding the need to identify a demonstrated harm.

A judge member agreed with the practitioner member's comments that allowing self-represented litigants greater access to electronic filing systems could lead to greater privacy

concerns. He also noted that this is an area where artificial intelligence could be helpful, yet privacy concerns are difficult to fully resolve post-filing because some entities review filings minutes after they are made public. This member also mentioned a different issue concerning filings under seal. Local circuit practices concerning sealed filings vary widely. The member thought that privacy concerns are most acute in criminal matters, particularly when the case involves cooperating defendants. If the district court accepts a guilty plea from a cooperating defendant and this is reflected in a sealed filing, it could be catastrophic for a local practice (for instance, of automatically unsealing a filing after a certain time period) to divulge that document.

Mr. Byron responded that the member highlighted an example of a concern that would be included in the fourth category of other sensitive information beyond the current scope of the privacy rules. The current privacy requirements are fairly targeted to narrow redaction requirements for information like home addresses. He emphasized that he was not discouraging discussion of protecting other information. Rather, those ideas are simply in a separate category.

Professor Beale noted that redactions for social security numbers and privacy protections for minors were on the Committee's agenda for discussion later in the meeting.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Furman and Professor Capra presented the report of the Advisory Committee on Evidence Rules, which last met on November 8, 2024, in New York, NY. The Advisory Committee presented several information items and no action items. The Advisory Committee's report and the draft minutes of its last meeting are included in the agenda book beginning at page 160.

Information Items

Rule 801 (Definitions That Apply to This Article; Exclusions from Hearsay). Judge Furman noted a proposed amendment to Rule 801(d)(1)(A) was out for public comment. The proposed amendment would provide that all prior inconsistent statements by a testifying witness are admissible over a hearsay objection. Two comments had been submitted thus far, including a comment by the Federal Magistrate Judges Association that supports the proposed amendment. The FMJA supported the proposal on the grounds that it would make the rule consistent with Rule 801(d)(1)(B) and would reduce confusion.

Rule 609 (Impeachment by Evidence of a Criminal Conviction). Judge Furman reported that the Advisory Committee continues to consider a proposal to amend Rule 609(a)(1)(B). Rule 609(a)(1) addresses the impeachment use of evidence of a witness's prior felony conviction. Rule 609(a)(1)(A) addresses cases in which the witness is not a criminal defendant. Rule 609(a)(1)(B) addresses criminal cases in which the witness is a defendant and allows admission of the evidence if its probative value outweighs its prejudicial effect. The Advisory Committee previously rejected a proposal to abrogate Rule 609(a)(1) altogether. In the wake of that decision, the Advisory Committee agreed to consider a more modest amendment that would alter Rule 609(a)(1)(B)'s balancing test to make it less likely that courts would admit highly prejudicial and minimally probative evidence of convictions against criminal defendants.

Specifically, the proposal being discussed would add the word "substantially" before the word "outweighs" in Rule 609(a)(1)(B). The Advisory Committee members who were present at

the November meeting were evenly divided on whether to further consider the proposal. One member was absent. The proposal was supported by the federal public defender representative and opposed by the DOJ. There was a general acknowledgement that some courts are admitting highly inflammatory prior convictions similar to the charged crime, contrary to what was intended by the rule, but there was disagreement about the magnitude of that problem. The magnitude of the problem could be difficult to identify because this often does not get further than a district court ruling, which may not be in writing or reported. There is also some evidence that decisions in this area deter defendants from taking the stand.

The FJC identified research approaches to further examine this question but concluded that the only fruitful approach may be sending a nationwide questionnaire to defense counsel. The Advisory Committee agreed unanimously not to use that approach given the low probability that it would yield useful data.

The Advisory Committee agreed to discuss the proposed amendment again at its Spring meeting. The member who was absent at the Fall meeting had previously voted in favor of abrogating Rule 609(a)(1) altogether and supported proceeding with the Rule 609(a)(1)(B) amendment.

Artificial Intelligence (AI) and Deepfakes. In the fall of 2023, the Advisory Committee began considering challenges posed by the development of AI, and the Advisory Committee is focusing on two issues. The first issue is authenticity and the problem of deepfakes. The second issue is reliability when machine learning evidence is admitted without supporting expert testimony.

At the November meeting, informed by an excellent memorandum by Professor Capra, the Advisory Committee considered whether and how to proceed with potential rulemaking to address these concerns. There was a consensus that AI presents real issues of concern for the Rules of Evidence and that there are strong arguments for taking a hard look at the rules. At the same time, there was concern that the development of AI could outpace the rulemaking process. It was also noted that the rules have already shown the flexibility to meet the challenges of evolving technology in other instances, for example with respect to social media.

The Advisory Committee discussed a number of proposals and agreed that two paths warrant further consideration. First, regarding reliability, the Advisory Committee tentatively agreed on a proposed amendment that would create a new rule, Rule 707, that would essentially apply the Rule 702 standard to evidence that is the product of machine learning. The proposal is set out on page 162 of the agenda book. The rule would exempt the output of basic scientific instruments or routinely relied upon commercial software. The Advisory Committee is considering whether to further explain the scope of the exemptions. The Advisory Committee rejected proposals to instead address the reliability issue in Chapter 9 of the rules, which concern authentication.

A judge member expressed support for taking up the topic of machine-generated evidence and agreed that the key admissibility question is reliability. He stressed the need for careful attention to the exemptions in the proposed draft rule. He queried whether DNA and blood testing would fall under an exemption and asked if Professor Roth was assisting the Advisory Committee

because she authored an excellent article about safeguards in this area. Professor Capra and Judge Furman said that she was. Professor Capra noted that Professor Roth had made a presentation on AI to the Committee and assisted in drafting the sketch of Rule 707 and its accompanying committee note. Professor Capra said that he and Professor Roth agreed that the commercial software exception may be too broad, and they are working on language that the Advisory Committee can consider at its next meeting. He also questioned whether an exception in the text is necessary to prevent courts from holding hearings on evidence related to common instruments such as thermometers.

Judge Bates noted the statement in the agenda book that disclosure issues relating to machine learning were better addressed in either the Civil or Criminal Rules, not the Evidence Rules, and that the issue should be brought to the attention of those respective Advisory Committees for their parallel consideration. He asked about the plan moving forward and any coordination among the committees.

Professor Capra said that he and Professor Beale had discussed the topic; the major issue concerns disclosure of source codes and trade secrets. These, he and Judge Furman said, are disclosure questions rather than evidence questions. But, Professor Capra reported, the discussions are at the preliminary stage.

Judge Bates noted that if coordination is important, then the discussions should progress beyond the preliminary stage. Professor Capra and Judge Furman agreed. Professor Beale said that the Criminal Rules Committee has not yet considered the issue.

Professor Marcus observed that the Civil Rules Committee, likewise, has not yet considered the issue. He noted the practice of using technology-assisted review when responding to discovery requests under Civil Rule 34. There has been a debate about whether a responding party must disclose the details of such technology-assisted review.

Judge Furman said that the Advisory Committee intends to come back to the Standing Committee seeking permission to publish the proposed new Rule 707 for public comment.

Second, regarding deepfakes, the Advisory Committee agreed that this is an important issue but is not sure that it requires a rule amendment at this time. At bottom, deepfakes are a sophisticated form of video or audio generated by AI. So they are a form of forgery, and forgery is a problem that courts have long had to confront—even if the means of creating the forgery and the sophistication of the forged evidence are now different. The Advisory Committee thus generally thought that courts have the tools to address the problem, as courts demonstrated when first confronting the authenticity of social media posts.

That said, the Advisory Committee also thought that it should take steps to develop an amendment it could consider in the event that courts are suddenly confronted with significant deepfake problems that the existing tools cannot adequately address. Accordingly, the Advisory Committee intends further work on the proposed rule found in the agenda book at page 163. This proposed Rule 901(c) would place the burden on the opponent of evidence to make an initial showing that a reasonable person could find that the evidence is fabricated. After such an initial

showing, the burden would shift to the proponent to show by a preponderance of the evidence that the evidence was not fabricated.

The Advisory Committee will continue to monitor developments to assess the need for rulemaking and think about definitional issues, such as what would be subject to the rule. Some proposals submitted would apply this kind of rule to all visual evidence whether or not it was generated by AI, but the Advisory Committee generally agreed that such proposals were too broad.

Judge Bates asked for confirmation that the Advisory Committee's plan is to consider an approach similar to the draft Rule 901(c) but not yet seek the Standing Committee's approval for publication. Judge Furman said that was correct.

Judge Furman said that the Advisory Committee also discussed the "liar's dividend" – that is, a situation where counsel objects to genuine evidence, attempting to create a reasonable doubt in a criminal case and arguing that the evidence may have been faked. Ultimately, the Advisory Committee thought that this was not an issue for the Rules of Evidence.

A judge member commented that the memorandum (in discussing the sketch of the possible Rule 901(c)) first mentions that the opponent of AI evidence must make an initial showing that there is something suspicious about the item, which seems like a reasonable suspicion or probable cause standard; but then the memo goes on to say the showing must be enough for a reasonable person to find that the evidence is fabricated, which sounds instead like a preponderance standard. The member stated that these two formulations are in tension and questioned whether it would be possible for someone to meet the preponderance test without more information or discovery. Judge Furman said that the Advisory Committee will take the member's comment under advisement.

False Accusations. Judge Furman reported that, prompted by a suggestion, the Advisory Committee considered whether to propose a rule amendment to address false accusations of sexual misconduct, either by an amendment to Evidence Rule 412 or a new Rule 416. As between these alternatives, the Advisory Committee agreed that a new rule would be preferable, but the Advisory Committee ultimately decided not to pursue an amendment and to take the issue off its agenda. These issues more often occur in state and military courts—which would be unlikely to adopt a federal model and which have existing tools adequate to address the issue.

Rule 404 (Character Evidence; Other Crimes, Wrongs, or Acts). Judge Furman reported that this item was prompted by a suggestion asserting that courts are admitting evidence of uncharged acts of misconduct even where the probative value of the act depends on a propensity inference. The Advisory Committee considered amending Rule 404(b) to require the government to show that the probative value of the other act evidence does not depend on such an inference. Over the objection of the federal public defender representative, the Advisory Committee decided not to pursue an amendment and to remove this item from its agenda.

Members noted that Rule 404(b)'s notice requirement was amended in 2020 to require the government to articulate a non-propensity purpose for bad act evidence, and the Advisory Committee thought that it should wait to see how courts apply the new amendment. Some Advisory Committee members also thought that some examples cited by the suggestion were

proper applications of Rule 404(b). In addition, the DOJ strongly opposed an amendment because, it argued, the 2020 amendment was the product of substantial work and compromise.

Judge Furman said that the Advisory Committee will continue to monitor developments in this area.

Rule 702 and Peer Review. Judge Furman reported that the Advisory Committee considered a suggestion to amend Rule 702 to address the role of peer review as set out in *Daubert v. Merrell Dow Pharmaceuticals, Inc*., 509 U.S. 579 (1993), and Rule 702's 2000 committee note. Under *Daubert* and the committee note, the existence of peer-review is relevant to a court's determination of the reliability of an expert's methodology, and thus the admissibility of expert testimony. The attorneys argued that this is problematic because many studies cannot be replicated.

The Advisory Committee decided not to pursue an amendment and to remove the item from the agenda. The consensus of committee members was that Rule 702 is general: it does not mention particular factors. The Advisory Committee thought that singling out a particular factor in the text would be awkward and potentially problematic. Moreover, courts have exercised appropriate discretion in connection with the peer review factor and there is not a problem warranting an amendment.

***The Supreme Court's Decisions in* Diaz v. United States *and* Smith v. Arizona.** Judge Furman stated that the Advisory Committee discussed two recent Supreme Court decisions pertaining to the Rules of Evidence. First, in *Diaz v. United States*, 602 U.S. 526 (2024), the Court addressed whether Rule 704(b) prohibited expert testimony in a drug smuggling case that "most people" who transport drugs across the border do so knowingly. The Court found no error because the expert's testimony was based on probability and not certainty. The Advisory Committee determined that the case did not warrant an amendment to the rule and that the Court's result was consistent with the language and intent of the rule.

Second, in *Smith v. Arizona*, 602 U.S. 779 (2024), a forensic expert testified to a positive drug test by relying on the testimonial hearsay of another analyst, and the other analyst's findings were disclosed to the jury. The Court held that the expert's disclosure to the jury of testimonial hearsay violated the defendant's right to confrontation, even if the purpose of the disclosure was purportedly to illustrate the basis of the testifying expert's opinion. Here, too, the Advisory Committee determined that an amendment is not presently necessary. There was some concern about whether the case could be construed to apply to reliance in addition to disclosure. If there were a constitutional bar on an expert's reliance on other experts' findings, an amendment to Rule 703 to prohibit reliance on testimonial hearsay in a criminal case would likely be necessary. Judge Furman said that the Advisory Committee will continue to monitor developments and how the case is applied in the lower courts.

Rule 902 and Tribal Certificates. Judge Furman reported that the Advisory Committee received a suggestion to consider adding federally recognized Indian tribes to the list of entities in Evidence Rule 902(1), which provides that domestic public records that are sealed and signed are self-authenticating. The list does not include Indian tribes, which means that a party who seeks to offer a record from a federally recognized Indian tribe must use another route to authenticate such evidence.

The Advisory Committee previously considered the issue and did not take action, but recent developments have arguably made this a live issue again, most notably, the Supreme Court's decision in *McGirt v. Oklahoma*, 591 U.S. 894 (2020). In addition, at least two recent decisions by courts of appeals held that the prosecution unsuccessfully attempted to establish Indian status through the business records exception.

At the fall 2024 Advisory Committee meeting, some members thought that this is not a problem with the rules but rather a failure by prosecutors to do what they must to authenticate the documents under existing rules, such as properly lay a foundation for the business records exception. In addition, there was a concern about whether all federally recognized tribes have resources and recordkeeping akin to those of the entities currently encompassed in Rule 902(1). The Advisory Committee will discuss these issues at its Spring meeting with further input from the DOJ.

Judge Bates thanked Judge Furman and Professor Capra for their report.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Eid and Professor Hartnett presented the report of the Advisory Committee on Appellate Rules, which last met on October 9, 2024, in Washington, DC. The Advisory Committee presented several information items and no action items. The Advisory Committee's report and the draft minutes of its last meeting are included in the agenda book beginning at page 193.

Information Items

Proposed amendments to Rule 29, dealing with amicus briefs, along with conforming amendments to Rule 32 and the Appendix of Length Limits, and proposed amendments to Form 4, the form used for applications to proceed in forma pauperis (IFP), were published for public comment in August 2024. The public comment period closes February 17. The Advisory Committee will be holding a hearing on the issues on February 14, where 16 witnesses are expected to testify.

Proposed Amendment to Form 4 (Affidavit Accompanying Motion for Permission to Appeal IFP). Judge Eid commented that the amended Form 4 is similar to, but less intrusive than, the existing form. She observed that only one comment had been submitted on the proposal (that comment is favorable), and five people are expected to testify about the proposal at the hearing. After considering comments and testimony and making any necessary changes, the Advisory Committee expects to present the proposed amended Form 4 for final approval in June.

Proposed Amendment to Rule 29 (Brief of an Amicus Curiae). Judge Eid reported that the Advisory Committee had received over a dozen comments on the Rule 29 proposal and at least 11 people are expected to testify about the proposal at the February hearing. Judge Eid explained that the proposal makes two main changes.

The first change relates to disclosures. Under the proposal, an amicus would have to disclose whether a party to the case provides it with 25% or more of the amicus's annual revenue. In addition, the current rule requires an amicus to disclose whether a nonmember made

contributions earmarked for a that brief. The proposal would extend this requirement to someone who recently became a member.

The second change relates to a motion requirement. The current rule permits an amicus to file a brief at the initial stage either by consent or by motion. The Advisory Committee's proposal would remove the consent option. Judge Eid noted that, at the Standing Committee's June 2024 meeting, members expressed concern that this proposal would create more work for judges by generating unnecessary motions. Judge Eid and Professor Hartnett reported these concerns to the Advisory Committee at its fall 2024 meeting; at that meeting, the Advisory Committee also heard that the Second, Ninth, and Tenth Circuits supported requiring a motion.

Judge Eid explained the second change's interaction with recusals. She explained that, in some circuits, filing an amicus brief by consent can block a case from being assigned to a judge and that this could occur without any judicial intervention (before the case is assigned to a panel). In such circuits, imposing a motion requirement would provide the opportunity for a judge to decide whether to disallow the brief because it would cause a recusal. Judge Eid noted that there is a tradeoff: imposing a motion requirement creates extra work but it creates the opportunity for judicial intervention. The Advisory Committee has asked its Clerk representative to survey the circuit clerks about their circuits' practices. The Advisory Committee is likely to consider proposing a rule that would eliminate the consent option unless a circuit opts to permit filings on consent.

A judge member asked Judge Bates whether the rules can allow circuits to opt out. Judge Bates, Judge Eid, and Professor Struve responded that it is not always an option but that in appropriate circumstances the rules can allow circuits to opt out.

Judge Bates noted that the question of changing this feature of the current rule initially arose because the Supreme Court changed its practice. The Supreme Court, though, accepts amicus briefs without any requirement. He observed that the proposed change to Rule 29 goes in the opposite direction.

A practitioner member supported setting a rule with which all circuits would be comfortable. He suggested a default rule requiring a motion but allowing circuits to permit filing by consent. Judge Eid responded that the Advisory Committee will consider that approach.

Professor Hartnett asked a judge member if she would be comfortable with a rule that includes an opt-out provision for circuits, given her concerns expressed at the last meeting. The judge member responded that an opt out would be a reasonable approach because courts may have different issues with the proposed rule and some courts receive more amicus briefs than others.

Rule 15 and the "Incurably Premature" Doctrine. Judge Eid reported that this item stems from a suggestion to fix a potential trap for the unwary. Under the incurably premature doctrine, if a motion to reconsider an agency decision makes that decision unreviewable in the court of appeals, then a petition to review that agency decision is not just held in the court of appeals awaiting the agency's decision on the motion to reconsider. Rather, the petition for review is dismissed, and a new petition for review must be filed after the agency decides the motion to reconsider. Judge Eid observed that Appellate Rule 4 used to work in a similar fashion, but it was

amended to provide that such a premature notice of appeal becomes effective when the post-judgment motion is decided.

Judge Eid reported that the Advisory Committee is considering whether to make a similar amendment to Rule 15. She noted that the Advisory Committee had previously studied such a proposal but that the earlier proposal had been opposed by the D.C. Circuit. Judge Eid predicted that the Advisory Committee might seek permission, at the Standing Committee's June meeting, to publish such a proposal for comment.

A judge member noted that a difference between Rule 4 and Rule 15 is that statutory jurisdictional provisions govern court review of the decisions of some agencies. She wondered whether a court could defer consideration of a petition that the court had no jurisdiction to decide when the petition was filed. In addition, based on the volume of petitions her court receives, this could be a burden on the clerk's office. She offered to raise the issue with her colleagues. Judge Eid thanked the member and invited her to ask her colleagues about the topic.

Intervention on Appeal. Judge Eid noted that the discussion of this item appears in the agenda book beginning on page 196. She observed that members of the Advisory Committee thought it would be helpful to have a rule addressing intervention on appeal, but that they also had concerns that adopting such a rule might increase the volume of requests to intervene on appeal. Judge Eid suggested that intervention does not typically pose difficult issues in connection with petitions in the court of appeals for review of agency determinations. Instead, problems have manifested in some cases where a plaintiff sues to challenge a government policy and then there is a subsequent change in administration of the government whose policy is under challenge. Problems have also arisen in some cases where a plaintiff seeks a "universal" remedy, that is, one that would benefit nonparties as well as parties. She said that the Advisory Committee continues to monitor developments and that the FJC is conducting research to help inform the Advisory Committee.

Judge Eid commented that the Advisory Committee thought it might be able to craft a rule that would structure the analysis, provide guidance, and limit the range of debates on the issue. Ultimately, a rule could make clear that intervention on appeal should be rare. The Advisory Committee is waiting for the FJC's research and may take up this item next year. A judge member noted the current lack of guidance for attorneys; this member suggested that a rule could usefully say: "intervention on appeal should be rare, requests must be timely, and intervening on appeal is not a substitute for amicus participation."

A member stated that he did not like the idea of avoiding rulemaking on a topic merely to discourage the practice that the potential rule would address. He suggested that it would be better to adopt a rule that would provide more guidance on the issue while including the caveat that intervention on appeal should be rarely used.

Rule 4 and Reopening Time to Appeal. Judge Eid reported that the Advisory Committee has begun considering a suggestion to address various issues involving reopening the time to appeal under Rule 4(a)(6). The suggestion seeks to clarify whether a single document can serve as a motion to reopen the time to appeal and then (once the motion is granted) as the notice of appeal. Relatedly, the suggestion seeks to clarify whether a notice of appeal must be filed after a motion

to reopen the time to appeal has been granted. Judge Eid said that the Advisory Committee has just begun to look at this issue.

Rule 8 and Administrative Stays. Judge Eid reported that the Advisory Committee is in the preliminary stages of considering a suggestion to amend Rule 8. A proposed rule could make clear the purpose and proper duration of an administrative stay.

A judge member recommended receiving input from chief circuit judges on the topic. He commented that Professor Rachel Bayefsky authored a superb article on administrative stays.

Other Items. Judge Eid reported that the Advisory Committee decided to remove several items from its agenda, including a suggestion to prohibit the use of all capital letters for the names of persons, a suggestion to move common local rules to national rules, a suggestion to create a set of common national rules that would collect the provisions that are the same across the different sets of national rules, a suggestion to standardize page equivalents for word limits, and a suggestion regarding standards of review.

Judge Bates thanked Judge Eid and Professor Hartnett for their report.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Connelly and Professors Gibson and Bartell presented the report of the Advisory Committee on Bankruptcy Rules, which last met on September 12, 2024, in Washington, DC. The Advisory Committee presented action items for publication of one rule and one official form, as well as four information items. The Advisory Committee's report and the draft minutes of its last meeting are included in the agenda book beginning at page 223.

Action Items

Publication of Proposed Amendment to Rule 2002 (Notices). Judge Connelly reported on this item. The text of the proposed amendment begins on page 229 of the agenda book, and the written report begins on page 224. Rule 2002 requires the clerk to provide notice of an extensive list of items or actions that occur in every bankruptcy case. Rule 2002(o) provides that the caption of the notices under this rule shall comply with Rule 1005, which governs the caption of the petition that initiates a bankruptcy case. Rule 1005 requires the petition's caption to include information such as the debtor's name, other names the debtor has used, and the last four digits of the debtor's social security number or taxpayer-identification number. By incorporating Rule 1005's requirements, Rule 2002(o) requires that Rule 2002 notices include this information also. Judge Connelly stated that including this information in such notices is onerous and exposes sensitive information.

The proposed amendment would change Rule 2002(o) to eliminate the cross-reference to Rule 1005 and instead require that the caption comply with Official Form 416B. The result would be to require an ordinary short title caption consisting of the name, case number, chapter of bankruptcy, and the title of item being noticed.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee gave approval to publish the proposed amendment to Rule 2002 for public comment.**

Publication of Proposed Amendment to Official Form 101 (Voluntary Petition for Individuals Filing for Bankruptcy). Judge Connelly reported on this item. The text of the proposed amendment begins on page 231 of the agenda book, and the written report begins on page 225. Form 101 is the initial form for filing a bankruptcy case. The form currently has a field for disclosing the debtor's employer identification number, requesting "Your Employer Identification Number (EIN), if any." Commonly, pro se filers are mistakenly providing the EIN of their employers. When multiple debtors file petitions listing the same EIN, the system erroneously flags them as repeat filers.

The proposed amendment would change the language in Form 101 to say: "EIN (Employer Identification Number) issued to you, if any. Do NOT list the EIN of any separate legal entity such as your employer, a corporation, partnership, or LLC that is not filing this petition."

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee gave approval to publish the proposed amendment to Official Form 101 for public comment.**

Information Items

Judge Connelly reported on four topics being considered by the Advisory Committee. The written report begins on page 225 of the agenda book.

Suggestion to Require Full Redaction of Social Security Numbers in Court Filings. Judge Connelly reported that the Advisory Committee has been studying whether the Bankruptcy Rules should continue to provide for disclosure of the last four digits of social security numbers in bankruptcy filings but has decided not to take action at this time. Judge Connelly noted the invaluable work of the FJC, which conducted an extensive study on the disclosure of social security numbers in federal court filings.

The Advisory Committee also conducted its own study by identifying the official bankruptcy forms that disclose the last four digits of social security numbers. Currently, several official forms require the disclosure of these last four digits. The FJC surveyed stakeholders, asking for input about the possible impact of eliminating the last four digits on the forms. Judge Connelly said that it may be critical to obtain this information to precisely determine the individuals who are or have been in bankruptcy because this allows creditors to accurately file claims, know to take no action on debts due to the automatic stay, or know that a debt has been discharged. Indeed, the stakeholders surveyed said that the last four digits on the official forms are essential. The numbers on some forms were essential to all stakeholders, and the numbers on all forms were essential to some stakeholders. Judge Connelly observed that there does not appear to be an effective means for identifying individuals without the last four digits of social security numbers, since it is not uncommon for multiple individuals with the same name to file for bankruptcy.

The Advisory Committee thus decided not to take action because it did not identify a real-world harm from disclosure of the last four digits in bankruptcy cases but did identify a harm in not disclosing this information. Although the FJC study did find disclosures of some full social security numbers in bankruptcy cases, those disclosures occurred despite the current rules, so rule amendments would not address that issue. Judge Connelly commented that the Advisory Committee will monitor developments in the other advisory committees and may revisit the issue if a time comes when stakeholders can effectively identify debtors without the need for the last four social security number digits.

Suggestion to Propose a Rule Requiring Random Assignment of Mega Bankruptcy Cases Within a District. Judge Connelly reported that the Advisory Committee received suggestions for a rule to require random assignment of bankruptcy cases designated as mega bankruptcy cases. She noted that the Committee on the Administration of the Bankruptcy System and the Committee on Court Administration and Case Management are considering similar issues. Accordingly, the Advisory Committee will defer any action on this item until it receives guidance from the other committees.

Suggestions to Allow Appointment of Masters in Bankruptcy Cases and Proceedings. Judge Connelly observed that under Bankruptcy Rule 9031, special masters cannot be appointed by a bankruptcy court. Two suggestions propose an amendment to Rule 9031 to allow for the appointment of masters in bankruptcy cases. She recalled that the Advisory Committee has considered, and rejected, many similar suggestions in previous decades. The Advisory Committee continues to consider the issue with this history in mind. Judge Connelly also noted that the FJC will survey bankruptcy judges to help identify the need and potential use for masters. The Advisory Committee should have the survey results by the June meeting.

Judge Connelly said that one issue raised was whether bankruptcy judges, being non-Article-III judges, would have the authority to appoint masters.

Recommendation Concerning Proposed Amendment to Official Form 318 (Discharge of Debtor in a Chapter 7 Case) and Director's Forms 3180W (Chapter 13 Discharge) and 3180WH (Chapter 13 Hardship Discharge). Judge Connelly reported that the Advisory Committee received a suggestion for an amendment to the bankruptcy form Order of Discharge. The form establishes that a debtor has been discharged of its debts. The suggestion proposes adding language to the form that would notify the recipient that there may be unclaimed funds and that they can check the Unclaimed Funds Locator to ascertain whether they are entitled to any.

Currently, unclaimed funds are paid into the Treasury and kept until the claimant retrieves the funds. Judge Connelly acknowledged that this is a problem that needs to be addressed, but that the Advisory Committee decided to take no action on this particular suggestion. The Advisory Committee had several reasons, one of which is a timing issue. A bankruptcy discharge order is issued once the debtor is eligible for a discharge, but the unclaimed funds are not paid into the Treasury until a trustee's disbursements have gone stale. In a Chapter 7 case, this could be years after the debtor receives their personal discharge. In a Chapter 13 case, it could still be six months after the debtor's last payment to the trustee. In either event, there likely are not unclaimed funds available when the discharge order is issued. Thus, the proposed notice would be confusing or misleading.

Judge Bates thanked Judge Connelly and the Advisory Committee.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Rosenberg and Professors Marcus and Bradt presented the report of the Advisory Committee on Civil Rules, which last met on October 10, 2024, in Washington, DC. The Advisory Committee presented two action items and several information items. The Advisory Committee's report and the draft minutes of its last meeting are included in the agenda book beginning at page 268.

Judge Rosenberg reported that the Judicial Conference approved the proposed amendments to Rules 16 and 26 and the proposed new Rule 16.1. The Judicial Conference sent the proposals to the Supreme Court. If the Supreme Court approves the proposals and forwards them to Congress, the proposals will be on track to take effect on December 1, 2025, absent contrary action by Congress.

Action Items

Publication of Proposed Amendment to Rule 81(c) Concerning Jury-Trial Demands in Removed Actions. Judge Rosenberg reported on this item. The text of the proposed amendment begins on page 292 of the agenda book, and the written report begins on page 271. Before 2007, Rule 81(c) said: "If state law does not require an express demand for a jury trial, a party need not make one after removal unless the court orders the parties to do so within a specified time." This excused a jury demand only when the case was removed from a state court that never requires a jury demand. But in the 2007 restyling, the verb "does" was changed to "did." This restyling could produce confusion when a case is removed from a state court that has a jury demand requirement but permits that demand later in the litigation. Accordingly, the Advisory Committee considered amendment to remove any uncertainty about whether and when a jury demand must be made after removal.

At the Advisory Committee's October meeting, it recommended a proposed amendment to require a jury demand in all removed cases by the deadline set forth in Rule 38. A point made during that meeting was that even when a party fails to meet the Rule 38 deadline, the court may nevertheless order a jury trial under Rule 39(b).

The Advisory Committee unanimously voted to recommend for publication the draft amendment to Rule 81(c) and its accompanying committee note. The Advisory Committee rejected the alternative proposal to return to the language in place before the 2007 change.

Professor Marcus observed that the existing rule creates uncertainty about when a jury demand is required and said that this proposed amendment removes that uncertainty by requiring a jury demand in accordance with Rule 38. Professor Cooper agreed and clarified that a party need not make a jury demand after removal if the party already made a demand before removal.

A practitioner member asked if the first line in the proposed Rule 81(c)(3)(B) should be in the past tense ("If no demand was made") rather than the current draft language ("If no demand is made"). Professor Garner's initial response was that the phrase should be in the present perfect

tense ("has been made") because it refers to the present status of something that has occurred. The practitioner member noted that using the present perfect tense would match the following sentence.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee gave approval to publish the proposed amendment to Rule 81 for public comment**, with the change on page 292, line 14 in the agenda materials from "is" to "has been."

Publication of Proposed Amendment to Rule 41 (Dismissal of Actions). Judge Rosenberg reported on this item. The text of the proposed amendment begins on page 288 of the agenda book, and the written report begins on page 274. However, during the meeting a restyled version of the proposed amendment was displayed on the screen, reflecting input of the style consultants subsequent to the publication of the agenda book. Judge Rosenberg reported that courts widely disagreed on the interpretation of Rule 41(a). Although the rule is titled "Dismissal of Actions" and describes when a plaintiff may dismiss an action, many courts use the rule to dismiss less than an entire action. After several years of study, feedback, and deliberation, the Advisory Committee determined that the rule should be amended to permit dismissal of one or more claims in a case rather than permitting the dismissal of only the entire action. The Advisory Committee also concluded that the rule should be clarified to require that only current parties to the litigation must sign a stipulation of dismissal of a claim.

During the Subcommittee's outreach, there was no opposition to such an amendment, and the proposed change would provide nationwide uniformity and conform to the practice of most courts. Further, the proposed amendment would help simplify complex cases and support judicial case management. Accordingly, the Advisory Committee unanimously recommended for publication the proposed amendment to Rule 41.

Judge Rosenberg said that the proposed rule amendment differs slightly from the draft shown in the agenda book. Where the agenda book draft language refers to "a claim or claims" in lines 7-8, 19, and 41-42 (pages 288-90), the restyled amendment proposal refers instead to "one or more claims."

Professor Bradt said that a concern was raised regarding the use of the term "opposing party" in Rule 41(a)(1)(A)(i). The concern was that the term could be ambiguous with respect to who would be the party whose service of an answer or a motion for summary judgment would trigger the end of the period in which one could unilaterally dismiss a claim. The Advisory Committee ultimately declined to change this language because of its common use in other rules, all of which have a fairly clear definition of opposing party as being the party against whom the claim is asserted.

Judge Bates asked whether it would be inconsistent to use instead the term "opposing party on the claim." Professor Bradt recalled that the Advisory Committee discussed similar suggestions at its October meeting. The Advisory Committee agreed that adding such language would not introduce any problems but that the additional language would be redundant. Professor Kimble emphasized the importance of using consistent language in the rules.

Judge Rosenberg asked about adding language in the committee note to make clear that the rule refers to the opposing party to the claim. Professor Kimble responded that he would not have

a similar concern if the additional language were placed in the committee note. Professor Bradt said that the Advisory Committee declined to add the additional language to promote consistent usage in the rules and noted that no responses to the Advisory Committee's outreach expressed any confusion. He said that the Advisory Committee could learn about confusion during the public comment period. Professor Cooper opposed adding the additional language to the rule text but suggested using "party opposing the claim" if the Advisory Committee decides to address the matter in the committee note.

Judge Rosenberg asked Judge Bates if he thought an additional sentence for the committee note should be drafted. Judge Bates saw no reason not to draft the additional language for the committee note if Judge Rosenberg, Professor Marcus, and Professor Bradt thought the addition would be beneficial.

A practitioner member asked about the conforming change in Rule 41(d). He observed that term "action" still appears in the rule. He thought that "of that previous action" in Rule 41(d)(1) was unclear (because it is intended to refer to the initial phrase in Rule 41(d), which as amended would now say "a claim" rather than "an action") and suggested that Rule 41(d) could instead use the phrase "of the previous action where the claim was raised." In addition, he observed that the draft committee note stated that references to action have been replaced and suggested that this language be adjusted if the rule retains some references to actions.

Professor Bradt responded that it was intentional to retain "action" in Rule 41(d) to make clear that the rule refers to a new case being filed. He said that the member's suggested additional language would not cause harm and offered instead "of that previous action in which one or more claims was voluntarily dismissed." Professor Bradt asked the member if this would clarify the rule. The member said that he was not devoted to any specific language but thought some clarification would be helpful and added that "the previous action" may be preferable to "that previous action."

Professor Kimble suggested "that previous action in which the claim was voluntarily dismissed." Professor Bradt and the member agreed. Professor Garner asked if the party would become responsible for all the costs of the action if one claim were dropped. Professor Bradt responded that ordinarily the party would only be responsible for the cost associated with the dismissed claim, but the court would retain the ability to impose the costs of the entire action. Professor Garner said that, as a style matter, "the" is preferable to "that." This would yield the phrase "of the previous action in which a claim was voluntarily dismissed."

Judge Bates questioned whether "voluntarily" would be appropriate to use in Rule 41(d). Professor Bradt responded that Rule 41(d) applies to voluntary dismissals but not involuntary dismissals and said that the proposed amendment does not seek to change that feature of Rule 41(d). Professor Cooper agreed that Rule 41(d) covers all dismissals under Rule 41(a), even if the plaintiff needs a court order, but Rule 41(d) does not include involuntary dismissals under Rule 41(b). Judge Bates observed that the headings of Rule 41(a)(1) and (2) distinguish between voluntary dismissals "By the Plaintiff" (Rule 41(a)(1)) and voluntary dismissals "By Court Order" (Rule 41(a)(2)).

Professors Cooper and Kimble commented that "previous" is unnecessary. To clarify the committee note, Professor Bradt suggested one additional word: adding "some" before "references

to 'action.'" He asked if this would clarify that the proposed change does not eliminate all references to action. Professor Capra disagreed with adding "some" to the committee note and suggested that it refer to the provisions actually changed.

Professor King suggested working on the proposal further and seeking publication at the Standing Committee's June meeting. Professor Capra agreed with Professor King. Professor Kimble also agreed and said that the style consultants would like to take more time to consider the proposed language. Judge Bates observed that the Standing Committee could consider the proposal with updated language at its June meeting for publication in August. Judge Rosenberg and Professor Bradt agreed with this plan.

Professor Bradt summarized the items that the Advisory Committee will work on. First, revising the committee note to clarify that some but not all references to "action" are being replaced. Second, considering the addition of rule text or a sentence in the committee note to clarify what is meant by "opposing party" in Rule 41(a)(1)(A)(i). Third, revising the proposed amendment to Rule 41(d)(1) to clarify its application to voluntary dismissals with or without court orders and to make clear the court's authority in the subsequent action to require the plaintiff to pay all or part of the costs related to the prior action in which they voluntarily dismissed the claim.

Professor Hartnett wondered how "and remain in the action" in the proposed Rule 41(a)(1)(A)(ii) interacts with Rule 54(b). For example, consider a situation where a plaintiff sues two defendants, and the court grants one defendant's motion to dismiss the claims against it. Absent a Rule 54(b) certification, that defendant remains in the action – for purposes of the application of the final-judgment requirement for taking an appeal – until the disposition of the claims against the remaining defendant. However, Professor Hartnett thought, the Advisory Committee appears to intend "remain in the action" to mean something different in Rule 41. Professor Hartnett expressed concern that this could cause confusion.

Professor Bradt asked if Professor Harnett had a proposal to solve this issue. Professor Hartnett said his initial reaction was to drop the proposed additional language. Professor Marcus explained that the proposal was in response to cases where parties no longer involved in the case refused to stipulate to a dismissal. Professor Bradt added that a problem also arises where a party no longer involved in the case cannot be found to obtain their signature for a dismissal.

Professor Bradt said that the Advisory Committee will continue to work on the proposed amendment and will present a revised proposal at the Standing Committee's June meeting. Judge Rosenberg agreed.

Information Items

Judge Rosenberg reported on the work of the Advisory Committee's subcommittees as well as a few other information items. These items are described in the written report beginning on page 276 of the agenda book.

Rule 45(b) and the Manner of Service of Subpoenas. Judge Rosenberg reported that the Discovery Subcommittee continues to consider the problems that can result from Rule 45(b)(1)'s directive that service of a subpoena depends on "delivering a copy to the named person." As to

potential alternative methods of service, the Subcommittee determined to leave the decision of what to employ for a given witness to the presiding judge.

The Subcommittee is also considering the requirement that when a subpoena requires attendance by the person served, the witness fees and mileage be "tendered" to the witness. The Subcommittee is studying two options. The first option is retaining the obligation to tender fees but not as part of service. The second option is eliminating the obligation to tender the fees.

Judge Rosenberg invited feedback on the issues of tendering fees at time of service and also whether the rule should be amended to require that the subpoena be served at least 14 days before the date on which the person is commanded to attend. Professor Marcus noted that the Subcommittee will also be looking at filing under seal.

Professor King observed that Rule 45(b) is similar to Criminal Rule 17(d) (on service of subpoenas in criminal cases). She suggested that the committees coordinate during the drafting process. However, she acknowledged that different considerations may affect the criminal and civil service rules.

Rule 45(c) and Subpoenas for Remote Testimony. Judge Rosenberg reported that the Advisory Committee received a suggestion to relax the constraints on the use of remote testimony. The Advisory Committee will monitor comments submitted on the proposed bankruptcy rule amendments that would permit the use of remote testimony for contested matters in bankruptcy court.

Judge Rosenberg said that the Advisory Committee will continue to consider an amendment to Rule 45(c) to clarify that a court can use its subpoena power to require a distant witness to provide testimony once it determines that remote testimony is justified under the rules. This issue came to the Advisory Committee's attention because of a Ninth Circuit ruling, *In re Kirkland*, 75 F.4th 1030 (9th Cir. 2023), holding that current Rule 45 does not permit a court that finds remote testimony justified under Rule 43 to compel a distant witness to provide that testimony by subpoena. The Subcommittee is inclined to recommend an amendment that would provide that when a witness is directed to provide remote testimony, the place of attendance is the place the witness must go to provide that testimony.

Judge Bates observed that no public comments had been submitted so far on the bankruptcy rule amendment relating to remote testimony in contested matters.

A judge member said that he disagreed with the Ninth Circuit's decision but that given the ruling, he thought an amendment to the rule is necessary. He asked how an amendment might affect the definition of unavailability in Rule 32 (concerning use of depositions). Professor Marcus responded that the Committee is discussing the issue of unavailability under Rule 32 as well as under Evidence Rule 804 (concerning the hearsay exception for unavailability). He explained that the Committee did not intend the change to Rule 45 to affect the interpretation of unavailability under Rules 32 or 804 and suggested that the committee note could make that clear.

Another judge member commented that even if no comments are received on the bankruptcy rule, many others are experimenting with remote proceedings, such as state courts and immigration courts. He suggested that there was no good reason to delay in moving ahead with

remote proceedings. Judge Rosenberg responded that the Subcommittee initially considered proposing changes to Rule 45 and Rule 43 together but now thinks it will take more time to discuss changes to Rule 43 because a proposed change to Rule 43 would be more controversial. The Advisory Committee was in the process of gathering other perspectives on remote testimony, like those from the American Association for Justice and the Lawyers for Civil Justice. Professor Marcus emphasized that the Committee is not delaying consideration of remote testimony but rather the Committee feels urgency to move forward with an amendment to address *In re Kirkland*.

A member cautioned against overreading the lack of comments received so far for the bankruptcy rule amendment, since the amendment relates only to contested matters and not adversary proceedings. Further, bankruptcy courts have comfortably used remote technology for a long time. The bankruptcy responses therefore provide little guidance on a possible reaction to remote proceedings in non-bankruptcy civil cases. Professor Marcus agreed. Judge Connelly said that although no comments had been submitted yet, the Bankruptcy Rules Committee expects comments before the end of the notice period. Judge Connelly also noted that the bankruptcy rule amendments may have limited impact because contested matters are often akin to motion practice in district court.

Judge Bates observed that the Advisory Committee was considering issues across Rules 43 and 45. And because remote testimony is a broader issue than the issue regarding subpoenas, he urged the Advisory Committee to be cognizant of that and not let the subpoena consideration drive the analysis.

Rule 55 and the Use of the Verb "Must" with Regard to Action by Clerk. Judge Rosenberg reported that Rule 55(a) says that if the plaintiff can show that the defendant has failed to plead or otherwise defend, "the clerk must enter the party's default." Rule 55(b)(1) says that if "the plaintiff's claim is for a sum certain or a sum that can be made certain by computation, the clerk … must enter judgment for that amount and costs against a defendant who has been defaulted for not appearing." The Advisory Committee had found that the command in Rule 55(a) does not correspond to what is happening in many districts. FJC research shows wide variations among district courts in how they handle applications for entry of default or default judgment.

The Advisory Committee discussed whether to amend Rule 55. Some members favored changing "must" to "may" to protect clerks from pressure when there are serious questions about whether entry is appropriate. However, some members thought that "may" would create ambiguity. Judge Rosenberg said that the Advisory Committee is in the early stages of discussing this issue. Professor Marcus added that this command that some clerks find unnerving has been in the rule since 1938.

A judge member thought that there are two separate issues: the pressure on clerks to make a decision they feel uncomfortable making and whether entry should be mandatory. Professor Marcus responded that a number of districts have provisions allowing the clerk to act or refer the matter to the court.

At this point in the Civil Rules Committee's report, the discussion was paused in order to allow the Criminal Rules Committee to make its report (described below). The Civil Rules Committee's presentation resumed thereafter with the discussion of third party litigation funding.

Third Party Litigation Funding. Judge Rosenberg reported that a subcommittee was recently appointed to study the topic. Third party litigation funding first appeared on the Advisory Committee's agenda in 2014, primarily in the context of multidistrict litigation. Since then, litigation funding activity has increased and evolved. The Subcommittee has met once so far to plan its examination of the topic. It will examine, among other things, the model in place in the District of New Jersey, which adopted a local rule calling for disclosure. The Wisconsin legislature included a disclosure rule in its tort reform discovery package. The Subcommittee is only studying and monitoring the issue and does not anticipate making any proposals in the near future.

A practitioner member noted that disclosures have been required by some judge-made rules in Delaware courts, and also suggested that it may be helpful to examine arbitration practices, where mandatory disclosure of third-party litigation funding is the norm. Judge Rosenberg asked if discovery ensues after such disclosures and whether the disclosures are ex parte. The member replied that he did not know about discovery, but he thought that the disclosures are not ex parte because they are designed to provide information for conflict-of-interest purposes.

Another practitioner member observed that in his practice, he often wonders if there is a funder involved and it is very difficult to get discovery about that information. He commented that there may be reasons why information on funding should never be disclosed to a jury, but he expressed concern that funders exercise control over claims. The attorney may even be associated with the funder before the attorney is associated with their client. The member said that funders can make resolving a case more difficult. He recounted a case where a funder loaned a company a large sum of money secured by existing and future claims, caused the company to file claims, and then prevented the company from settling their claims. He thought that some sort of discovery into the funder relationship should be permitted.

Judge Rosenberg invited the member to share persons or organizations with whom it would be helpful to speak. She said that the Subcommittee is eager to learn how pervasive funding is, what constitutes litigation funding, how it could be defined, and what, if anything, the rulemakers should do about it. The Subcommittee knows that funding can be problematic from a recusal standpoint and a control standpoint, but it needs to understand the breadth and pervasiveness of the problem.

Professor Marcus observed that a court presumably could order discovery on funding even without a new rule on point and he asked why they do not always do so. As to recusal, Professor Marcus recalled a judge during a prior discussion stating that not very many judges invest in hedge funds. He asked what a judge is supposed to do upon learning of funding. A practitioner member replied that the Subcommittee should look into the breadth of litigation funders because he suspected that litigation funders include not only hedge funds, but also other entities such as insurance companies. Thus, the member said, funding does pose potential recusal issues. He also said that in his experience the trend is generally not to allow discovery on the issue unless a party can come forward with some specific reason to believe that something untoward is going on.

Another practitioner member agreed. He said that an objection is often made arguing that funding arrangements are matters between the funder and client, and the opposing party should not receive the information even if it is needed to determine whether the court should recuse. The member framed this as a chicken and egg problem: the opposing party may be able to articulate a

basis for funding concerns only after receiving information about the funding arrangement. He repeated that most courts do not allow discovery into the issue because it is seen as a fishing expedition.

Professor Hartnett commented on the disclosure rule in the District of New Jersey. He said that he is a member of the Lawyers' Advisory Committee that developed and drafted the rule ultimately promulgated by the district. He offered to facilitate a meeting with the Lawyers' Advisory Committee. Judge Rosenberg said that the FJC has been in touch with the district's Clerk of Court to learn the types of disclosures being made under the local rule and how judges use the information disclosed.

Professor Coquillette observed that this is another area where a rules committee's work overlaps with another rulemaking system because this issue is covered by state disciplinary rules, particularly when lawyers and their clients have differing interests.

A member cautioned that the term third party litigation funding captures a broad and varied set of arrangements. It may be on the plaintiff or defense side, it may be framed as insurance, and parties offering funding can include hedge funds and private equity firms. To craft a rule, even if it relates only to disclosures, one must determine what the funding device is and what type of concern it raises. If the concern is about control, the member agreed with Professor Coquillette that there could be other ways of addressing that concern or that any rulemaking could be narrow and targeted. But he thought that unless a disclosure rule was limited to seeking a very narrow set of information about control, it could be difficult to craft a rule that would be both meaningful and long-lasting. Judge Bates recalled that the scope of third-party litigation funding was an initial question that the Advisory Committee confronted many years ago. The member also noted that some states have abolished champerty as an operative doctrine, while other states still enforce champerty restrictions.

Cross-Border Discovery Subcommittee. Judge Rosenberg reported that the Subcommittee was formed in response to a proposal urging study of cross-border discovery with an eye toward possible rule changes to improve the process. The Subcommittee is focused on foreign discovery under 28 U.S.C. § 1781 and the Hague Convention from litigants that are parties to U.S. litigation. The Subcommittee has met with bar groups, and Subcommittee members will attend the Sedona Conference Working Group 6, which focuses on cross-border discovery issues. The Subcommittee will continue to reach out to groups and participate in relevant meetings, though it does not anticipate making any proposals in the near future. Professor Marcus confirmed that he will attend the Sedona Conference meeting and said that it is not clear whether there is widespread support for rulemaking in this area.

Rule 7.1 Subcommittee. Judge Rosenberg reported that the Subcommittee is considering whether to expand the disclosures required of nongovernmental corporations. She said that the current rule, which requires that nongovernmental corporations disclose any parent corporation and any publicly held corporation owning 10% or more of its stock, does not provide enough information for judges to evaluate their statutory obligations in all cases. The Subcommittee seeks to ensure that any proposed rule helps judges evaluate their obligations and is consistent with recently issued Codes of Conduct Committee guidance. The guidance indicates that a judge has a

financial interest requiring recusal if the judge has a financial interest in a parent that "controls" a party. The current rule likely requires disclosure of most such circumstances but not all.

Judge Rosenberg said that the Subcommittee is considering an amendment requiring disclosure based on a financial interest. In addition to the current disclosure requirements, the amendment would also require corporate parties to disclose any publicly held business organization that directly or indirectly controls the party. The Subcommittee hopes to present a proposed amendment and committee note for Advisory Committee consideration at the Advisory Committee's April meeting. Professor Bradt added that the Subcommittee continues outreach to likely affected parties, including organizations of general counsel.

Use of the Term "Master" in the Rules. Judge Rosenberg reported that the American Bar Association had submitted a suggestion to remove the word "master" from Rule 53 and other places. The Academy of Court-Appointed Neutrals and the American Association for Justice submitted supporting suggestions. At its October meeting, the Advisory Committee decided to keep the matter on its agenda for monitoring, but it does not anticipate making any proposals in the near future.

Professor Marcus noted that "master" appears in many rules. It appears in Rule 53, at least six other Civil Rules, the Supreme Court's rules, and several federal statutes. Professor Marcus asked whether the term should be removed from the Civil Rules, and if so, what should replace it. The Academy of Court-Appointed Neutrals suggested "court-appointed neutral," but this does not seem to describe persons who can do the many things that Rule 53 masters can do, such as make rulings.

Professor Garner commented that there are about 12 or 13 different contexts in which master historically has been used. He thought that the suggestions may be focusing on one historical use of the term. Professor Garner authored an article on the topic and offered to share it with the Advisory Committee.

A judge member commented that the issue is whether the term should be used or not. This member thought that if there are many appropriate uses of the term, then that would be a reason not to make a change. But if the term has become offensive, then the Advisory Committee should amend the rules. A practitioner member agreed that this should be the focus. This member stressed that it is important to look for a replacement term that would have the same utility: the term "master" has become a term of art with a particular meaning in litigation that terms like "neutral" do not capture. The member said that the term "master" is obsolete but that it is difficult to think of a replacement.

Another judge member asked whether states continue to use the term and, if not, what terms they have replaced it with. Professor Marcus recalled that a submission referred to recent changes elsewhere and noted that the Academy of Court-Appointed Neutrals was previously called the Academy of Court-Appointed Masters. He also said that the AAJ suggestion did not suggest a proposed substitute term. Professor Marcus suggested one possibility is waiting to see what term becomes familiar and recognized in litigation.

Professor Coquillette noted that treatises exist in online databases that use Boolean search operators. Changing key terms will complicate the use of these word retrieval systems.

A judge member also noted that the Supreme Court uses the term, and the Court's usage would not be altered by changes to the national rules for the lower federal courts.

Professor Capra said that recent changes include New Jersey now using the term "special adjudicator," and New York using "referee."

Random Case Assignment. Judge Rosenberg reported that the Advisory Committee has received several proposals to require random district judge assignment in certain types of cases. In March 2024, the Judicial Conference issued guidance to all districts concerning civil actions that seek to bar or mandate statewide enforcement of a state law or nationwide enforcement of a federal law, whether by declaratory judgment or injunctive relief. In such cases, judges would be assigned by a district-wide random selection. Judge Rosenberg stated that the Advisory Committee is monitoring the implementation of the guidance, but that it is premature to make any rule proposals in the near future.

Judge Bates thanked Judge Rosenberg and the reporters for their report.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Dever and Professors Beale and King presented the report of the Advisory Committee on Criminal Rules, which last met on November 6-7, 2024, in New York, NY. The Advisory Committee presented several information items and no action items. The Advisory Committee's report and the draft minutes of its last meeting are included in the agenda book beginning at page 320.

Information Items

Rule 53 and Broadcasting Criminal Proceedings. Judge Dever noted that Rule 53 provides that "[e]xcept as otherwise provided by a statute or these rules, the court must not permit … the broadcasting of judicial proceedings from the courtroom." The Rule 53 Subcommittee previously considered but did not act on a suggestion from some members of Congress suggesting that a clause be added excluding from the rule any trial involving Donald J. Trump. Subsequently, a consortium of media organizations proposed that Rule 53 be revised to permit the broadcasting of criminal proceedings, or to at least create an "extraordinary case" exception to the prohibition on broadcasting. A subcommittee was formed to consider that suggestion.

The Subcommittee met a number of times and gathered information about Judicial Conference Policy § 420(b), which permits the court to permit broadcasting of civil and bankruptcy non-trial proceedings in which no testimony will be taken. The Subcommittee also received an excellent FJC survey on state practices related to broadcasting and attempted to find empirical studies on the effect of broadcasting on criminal proceedings. Ultimately, the Subcommittee unanimously recommended no change to Rule 53, citing concerns about due process, fairness, privacy, and security. With one dissenting vote, the Advisory Committee decided not to propose amending Rule 53.

Professor King noted that, after the agenda book for the Advisory Committee's fall meeting was published, the Advisory Committee received an additional two submissions related to broadcasting. Professor Beale noted that one of those submissions was from the proponent of the original Rule 53 proposal. She noted that the Advisory Committee welcomed comments on the topic.

A judge member expressed interest in the FJC's research on remote public access to court proceedings. This judge member expressed skepticism about the assertion that the risks of broadcasting are somehow greater in federal court proceedings than in state court proceedings (where the risks seem to have been overcome). The member also wondered why the DOJ had abstained from voting on whether to remove the Rule 53 proposal from the Committee's study agenda.

Rule 17 Subpoena Authority. Judge Dever reported that the Advisory Committee was continuing to consider a proposal from the New York City Bar Association to amend Rule 17. The Rule 17 Subcommittee has learned of a wide range of practices under Rule 17 and associated caselaw. The Subcommittee will continue to meet and will present further information at the Advisory Committee's April meeting.

References to Minors by Pseudonyms and Full Redaction of Social Security Numbers. Judge Dever noted that Rule 49.1(a)(3) currently requires filings referring to a minor to include only that minor's initials unless the court orders otherwise. Rule 49.1(a) also provides that only the last four digits of a social security number may appear in public filings. The DOJ and two bar groups have proposed amending the rule to require that minors be referred to by a pseudonym rather than initials in order to provide greater protection of their privacy. Meanwhile, Senator Wyden has suggested amending the rule with respect to social security numbers. The relevant Subcommittee expects to present a proposal to the Advisory Committee at its April meeting.

Professor Beale noted that if Rule 49.1 is amended to require use of pseudonyms for minors, this would create disuniformity unless the other privacy rules are similarly amended. She noted that DOJ policy is to use pseudonyms, and federal defenders said they mostly use pseudonyms already as well. Professor Beale thought that the rules should reflect this practice. Given that the Criminal Rules Committee would consider this proposal at its Spring meeting, she expressed a hope that the other advisory committees would do so as well.

As to Senator Wyden's concern about the inclusion of the last four digits of social security numbers in court filings, Judge Dever stated that disclosure of the last four digits can impact a person's privacy interests. He recognized that different issues arise with respect to the Bankruptcy Rules; but the Criminal Rules Committee thought that, outside that context, removing the last four digits from public filings makes sense.

Professor Beale said that the Advisory Committee received feedback from federal defenders, the DOJ, and the Clerk of Court liaison, none of whom see a need for the last four digits in public filings. Where reference to a social security number is actually necessary (for example, in a fraud case), it can be filed under seal. Professor Beale acknowledged that references to social security numbers can be necessary in bankruptcy cases. But for the other rule sets, she suggested,

the time has come to re-examine the risks of disclosing the last four digits of the social security number.

Summing up, Judge Bates noted that the Criminal Rules Committee will be considering the privacy issues related to pseudonyms for minors and full redaction of social security numbers and encouraged the Appellate and Civil Rules Committees to consider the issues as well.

Professor Marcus noted that in civil proceedings permitting a party to proceed anonymously is controversial. He wondered whether the considerations are different for minors. Judge Bates clarified that the issue before the Criminal Rules Committee is not as to a party; it would be very rare for a minor to be a defendant in a federal prosecution.

Ambiguities and Gaps in Rule 40. Judge Dever reported that a Subcommittee was established to address possible ambiguities in Rule 40, which relates to arrests for violating conditions of release set in another district. Magistrate Judge Bolitho raised this issue, and the Magistrate Judges Advisory Group submitted a detailed letter expressing its concerns. Judge Harvey was appointed to chair the Subcommittee.

Rule 43 and Extending the Authority to Use Videoconferencing. Judge Dever recalled that, over the years, the Advisory Committee has considered many suggestions submitted by district judges concerning the use of videoconference technology in Rule 11 proceedings, sentencings, and hearings on revocation of probation or supervised release. By contrast, neither the National Association of Criminal Defense Lawyers nor the DOJ had submitted such suggestions.

During the discussion at the Advisory Committee's last meeting, the members generally did not support changing the rules for Rule 11 or sentencing proceedings, although one member noted the long distances that participants must travel in some districts.

A Subcommittee has been appointed to study the topic. The Subcommittee intends to explore the universe of proceedings that the rules do not already cover, since the rules already permit videoconferencing for some proceedings, like initial appearances, arraignments, and Rule 40 hearings.

A judge member supported considerably relaxing Rule 43. He thought that videoconferencing should be available for noncritical proceedings if the defendant consents but not for trials, guilty pleas, or sentencings. Judge Dever responded that Rule 43(b)(3) already permits hearings involving only a question of law to proceed without the defendant present. The Subcommittee will discuss other types of proceedings.

Contempt proceedings. Judge Dever reported that the Advisory Committee received a proposal to substantially change Criminal Rule 42 concerning contempt proceedings. The proposal also advocated revisions to various federal statutes. The Advisory Committee removed the proposal from its agenda.

Judge Bates thanked Judge Dever for the report.

OTHER COMMITTEE BUSINESS

The legislation tracking chart begins on page 378 of the agenda book. The Rules Law Clerk provided a legislative update, noting that the 118th legislative session ended shortly before the Standing Committee's meeting.

Action Item

Judiciary Strategic Planning. As at prior meetings, Judge Bates asked the Standing Committee to authorize him to work with Rules Committee Staff to respond to the Judicial Conference of the United States regarding strategic planning. Without objection, the Standing Committee authorized Judge Bates to work with Rules Committee Staff to submit a response regarding strategic planning on behalf of the Standing Committee.

CONCLUDING REMARKS

Judge Bates thanked the Standing Committee members and other attendees. The Standing Committee will next convene on June 10, 2025, in Washington, DC.

TAB 1C

Agenda E-19
Rules
March 2025

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES:

The Committee on Rules of Practice and Procedure (Committee or Standing Committee) met on January 7, 2025. New member Judge Joan N. Ericksen was unable to participate.

Representing the advisory committees were Judge Allison H. Eid (10th Cir.), Chair, and Professor Edward Hartnett, Reporter, Advisory Committee on Appellate Rules; Judge Rebecca Buehler Connelly, chair, Professor S. Elizabeth Gibson, Reporter, and Professor Laura B. Bartell, Associate Reporter, Advisory Committee on Bankruptcy Rules; Judge Robin L. Rosenberg, Chair, Professor Richard L. Marcus, Reporter, Professor Andrew Bradt, Associate Reporter, and Professor Edward Cooper, consultant, Advisory Committee on Civil Rules; Judge James C. Dever III, Chair, Professor Sara Sun Beale, Reporter, and Professor Nancy J. King, Associate Reporter, Advisory Committee on Criminal Rules; and Judge Jesse M. Furman, Chair and Professor Daniel Capra, Reporter, Advisory Committee on Evidence Rules.

Also participating in the meeting were Professor Catherine T. Struve, the Standing Committee's Reporter; Professor Daniel R. Coquillette, Professor Bryan A. Garner, and Professor Joseph Kimble, consultants to the Standing Committee; H. Thomas Byron III, the Standing Committee's Secretary; Bridget M. Healy and Scott Myers, Rules Committee Staff Counsel; Kyle Brinker, Law Clerk to the Standing Committee; John S. Cooke, Director, and Dr. Tim Reagan, Senior Research Associate, Federal Judicial Center; and Elizabeth J. Shapiro,

Deputy Director, Federal Programs Branch, Civil Division, Department of Justice, on behalf of Deputy Attorney General Lisa O. Monaco.

In addition to its general business, including a review of the status of pending rule amendments in different stages of the Rules Enabling Act process, the Standing Committee received and responded to reports from the five advisory committees. The Committee also received updates on joint committee business that involve ongoing and coordinated efforts in response to suggestions on: (1) expanding access to electronic filing by self-represented litigants, (2) adopting nationwide rules governing admission to practice before the U.S. district courts, and (3) requiring complete redaction of Social Security numbers (SSNs).

FEDERAL RULES OF APPELLATE PROCEDURE

Information Items

The Advisory Committee on Appellate Rules met on October 9, 2024. The Advisory Committee is considering several issues, including possible amendments to Rule 15 (Review or Enforcement of an Agency Order—How Obtained; Intervention) to address the "incurably premature" doctrine regarding review of agency action, Rule 4 (Appeal as of Right—When Taken) concerning reopening of the time to take a civil appeal, and Rule 8 (Stay or Injunction Pending Appeal) to address the purpose and length of administrative stays, and suggestions for a new rule governing intervention on appeal. The Advisory Committee removed from its agenda suggestions regarding standards of review, use of capital letters and diacritical marks in case captions, incorporation of widely adopted local rules into the national rules, and standardizing page equivalents for word limits. The Advisory Committee will hold a February 2025 hearing on its two proposals that are out for public comment; one proposal concerns Rule 29's amicus brief requirements and the other concerns the information required on Form 4 for seeking in forma pauperis status.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rules and Form Approved for Publication and Comment

The Advisory Committee on Bankruptcy Rules submitted proposed amendments to Rule 2002 (Notices) and Official Form 101 (Voluntary Petition for Individuals Filing for Bankruptcy) with a recommendation that they be published for public comment in August 2025. The Standing Committee unanimously approved the Advisory Committee's recommendation.

Rule 2002 (Notices)

The proposed amendment to Rule 2002(o) would simplify the caption of most notices given under Rule 2002 by requiring that they include only the court's name, the debtor's name, the case number, the chapter under which the case was filed, and a brief description of the document's character. Notably, most Rule 2002 notices would no longer be required to include the last four digits of the debtor's SSN or individual taxpayer identification number.

Official Form 101 (Voluntary Petition for Individuals Filing for Bankruptcy)

Question 4 in Part 1 of Official Form 101 would be amended to clarify that the question is attempting to elicit only the Employer Identification Number (EIN), if any, of the individual filing for bankruptcy and not the EIN of any other person. The modification will guide debtors to avoid the error of providing their employer's EIN. Because multiple debtors could have the same employer, deterring such debtors from erroneously providing their employer's EIN will avoid triggering an erroneous automated report that the debtor has engaged in repeat filings.

Information Items

The Advisory Committee on Bankruptcy Rules met on September 12, 2024. In addition to the recommendation discussed above, the Advisory Committee considered suggestions for an amendment to allow appointment of masters in bankruptcy cases and proceedings and for a new rule concerning random assignment of mega bankruptcy cases within a district, which the

Advisory Committee will revisit after the Committee on the Administration of the Bankruptcy System has concluded its consideration of potential related policy (*see* Report of the Committee on the Administration of the Bankruptcy System, at Agenda E-3). The Advisory Committee removed from its agenda a suggestion to add language concerning the possibility of unclaimed funds to the forms for orders of discharge in cases under chapters 7 and 13. After careful study of a suggestion to require complete redaction of SSNs (rather than redaction of all but the last four digits, as currently required by the national rules), and after considering bankruptcy stakeholders' expressed need for the last four digits of the SSN, the Advisory Committee decided to take no action on the suggestion at this time; however, the Advisory Committee will continue to monitor discussions of this suggestion in the other advisory committees.

FEDERAL RULES OF CIVIL PROCEDURE

Rule Approved for Publication and Comment

The Advisory Committee on Civil Rules submitted proposed amendments to Rule 81 (Applicability of the Rules in General; Removed Actions) and Rule 41 (Dismissal of Actions) with a recommendation that they be published for public comment in August 2025. The Standing Committee unanimously approved the Advisory Committee's recommendation concerning Rule 81 (with a stylistic change) and offered feedback on the language of the proposed amendment to Rule 41. The Advisory Committee will bring the Rule 41 proposal back for approval at the Standing Committee's June 2025 meeting.

The proposed amendment to Rule 81(c) would provide that a jury demand must always be made after removal if no such demand was made before removal and a party desires a jury trial, and the Rule 41 proposal would clarify that Rule 41(a) is not limited to authorizing dismissal only of an entire action but also permits the dismissal of one or more claims in a multi-

claim case and that a stipulation of dismissal must be signed by only all parties who have appeared and remain in the action.

Information Items

The Advisory Committee on Civil Rules met on October 10, 2024. In addition to the recommendations discussed above, the Advisory Committee continued to discuss proposals to amend Rule 45 (Subpoena) regarding the manner of service of subpoenas and the tendering of witness fees at time of service. The Advisory Committee is also studying possible amendments concerning remote testimony; one possible amendment to Rule 45 would clarify the court's subpoena authority with respect to remote trial testimony, while a different possible amendment to Rule 43 (Taking Testimony) would relax the standards governing permission for remote trial testimony. The Advisory Committee heard updates from its subcommittee on Rule 7.1 (Disclosure Statement). The Advisory Committee also continues to study suggestions on Rule 55 (Default; Default Judgment), cross-border discovery, and the use of the term "master" in the Civil Rules, and has commenced a renewed study of the topic of third-party litigation funding. On the random assignment of cases, the Advisory Committee noted the Judicial Conference's March 2024 adoption of policy on this topic (JCUS-MAR 2024, p. 8) and will continue to study the districts' response to this policy.

FEDERAL RULES OF CRIMINAL PROCEDURE

Information Items

The Advisory Committee on Criminal Rules met on November 6-7, 2024. The Advisory Committee continued to discuss a proposal to expand the availability of pretrial subpoenas under Rule 17 (Subpoena) and heard the views of 12 invited speakers who provided comments on a possible draft amendment. In addition, the Advisory Committee established two new subcommittees to consider proposals for amendments to clarify Rule 40 (Arrest for Failing to

Appear in Another District or for Violating Conditions of Release Set in Another District) and for amendments to Rule 43 (Defendant's Presence) to extend the district courts' authority to use videoconferencing with the defendant's consent.

The Advisory Committee is actively considering proposals to amend Rule 49.1 (Privacy Protection for Filings Made with the Court) to protect minors' privacy by requiring the use of pseudonyms and to require complete redaction of SSNs (rather than redaction of all but the last four digits).

The Advisory Committee decided to remove from its agenda a proposal to amend Rule 53 (Courtroom Photographing and Broadcasting Prohibited) to allow broadcasting of criminal proceedings under some circumstances and a proposal to revise the procedures for contempt proceedings under Rule 42 (Criminal Contempt).

FEDERAL RULES OF EVIDENCE

Information Items

The Advisory Committee on Evidence Rules met on November 8, 2024. The Advisory Committee discussed possible amendments relating to the admissibility of evidence generated by artificial intelligence. The discussion focused on two areas: the admissibility of machine-learning evidence offered without the accompanying testimony of an expert, and challenges to the admissibility of asserted "deepfakes" (that is, fake audio and/or visual recordings created through the use of artificial intelligence). To address the first topic, the Advisory Committee is developing a proposed new Rule 707 that would apply to machine-generated evidence standards akin to those in Rule 702 (Testimony by Expert Witnesses); the Advisory Committee will recommend to the Civil and Criminal Rules Committees that they consider any associated issues concerning disclosures relating to machine-learning evidence. The Committee is not currently intending to bring forward for

publication a proposal addressing the second topic (deepfakes) but will work on a possible amendment to Rule 901 (Authenticating or Identifying Evidence) that could be brought forward in the event that developments warrant rulemaking on the topic.

The Advisory Committee is considering a possible amendment to Rule 609 (Impeachment by Evidence of a Criminal Conviction) to tighten the standard for admission in criminal cases of evidence of a defendant's prior felony conviction. It has also begun to study a proposal to amend Rule 902 (Evidence That Is Self-Authenticating) to add federally recognized Indian tribes to Rule 902(1)'s list of governments the public documents of which are self-authenticating.

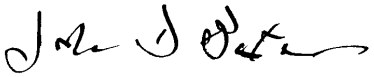
The Advisory Committee decided to remove from its agenda a proposal to amend Rule 702 (Testimony by Expert Witnesses) regarding peer review and a suggestion regarding a possible amendment or new rule to address allegations of prior false accusations of sexual misconduct. In addition, the Advisory Committee decided to table a suggestion for a proposed amendment to Rule 404 (Character Evidence, Other Crimes, Wrongs, or Acts) concerning evidence of other crimes, wrongs, or acts the relevance of which depends upon inferences about propensity. Finally, the Advisory Committee determined that the decisions in *Smith v. Arizona*, 602 U.S. 779 (2024), and *Diaz v. United States*, 602 U.S. 526 (2024), do not currently require any amendments to Rule 703 (Bases of an Expert's Opinion Testimony) or Rule 704 (Opinion on an Ultimate Issue), but it will monitor the lower court caselaw applying those decisions.

JUDICIARY STRATEGIC PLANNING

The Committee was asked by Chief Judge Michael A. Chagares (3d Cir.), the judiciary's planning coordinator, to identify any changes it believes should be considered in updating the *Strategic Plan for the Federal Judiciary* in 2025. Recommendations on behalf of the Committee

regarding the judicial workforce and preserving public trust in the judiciary were communicated to Chief Judge Chagares by letter dated January 15, 2025.

Respectfully submitted,



John D. Bates, Chair

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Louis A. Chaiten
Joan N. Ericksen
Stephen A. Higginson
Edward M. Mansfield
Troy A. McKenzie
Patricia Ann Millett
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Andrew J. Pincus
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Kosta Stojilkovic
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TAB 1D

PROPOSED AMENDMENTS TO THE FEDERAL RULES

Effective (no earlier than) December 1, 2024

Current Step in REA Process:

- Effective December 1, 2024

REA History:

- Transmitted to Congress (Apr 2024)
- Transmitted to Supreme Court (Oct 2023)
- Approved by Standing Committee (June 2023 unless otherwise noted)
- Published for public comment (Aug 2022 – Feb 2023 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 32	Conforming proposed amendment to subdivision (g) to reflect the proposed consolidation of Rules 35 and 40.	AP 35, 40
AP 35	The proposed amendment would transfer the contents of the rule to Rule 40 to consolidate the rules for panel rehearings and rehearings en banc together in a single rule.	AP 40
AP 40	The proposed amendments address panel rehearings and rehearings en banc together in a single rule, consolidating what had been separate provisions in Rule 35 (hearing and rehearing en banc) and Rule 40 (panel rehearing). The contents of Rule 35 would be transferred to Rule 40, which is expanded to address both panel rehearing and en banc determination.	AP 35
Appendix: Length Limits	Conforming proposed amendments would reflect the proposed consolidation of Rules 35 and 40 and specify that the limits apply to a petition for initial hearing en banc and any response, if requested by the court.	AP 35, 40
BK 1007(b)(7) and related amendments	The proposed amendment to Rule 1007(b)(7) would require a debtor to submit the course certificate from the debtor education requirement in the Bankruptcy Code. Conforming amendments would be made to the following rules by replacing the word "statement" with "certificate": Rules 1007(c)(4), 4004(c)(1)(H), 4004(c)(4), 5009(b), 9006(b)(3) and 9006(c)(2).	
BK 7001	The proposed amendment would exempt from the list of adversary proceedings in Rule 7001, "a proceeding by an individual debtor to recover tangible personal property under § 542(a)."	
BK 8023.1 (new)	This would be a new rule on the substitution of parties modeled on FRAP 43. Neither FRAP 43 nor Fed. R. Civ. P. 25 is applicable to parties in bankruptcy appeals to the district court or bankruptcy appellate panel, and this new rule is intended to fill that gap.	AP 43
BK Restyled Rules	The third and final set of current Bankruptcy Rules, consisting of Parts VII-IX, are restyled to provide greater clarity, consistency, and conciseness without changing practice and procedure. The first set of restyled rules (Parts I & II) were published in 2020, and the second set (Parts III-VI) were published in 2021. The full set of restyled rules is expected to go into effect no earlier than December 1, 2024.	
CV 12	The proposed amendment would clarify that a federal statute setting a different time should govern as to the entire rule, not just to subdivision (a).	

PROPOSED AMENDMENTS TO THE FEDERAL RULES

Effective (no earlier than) December 1, 2024

Current Step in REA Process:

- Effective December 1, 2024

REA History:

- Transmitted to Congress (Apr 2024)
- Transmitted to Supreme Court (Oct 2023)
- Approved by Standing Committee (June 2023 unless otherwise noted)
- Published for public comment (Aug 2022 – Feb 2023 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
EV 107	The proposed amendment was published for public comment as new Rule 611(d), but is now new Rule 107.	EV 1006
EV 613	The proposed amendment would require that, prior to the introduction of extrinsic evidence of a witness's prior inconsistent statement, the witness receive an opportunity to explain or deny the statement.	
EV 801	The proposed amendment to paragraph (d)(2) would provide that when a party stands in the shoes of a declarant or declarant's principal, hearsay statements made by the declarant or declarant's principal are admissible against the party.	
EV 804	The proposed amendment to subparagraph (b)(3)(B) would provide that when assessing whether a statement is supported by corroborating circumstances that clearly indicate its trustworthiness, the court must consider the totality of the circumstances and evidence, if any, corroborating the statement.	
EV 1006	The proposed changes would permit a properly supported summary to be admitted into evidence whether or not the underlying voluminous materials have been admitted. The proposed changes would also clarify that illustrative aids not admitted under Rule 1006 are governed by proposed new Rule 107.	EV 107

PROPOSED AMENDMENTS TO THE FEDERAL RULES

Effective (no earlier than) December 1, 2025, unless otherwise noted

Current Step in REA Process:

- Transmitted to Supreme Court (Oct 2024)

REA History:

- Approved by Standing Committee (June 2024 unless otherwise noted)
- Published for public comment (Aug 2023 – Feb 2024 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 6	The proposed amendments would address resetting the time to appeal in cases where a district court is exercising original jurisdiction in a bankruptcy case by adding a sentence to Appellate Rule 6(a) to provide that the reference in Rule 4(a)(4)(A) to the time allowed for motions under certain Federal Rules of Civil Procedure must be read as a reference to the time allowed for the equivalent motions under the applicable Federal Rule of Bankruptcy Procedure. In addition, the proposed amendments would make Rule 6(c) largely self-contained rather than relying on Rule 5 and would provide more detail on how parties should handle procedural steps in the court of appeals.	BK 8006
AP 39	The proposed amendments would provide that the allocation of costs by the court of appeals applies to both the costs taxable in the court of appeals and the costs taxable in the district court. In addition, the proposed amendments would provide a clearer procedure that a party should follow if it wants to request that the court of appeals to reconsider the allocation of costs.	
BK 3002.1 and Official Forms 410C13-M1, 410C13-M1R, 410C13-N, 410C13-NR, 410C13-M2, and 410C13-M2R	Previously published in 2021. Like the prior publication, the 2023 republished amendments to the rule are intended to encourage a greater degree of compliance with the rule's provisions. A proposed midcase assessment of the mortgage status would no longer be mandatory notice process brought by the trustee but can instead be initiated by motion at any time, and more than once, by the debtor or the trustee. A proposed provision for giving only annual notices HELOC changes was also made optional. Also, the proposed end-of-case review procedures were changed in response to comments from a motion to notice procedure. Finally, proposed changes to 3002.1(i), redesignated as 3002.1(i) are meant to clarify the scope of relief that a court may grant if a claimholder fails to provide any of the information required under the rule. Six new Official Forms would implement aspect of the rule.	
BK 8006	The proposed amendment to Rule 8006(g) would clarify that any party to an appeal from a bankruptcy court (not merely the appellant) may request that a court of appeals authorize a direct appeal (if the requirements for such an appeal have otherwise been met). There is no obligation to file such a request if no party wants the court of appeals to authorize a direct appeal.	AP 6
Official Form 410	The proposed amendment would change the last line of Part 1, Box 3 to permit use of the uniform claim identifier for all payments in cases filed under all chapters of the Code, not merely electronic payments in chapter 13 cases. The amended form went into effect December 1, 2024.	

PROPOSED AMENDMENTS TO THE FEDERAL RULES

Effective (no earlier than) December 1, 2025, unless otherwise noted

Current Step in REA Process:

- Transmitted to Supreme Court (Oct 2024)

REA History:

- Approved by Standing Committee (June 2024 unless otherwise noted)
- Published for public comment (Aug 2023 – Feb 2024 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
CV 16	The proposed amendments to Civil Rule 16(b) and 26(f) would address the "privilege log" problem. The proposed amendments would call for development early in the litigation of a method for complying with Civil Rule 26(b)(5)(A)'s requirement that producing parties describe materials withheld on grounds of privilege or as trial-preparation materials.	CV 26
CV 16.1 (new)	The proposed new rule would provide the framework for the initial management of an MDL proceeding by the transferee judge. Proposed new Rule 16.1 would provide a process for an initial MDL management conference, submission of an initial MDL conference report, and entry of an initial MDL management order.	
CV 26	The proposed amendments to Civil Rule 16(b) and 26(f) would address the "privilege log" problem. The proposed amendments would call for development early in the litigation of a method for complying with Civil Rule 26(b)(5)(A)'s requirement that producing parties describe materials withheld on grounds of privilege or as trial-preparation materials.	CV 16

PROPOSED AMENDMENTS TO THE FEDERAL RULES

Effective (no earlier than) December 1, 2026

Current Step in REA Process:

- Published for public comment (Aug 2024 – Feb 2025 unless otherwise noted)

REA History:

- Approved for publication by Standing Committee (Jan and June 2024 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 29	The proposed amendments to Rule 29 relate to amicus curiae briefs. The proposed amendments, among other things, would require all amicus briefs to include a concise description of the identity, history, experience, and interests of the amicus curiae, together with an explanation of how the brief and the perspective of the amicus will help the court. In addition, they would require an amicus that has existed for less than 12 months to state the date the amicus was created. With regard to the relationship between a party and an amicus, two new disclosure requirements would be added. Also, the proposed amendments would retain the member exception in the current rule, but limit the exception to those who have been members for the prior 12 months. Finally, the proposed amendments would require leave of court for all amicus briefs, not just those at the rehearing stage.	Rule 32; Appendix
AP 32	The proposed amendments to Rule 32 would conform to the proposed amendments to Rule 29.	Rule 29
AP Appendix	The proposed amendments to the Appendix would conform to the proposed amendments to Rule 29.	Rule 29
AP Form 4	The proposed amendments to Form 4 would simplify Form 4, with the goal of reducing the burden on individuals seeking in forma pauperis status (IFP) while providing the information that courts of appeals need and find useful when deciding whether to grant IFP status.	
BK 1007	The proposed amendments to Rule 1007(c)(4) eliminate the deadlines for filing certificates of completion of a course in personal financial management. The proposed amendments to Rule 1007(h) clarify that a court may require a debtor to file a supplemental schedule to report postpetition property or income that comes into the estate under § 115, 1207, or 1306 of the Bankruptcy Code.	
BK 3018	The proposed amendment to subdivision (c) would allow for more flexibility in how a creditor or equity security holder may indicate acceptance of a plan in a chapter 9 or chapter 11 case.	
BK 5009	The proposed amendments to Rule 5009(b) would provide an additional reminder notice to the debtors that the case may be closed without a discharge if the debtor's certificate of completion of a personal financial management course has not been filed.	
BK 9006	The proposed amendments conform to the proposed amendments to Rule 1007.	
BK 9014	The proposed amendment to Rule 9014(d) relaxes the standard for allowing remote testimony in contested matters to "cause and with appropriate safeguards." The current standard, imported from the trial standard in Civil Rule	

Effective (no earlier than) December 1, 2026

Current Step in REA Process:

- Published for public comment (Aug 2024 – Feb 2025 unless otherwise noted)

REA History:

- Approved for publication by Standing Committee (Jan and June 2024 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
	43(a), which is applicable across bankruptcy (in both contested matters and adversary proceedings) is cause "in compelling circumstances and with appropriate safeguards."	
BK 9017	The proposed amendment to Rule 9017 removes the reference to Civil Rule 43 leaving the proposed amendment to Rule 9014(d) to govern the standard for allowing remote testimony in contested matters, and Rule 7043 to govern the standard for allowing remote testimony in adversary proceedings.	
BK 7043	Rule 7043 is new and works with proposed amendments to Rules 9014 and 9017. It would make Civil Rule 43 applicable to adversary proceedings (though not to contested matters	
BK Official Form 410S1	The proposed changes would conform the form the pending amendments to Rule 3002.1 that are on track to go into effect on **December 1, 2025,** and would go into effect on the same date as the rule change.	
EV 801	The proposed amendment to Rule 801(d)(1)(A) would provide that all prior inconsistent statements admissible for impeachment are also admissible as substantive evidence, subject to Rule 403.	

TAB 1E

Legislation That Directly or Effectively Amends the Federal Rules
119th Congress
(January 3, 2025–January 3, 2027)

Ordered by most recent legislative action; most recent first

Name	Sponsors & Cosponsors	Affected Rules	Text and Summary	Legislative Actions Taken
Litigation Transparency Act of 2025	**H.R. 1109** *Sponsor:* Issa (R-CA) *Cosponsors:* Collins (R-GA) Fitzgerald (R-WI)	CV 5, 26	**Most Recent Bill Text:** https://www.congress.gov/119/bills/hr1109/BILLS-119hr1109ih.pdf **Summary:** Would require a party or record of counsel in a civil action to disclose to the court and other parties the identity of any person that has a right to receive a payment or thing of value that is contingent on the outcome of the action or group of actions and to product to the court and other parties any such agreement.	• 02/07/2025: H.R. 1109 introduced in House; referred to Judiciary Committee
Alexandra's Law Act of 2025	**H.R. 780** *Sponsor:* Issa (R-CA) *Cosponsors:* Kiley (R-CA) Obernolte (R-CA)	EV 410	**Most Recent Bill Text:** https://www.congress.gov/119/bills/hr780/BILLS-119hr780ih.pdf **Summary:** Would permit a previous nolo contendere plea in a case involving death resulting from the sale of fentanyl to be used as evidence to prove in an 18 U.S.C. § 1111 or § 1112 case that the defendant had knowledge that the substance provided to the decedent contained fentanyl.	• 01/28/2025 introduced in House; referred to Judiciary and Energy & Commerce Committees
Protect the Gig Economy Act of 2025	**H.R. 100** *Sponsor:* Biggs (R-AZ)	CV 23	**Most Recent Bill Text:** https://www.congress.gov/119/bills/hr100/BILLS-119hr100ih.pdf **Summary:** Would add a requirement to Civil Rule 23(a) that a member of a class may sue or be sued as representative parties only if "the claim does not allege the misclassification of employees as independent contractors."	• 01/03/2025 introduced in House; referred to Judiciary Committee

Legislation Requiring Only Technical or Conforming Changes
118th Congress
(January 3, 2023–January 3, 2025)

Name	Sponsors & Cosponsors	Affected Rules	Text and Summary	Legislative Actions Taken
Rosa Parks Day Act	**H.R. 964** *Sponsor:* Sewell (D-AL) *Cosponsors:* 62 Democratic cosponsors	AP 26, 45; BK 9006; CV 6; CR 45, 56	**Most Recent Bill Text:** https://www.congress.gov/bill/119th-congress/house-bill/964/text?s=3&r=2&q=%7B%22search%22%3A%22federal+holiday%22%7D **Summary:** Would make Rosa Parks Day a federal holiday.	• 02/04/2025: Introduced in House; referred to Committee on Oversight & Government Reform
Lunar New Year Day Act	**H.R. 794** *Sponsor:* Meng (D-NY) *Cosponsors:* 39 Democratic cosponsors	AP 26, 45; BK 9006; CV 6; CR 45, 56	**Most Recent Bill Text:** https://www.congress.gov/119/bills/hr794/BILLS-119hr794ih.pdf **Summary:** Would make Lunar New Year Day a federal holiday.	• 01/28/2025: Introduced in House; referred to Committee on Oversight & Government Reform
Election Day Act	**H.R. 6267** *Sponsor:* Fitzpatrick (R-PA) *Cosponsor:* Dingell (D-MI)	AP 26, 45; BK 9006; CV 6; CR 45, 56	**Most Recent Bill Text:** https://www.congress.gov/119/bills/hr154/BILLS-119hr154ih.pdf **Summary:** Would make Election Day a federal holiday.	• 01/03/2025: Introduced in House; referred to Committee on Oversight & Government Reform

TAB 1F

Federal Judicial Center

Date: February 25, 2025

To: Advisory Committees on Rules of Practice and Procedure

From: Tim Reagan (Research)
Maureen Kieffer (Education)
Christine Lamberson (History)
Federal Judicial Center

Re: Federal Judicial Center Research and Education

This memorandum summarizes recent efforts by the Federal Judicial Center relevant to federal-court practice and procedure. Center researchers attend rules committee, subcommittee, and working-group meetings and provide empirical research as requested. The Center also conducts research to develop manuals and guides; produces education programs for judges, court attorneys, and court staff; and provides public resources on federal judicial history.

RESEARCH

Completed Research for Rules Committees

Default and Default-Judgment Practices in the District Courts

At the request of the Civil Rules Committee, the Center studied district-court practices with respect to the entry of defaults and default judgments under Civil Rule 55 (www.fjc.gov/content/389994/default-and-default-judgment-practices-district-courts). In most districts, the clerk of court enters defaults, perhaps in consultation with chambers. District practices with respect to entry of default judgments for a sum certain were more varied; in many districts, the clerk of court never enters default judgments pursuant to the national rule.

Prior Convictions as Impeachment Evidence for Criminal Defendants

At the request of the Evidence Rules Committee, the Center prepared a research plan for surveying criminal defense attorneys on factors determining how defendants plead and whether they testify, consistency of rulings on whether criminal histories would be admissible for impeachment, and the predictive value of criminal history on defendants' truthfulness as witnesses. The committee decided to proceed with a proposal to amend Evidence Rule 609 without waiting for the research, which would have taken approximately two years.

Broadcasting Criminal Proceedings

The Center provided the Criminal Rules Committee with research support as it studied whether the proscription on remote public access to criminal proceedings should be amended. The committee decided not to pursue an amendment to that proscription at this time.

The Need for Redacted Social Security Numbers in Bankruptcy Cases

In light of proposals to fully redact Social Security numbers in public filings, rather than all but the last four digits, the Bankruptcy Rules Committee asked the Center to survey bankruptcy trustees and others on the need for partial Social Security numbers on certain public forms. Based on the results of the survey, the committee decided not to pursue a requirement for full redaction at this time, and it decided to continue to monitor treatment of the issue by other committees.

Remote Participation in Bankruptcy Contested Matters

The Center provided the Bankruptcy Rules Committee with research support as it studied remote participation in contested matters.

Current Research for Rules Committees

Intervention on Appeal

At the request of the Appellate Rules Committee, the Center is conducting research on interventions on appeal.

Bankruptcy Judges' Use of Masters

At the request of the Bankruptcy Rules Committee, the Center surveyed bankruptcy judges on how and whether they would use masters if they had the authority to do that.

Complex Criminal Litigation

As suggested by the Criminal Rules Committee, the Center is developing a collection of resources on complex criminal litigation as one of its curated websites.

Completed Research for Other Judicial Conference Committees

Redaction of Non-Government Party Names in Social Security and Immigration Case Documents

As part of its privacy study for the Committee on Court Administration and Case Management, the Center prepared a study of Social Security and immigration cases that (1) prepared a compilation of local rules and procedures on redacting non-government party names and (2) examined redaction in samples of publicly available dispositive documents (www.fjc.gov/content/391683/redaction-non-government-party-names-social-security-and-immigration-case-documents).

Civics Education and Outreach

A new curated website shows public-outreach and civics-education efforts by individual federal courts, as well as materials prepared by the Center and the Administrative Office (www.fjc.gov/content/388217/overview). The curated resources educate the public about the role, structure, function, and operation of the federal courts. The site includes an interactive map, created at the request of the Committee on the Judicial Branch, that displays highlighted civics-education resources and civics-program information pages on court websites. This may assist courts in developing or expanding their own civics efforts.

Remote Public Access to Court Proceedings

At the request of the Committee on Court Administration and Case Management, the Center conducted focus groups with district judges, magistrate judges, and bankruptcy judges to learn about their experiences providing remote public access to proceedings with witness testimony during the pandemic.

Current Research for Other Judicial Conference Committees

Evaluation of a Pilot Program in Which Comparative Sentencing Information Is Incorporated Into Presentence Investigation Reports

At the request of the Committee on Criminal Law, the Center is evaluating a two-year pilot program in which selected districts are incorporating comparative sentencing information from the Sentencing Commission's Judiciary Sentencing Information (JSIN) platform into presentence investigation reports.

The Privacy Study: Unredacted Sensitive Personal Information in Court Filings

At the request of the Committee on Court Administration and Case Management, the Center is conducting research on unredacted personal information in public filings.

Case Weights for Bankruptcy Courts

The Center has collected data and is conducting analyses for updating bankruptcy-court case weights. Case weights are used in the computation of weighted caseloads, which in turn are used when assessing the need for judgeships. The research was requested by the Committee on Administration of the Bankruptcy System.

Other Completed Research

United States District Courts' Local Rules and Procedures on Electronic Filing by Self-Represented Litigants

Prepared to supplement a planned episode of *Court to Court*, a documentary-style video program presented by the Center's Education

Division, this report compiles local rules and procedures in the ninety-four district courts on electronic filing by self-represented litigants (www.fjc.gov/content/391989/united-states-district-courts-local-rules-and-procedures-electronic-filing-self). More than two thirds of the courts permit self-represented litigants to use the court's electronic filing system at least on a case-by-case basis.

Science Resources

The Center maintains a curated website for federal judges with resources related to scientific information and methods (www.fjc.gov/content/326577/overview-science-resources). Recently added is information on dementia and the law (www.fjc.gov/content/385467/dementia-and-law).

JUDICIAL GUIDES

In Preparation

Manual for Complex Litigation

The Center is preparing a fifth edition of its *Manual for Complex Litigation* (fourth edition, www.fjc.gov/content/manual-complex-litigation-fourth).

Reference Manual on Scientific Evidence

The Center is collaborating with the National Academies of Science, Engineering, and Medicine to prepare a fourth edition of the *Reference Manual on Scientific Evidence* (third edition, www.fjc.gov/content/reference-manual-scientific-evidence-third-edition-1).

Manual on Recurring Issues in Criminal Trials

The Center is preparing a seventh edition of what previously was called *Manual on Recurring Problems in Criminal Trials* (sixth edition, www.fjc.gov/content/manual-recurring-problems-criminal-trials-sixth-edition-0).

Benchbook for U.S. District Court Judges

The Center is preparing a seventh edition of its *Benchbook for U.S. District Court Judges* (sixth edition, www.fjc.gov/content/benchbook-us-district-court-judges-sixth-edition).

HISTORY

Spotlight on Judicial History

Since 2020, the Center has posted twenty-five short essays about judicial history on a variety of topics (www.fjc.gov/history/spotlight-judicial-history). Recently posted are "Tort Claims Against the United States" (www.fjc.gov/history/spotlight-judicial-history/tort-claims-against-united-states) and "The Codification of Federal Statutes on the Judiciary" (www.fjc.gov/history/spotlight-judicial-history/federal-judicial-statutes).

Work of the Courts

Of the Center's seven essays on the work of the courts, the most recent two are "Foreign Treaties in the Federal Courts" (fjc.gov/history/work-courts/foreign-treaties-in-federal-courts) and "Juries in the Federal Judicial System" (www.fjc.gov/history/work-courts/juries-in-federal-judicial-system).

EDUCATION

Specialized Workshops

Reconstruction and the Constitution: A Historical Perspective

A two-day, in-person judicial workshop in Philadelphia on the Reconstruction Amendments included visits to the National Constitution Center; Independence Hall; the Old City Hall, where the Supreme Court met from 1791 to 1800; and Congress Hall, where Congress met from 1790 to 1800.

Ronald M. Whyte Intellectual Property Seminar

A four-day, in-person judicial workshop addressed the basics of patent, copyright, and trademark law; patent case management; and emerging issues in intellectual-property law. It was cosponsored by the Berkeley Center for Law and Technology.

Search and Surveillance Warrants in the Digital Age

This three-day, in-person program was designed for magistrate judges who handle criminal warrant applications as part of their day-to-day responsibilities.

Law and Technology Workshop for Judges

This three-day, in-person workshop addressed artificial intelligence and its regulation and governance, digital forensics, statistics in law and forensic evidence, technology and cognitive liberty, technology and the Fourth Amendment, access to justice, cybersecurity, and ethical and policy issues with artificial intelligence.

Distance Education

Evaluating Historical Evidence

The Center is offering judges a six-part interactive online series that provides tools for managing cases with significant historical evidence. Historians discuss historical methodology and provide practical tips on evaluating historical evidence, whether presented in the form of expert witnesses, amicus briefs, or litigant arguments. The first episode was "An Introduction: What Do Historians Do and How Do They Do It?"

Implications of Purdue Pharma *for Bankruptcy Judges*

A live webcast for bankruptcy judges discussed the implications of the Supreme Court's June 27, 2024, decision in *Harrington v. Purdue Pharma*

L.P., which held, "The bankruptcy code does not authorize a release and injunction that, as part of a plan of reorganization under Chapter 11, effectively seek to discharge claims against a nondebtor without the consent of affected claimants."

Court to Court

A documentary-style video program presenting innovation and creative problem solving by personnel in individual court units around the country, this program included as a recent episode "Transforming Justice: The Power of Drug Courts" (featuring Northern District of West Virginia Magistrate Judge Michael Aloi and Special Offender Specialist and U.S. Probation Officer Jill Henline).

Court Web

This monthly webcast included as recent episodes "Honoring the Past, Inspiring the Future—the 100th Anniversary of the Federal Probation Act" (featuring Northern District of Illinois Judge Edmond Chang, chair of the Criminal Law Committee, and District of Maryland Chief Probation Officer Leon Epps); "Neuroscience-Informed Decision-Making" (featuring retired District of Massachusetts Judge Nancy Gertner, now managing director of the Massachusetts General Hospital Center for Law, Brain & Behavior, and codirector and cofounder psychiatrist and lawyer Dr. Judith Edersheim); and "An Update on the Cardone Report after the 60th Anniversary of the CJA" (featuring District of New Hampshire Judge Landya B. McCafferty and Western District of Texas Judge Kathleen Cardone).

Term Talk

The Center presents periodic webcasts with the nation's top legal scholars discussing what federal judges need to know about the U.S. Supreme Court's most impactful decisions. Recent episodes included "*City of Grants Pass v. Johnson*; *McElrath v. Georgia*" (discussing status and conduct in the context of ordinances that punish sleeping and the absolute bar against retrying acquitted defendants even when there are inconsistent verdicts), "*Smith v. Arizona*; *Diaz v. United States*" (discussing guidelines for determining when reports prepared by analysts are testimonial and limitations on expert testimony about a defendant's mental state), "*Erlinger v. United States*; *Pulsifer v. United States*" (discussing the existence of a prior offense as a jury question and the requirements for safety-valve relief under the First Step Act), "*Chiaverini v. City of Napoleon*" (discussing how probable cause for one charge does not insulate other charges from a § 1983 malicious-prosecution claim), "*United States Trustee v. John Q. Hammons*; *Harrington v. Purdue Pharma L.P.*" (discussing the Supreme Court's rejection of the release of claims against third-party nondebtors without claimant consent and the Court's decision not to reimburse claimants for bounded nonuniformities), "*Fischer v. United States*; *Snyder v. United States*" (discussing the 2002 Sarbanes-Oxley Act as applied to January 6 defendants

and whether the amended federal bribery statute criminalizes gratuities), and "*Alexander v. S.C. State Conference of NAACP*; *Robinson v. Callais*" (discussing how courts should determine if race or party affiliation predominates in a legislature's redistricting and the uncertainty surrounding application of the *Purcell* principle).

Supreme Court Term in Review for Bankruptcy Judges

A 2024 webcast discussed some of the most significant Supreme Court decisions, including key bankruptcy cases.

Diocese Cases in Bankruptcy

This webcast for bankruptcy judges addressed the authority of the court, the scope of the automatic stay, and limitations of bankruptcy relief. It included discussion of the overarching themes of religion, trauma, procedural justice, confidence in the court system, and the inevitable media presence.

Consumer Case-Law Update for Bankruptcy Judges

This quarterly webcast features retired Western District of Tennessee Bankruptcy Judge William H. Brown discussing the latest consumer-bankruptcy case-law updates.

Business Case-Law Update for Bankruptcy Judges

This quarterly webcast features Professor Bruce Markell (a retired bankruptcy judge).

General Workshops

National Workshops for Trial-Court Judges

Three-day workshops are held for district judges in even-numbered years and annually for magistrate judges and bankruptcy judges respectively.

Circuit Workshops for U.S. Appellate and District Judges

The Center has recently put on three-day workshops for Article III judges in the Fourth and Ninth Circuits.

National Conference for Pro Se and Death Penalty Staff Attorneys

This three-day educational conference was most recently presented in 2024.

Orientation Programs

Orientation Programs for New Trial-Court Judges

The Center invites newly appointed trial-court judges to attend two one-week conferences focusing on skills unique to judging. The first phase includes sessions on trial practice, case management, and judicial ethics. In addition, district judges learn about the sentencing process, magistrate judges learn about search warrants, and bankruptcy judges learn about the bankruptcy code. The second phase includes sessions on such topics as civil-

rights litigation, employment discrimination, security, self-represented litigants, relations with the media, and ethics.

Orientation for New Circuit Judges

Orientation programs for new circuit judges include a three-day program hosted by the Center and a program at New York University School of Law for both state and federal appellate judges.

Orientation for New Term Law Clerks

The Center offers online orientation to new term law clerks. Phase I is offered before the clerkship begins, and phase II is offered after the clerkship has begun.

TAB 2

FORDHAM

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Memorandum To: Advisory Committee on Evidence Rules
From: Daniel J. Capra, Reporter
Re: Possible Amendment to Provide Broader Admissibility for Prior Statements of Testifying Witnesses
Date: April 1, 2025

At the Spring, 2024 meeting, the Committee voted to recommend that a proposed amendment to Rule 801(d)(1)(A) be released for public comment. That recommendation was unanimously approved by the Standing Committee, with one abstention, and the public comment period is now over. Rule 801(d)(1)(A) currently provides a very limited hearsay exemption for a prior inconsistent statement of a testifying witness: the prior statement must have been made under oath at a formal proceeding. The proposed amendment provides that all prior inconsistent statements are admissible over a hearsay objection.

This memorandum is divided into five parts. Part One discusses the history behind the Federal Rules' treatment of prior inconsistent statements. Part Two discusses the reasoning behind the amendment and also addresses concerns about expanding substantive admissibility of prior inconsistent statements. Part Three discusses state variations from the existing rule. Part Four addresses the public comment that has been received --- the spoiler alert being that there were only eight comments, and the most weighty ones were very favorable. Part Five sets forth the proposed rule amendment and Committee Note.

At this meeting, the Committee will consider whether to recommend final approval of the proposed amendment to Rule 801(d)(1)(A).

I. *The History of Federal Rule 801(d)(1)(A)*

The common-law approach to prior inconsistent statements was that they were hearsay and were admissible only to impeach the declarant-witness. The original Advisory Committee thought that the common-law rule, distinguishing between impeachment and substantive use of prior inconsistent statements, was "troublesome." It noted that the major concern of the hearsay rule is that an out-of-court statement could not be tested for reliability because the person who made the statement could not be cross-examined about it. But with prior inconsistent statements, "[t]he declarant is in court and may be examined and cross-examined in regard to his statements and their subject matter." And the Committee thought that it had "never been satisfactorily explained why cross-examination cannot be subsequently conducted with success." Moreover, "[t]he trier of fact has the declarant before it and can observe his demeanor and the nature of his testimony as he denies or tries to explain away the inconsistency." Finally, "the inconsistent statement is more likely to be true than the testimony of the witness at the trial because it was made nearer in time to the matter to which it relates and is less likely to be influenced by the controversy that gave rise to the litigation."[1]

For all these reasons, the Advisory Committee's proposed Rule 801(d)(1)(A) would have exempted all prior inconsistent statements of testifying witnesses from the hearsay rule. The Advisory Committee's Note to the proposal makes this clear: "Prior inconsistent statements traditionally have been admissible to impeach but not as substantive evidence. Under the rule they are substantive evidence."

It is notable that one of the advantages of the proposed amendment is that the Advisory Committee Note *will be commenting on the Rule that actually exists.* Currently the Advisory Committee Note reads like a brief filed against the Rule that exists, because Congress dramatically limited the Advisory Committee proposal.

Congress provided that only a very limited subset of prior inconsistent statements would be admissible over a hearsay objection. Rule 801(d)(1)(A) states that only those prior inconsistent statements "given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition" are admissible as substantive evidence. The rationales for this limitation, as expressed by the House Committee on the Judiciary, are that: 1) if the statement was given under oath at a formal proceeding, "there can be no dispute as to whether the prior statement was made"; and 2) the requirements of oath and formality of proceeding "provide firm additional assurances of the reliability of the prior statement."[2]

[1] Advisory Committee Note to Rule 801(d)(1)(A).

[2] House Comm. on Judiciary, Fed. Rules of Evidence, H.R.Rep. No. 650, 93d Cong., 1st Sess. p. 13.

There are problems with both of the rationales for Congress's tightening of the hearsay exemption for prior inconsistent statements. The first Congressional concern --- that the statement may never have been made --- is not a hearsay concern. Whether the statement was made (as distinguished from whether it is true) is a question ordinarily addressed by in-court regulators--the in-court witness to the statement testifies and is cross-examined, or other admissible evidence is presented that the statement was or was not made (like a video), and then whether the statement was actually made becomes a jury question.[3] Really, Congress's argument proves too much, because admitting *any* unrecorded out-of-court statement raises the question of whether it was ever made. Why do we find the in-court witness's testimony that the statement was made in all other situations sufficient, but question in-court testimony (from the declarant-witness or from someone else with knowledge) when it comes to prior inconsistent statements?[4]

It is likely, though, that the Congressional concern about the statement having been made was really about the purported difficulty of cross-examining witnesses who deny making a prior inconsistent statement. But as a Committee member stated, "that's when the fun begins."[5] Assuming of course that there is evidence that the witness made the statement, the denial is implausible and suspect. In such cases, there is no reason to exclude the prior statement, because the witness can be cross-examined about that implausibility and suspect motivation. Moreover, a witness should not be allowed to bar admissibility of his prior statement simply by declaring falsely than that he never made it. The witness should not have that kind of veto power.

The Supreme Court has recognized the advantage to the opponent when the witness denies making a prior statement. In *Nelson v. O'Neil*, 402 U.S. 622 (1971), the Court considered whether the production of the hearsay declarant at trial alleviated confrontation concerns when the declarant denied making a prior inconsistent statement.[6] The Court posed the question as "whether cross-examination can be full and effective where the declarant is present at the trial, takes the witness stand, testifies fully as to his activities during the period described in his alleged out-of-court statement, but denies that he made the inconsistent statement and claims that its substance is false." The *Nelson* Court found no error in admitting the hearsay statement as substantive evidence against

[3] Of course the inconsistent statement could be proven up through hearsay subject to an exception, such as a business or public record. The point is that concerns about whether the statement was ever made are not a reason, under the hearsay rule, to exclude the statement itself.

[4] Even if the concern about manufactured prior statements were legitimate, it would not need to be regulated by the requirements of oath at a formal proceeding. A less onerous requirement, such as that the statement was recorded, should surely suffice.

[5] Thanks to John Siffert for that bon mot at a previous meeting.

[6] *Nelson* was decided in the context of a claim that the defendant was denied his constitutional right to confront the declarant, but the constitutional issue presented by admitting hearsay against a criminal defendant is not different from whether hearsay should be admitted under a hearsay exception. Both contexts are about the effectiveness of cross-examination.

the defendant. The Court noted that the declarant's denial of the statement "was more favorable to the respondent than any that cross-examination by counsel could possibly have produced, had [the declarant] affirmed the statement as his." In sum, the better argument appears to be that the witness's denial of a prior inconsistent statement is no reason to exclude that statement **--- and that Congress, in narrowing Rule 801(d)(A), discarded the expert judgment of the Advisory Committee *and* the Supreme Court.**

The requirements of oath and formality surely do add reliable circumstances, and thus these requirements do respond to a hearsay concern. But the fact is that the witness is now under oath at trial, subject to cross-examination. That should be a sufficient guarantee of reliability; adding the oath and formality requirements raise the admissibility hurdle for prior inconsistent statements much higher than for most of the other hearsay exceptions. The Advisory Committee believed that delayed cross-examination and oath are sufficient to guarantee that the factfinder can properly assess trustworthiness. *The point is not that the prior statement is trustworthy.* The point is that any lack of trustworthiness can be determined at trial because the declarant is testifying. And Congress simply missed that point.

The end result of this Congressional intervention is to render the hearsay exception for prior inconsistent statements relatively useless especially to criminal defendants. It goes without saying that the vast majority of prior inconsistent statements are not made under oath at a formal proceeding. Essentially the major function for Rule 801(d)(1)(A) is to protect the proponent (almost always the government in a criminal case) from having its substantive case sapped by turncoat witnesses, when such witnesses have testified before the grand jury and then change their testimony at trial. So currently, the Rule is pitched in favor of the government, because it is usually only the government who will be offering formalized prior inconsistent statements under oath.

Congress's rationales for adding the oath and formality requirements are simply not strong enough to justify gutting the exception proposed by the Advisory Committee. **This is especially so because the limitation comes with significant negative consequences, including the following:**

1) Excluding testimony as hearsay even though the declarant can be cross-examined.

2) Requiring a difficult-to-follow jury instruction, i.e., that the statement can be used only to impeach the witness but not for its truth --- even though in many cases its impeachment value is dependent on it being true. *[Notably, the concern about confusing jury instructions was the motivation to lift the bar on prior consistent statements, by amending Rule 801(d)(1)(B) with the result that no limiting instruction ever has to be given.]*

3) Creating an imbalance when an inconsistent statement is offered and then a consistent statement is offered to rehabilitate. In that situation, the consistent statement is admissible *for all purposes* under Rule 801(d)(1)(B), whereas the inconsistent statement is admissible only for impeachment. Thus a court instructs the jury to use an inconsistent statement in a limited manner, but no such constraint is put on a consistent statement. This creates an unjustified evidentiary imbalance between inconsistent and consistent statements. As the Federal Magistrate Judges point out in their public comment, discussed infra, one of the virtues of the amendment is the uniform, and simple, treatment the rules would provide for both consistent and inconsistent statements.

4) Raising the possibility that parties will seek to evade the rule by calling witnesses to "impeach" them with prior inconsistent statements, with the hope that the jury will use the statements as proof of the matter asserted. That requires the courts to investigate and determine the motivation of the proponent for calling the witness (motivation that would be irrelevant if the prior statement were substantively admissible).[7]

II. Some Concerns Expressed About Expanding Substantive Admissibility of Prior Inconsistent Statements

At least as a matter of hearsay theory, it seems hard to deny that the current Rule 801(d)(1)(A) is too narrow. Logically the rule should allow substantive admissibility of all prior inconsistent statements.

But there are several concerns that have been expressed in opposition to expanding the exception, which are addressed in detail in this section.

It should be emphasized that the argument "unreliable statements will be admitted" is not addressed in this section, because it has already been discussed. "Unreliable" misses the point of the reliability guarantee in the Advisory Committee's rule: the person who made the "unreliable" statement is on the stand subject to cross-examination about it --- just as they are with respect to

[7] *See, e.g., United States v. Ince,* 21 F.3d 576, 579 (4th Cir. 1994) (government's impeachment of its witness with a prior inconsistent statement was improper where "the only apparent purpose" for the impeachment "was to circumvent the hearsay rule and to expose the jury to otherwise inadmissible evidence). *Compare United States v. Kane,* 944 F.2d 1406 (7th Cir. 1991) (impeachment with a prior inconsistent statement was improper where the prosecution had no reason to think that the witness would be hostile or would create the need to impeach her). *See* also *People v. Fitzpatrick*, 40 N.Y.2d 44, 49-50, 386 N.Y.S.2d 28 (1976) (noting the concern that "the prosecution might misuse impeachment techniques to get before a jury material which could not otherwise be put in evidence because of its extrajudicial nature"; also noting that "a number of authorities have pointed out that the potential for prejudice in the out-of-court statements may be exaggerated in cases where the person making the statement is in court and available for cross-examination").

See the Public Comment from Professor Michael Graham, *infra,* stating that eliminating the case law about motives to use impeaching inconsistent statements to evade the hearsay rule is an important reason for adopting the proposed amendment.

"unreliable" statements they might make at trial. Cross-examination is the ultimate solution to the hearsay problem.

A. Argument: Expanded Substantive Admissibility Benefits Only the Party with the Burden of Proof

There are two major benefits in litigation when a statement is given substantive rather than merely impeachment effect:

1) Most importantly, substantive evidence is all that the court may consider when resolving motions related to whether there is enough evidence to create a jury question, or sufficient evidence to support a jury verdict --- e.g., directed verdicts, Criminal Rule 29 motions, motions for summary judgment, etc.[8] On these legal, sufficiency questions, the judge is not allowed to consider impeachment evidence. Impeachment evidence is about credibility of witnesses, and credibility is the classic jury question.[9] It might also make a difference on appeal of an erroneous admission of evidence --- if the evidence is substantive it is more likely to be harmful than if it is only admissible for impeachment. So it is an advantage for a proponent when a prior inconsistent statement is admissible not only to impeach but for its truth.

2) Another advantage of substantive admissibility is that the party can argue to the jury that a fact has been established by the statement (e.g., the time of the crime has been shown by the witness's prior statement); that argument is impermissible if the statement is offered only for impeachment.

An argument has been made, on the basis of the first point above, that the major beneficiary of a rule providing substantive admissibility of prior inconsistent statements is the party with the burden of proof --- and the argument really focuses on concerns about giving the government an advantage in a criminal case.

It is true that an expansion of Rule 801(d)(1)(A) will help the government in some criminal cases. For example, at an Advisory Committee Symposium in 2017, a California prosecutor stated that substantive admissibility of prior inconsistent statements (under the California Rule of Evidence) is critical in gang prosecutions, where many witnesses recant their prior statements out of fear. The prosecutor stated that if the prior statements could not be used substantively, the

[8] The substantive/impeachment distinction is not important for motions for a new trial under Criminal Rule 33, because in ruling on such a motion "the district court may weigh the evidence and consider the credibility of the witnesses." *United States v. Moore,* 76 F.4th 1355, 1363 (11th Cir. 2023).

[9] See, e.g., *United States v. Green*, 981 F.3d 945, 960 (11th Cir. 2020) (reviewing the denial of a Rule 29 motion: "to the extent the appellants' arguments challenge the credibility of various witnesses, credibility determinations are exclusively within the province of the jury").

prosecution often would not be able to present sufficient substantive evidence, and the prosecutions would founder. And Louisiana in 2004 amended its Rule 801(d)(1)(A) to allow for greater substantive admissibility of prior inconsistent statements, after a number of prosecutions for domestic abuse faltered --- the victims made hearsay accusations, then renounced them at trial, and the government could not use the prior statements as substantive evidence.

It is not clear that providing this evidentiary advantage to the government is a proper reason for rejecting the amendment. Even if there is some advantage provided, an amendment cannot be rejected simply because it favors one side of the v. There are a number of rule amendments that have favored a party on one side of the v, and that fact has not precluded the amendment. To take three recent examples: 1) the amendments to Rule 702 favor defendants (in the sense that it is defendants that will more often invoke the protections and the burden as to reliability is placed on the proponent); 2) the amendments to Rule 106 definitely favor criminal defendants (in the sense that criminal defendants will be more likely, in practice, to take advantage of the changes); and 3) the fortification of the notice requirements in Rule 404(b) operates exclusively in favor of criminal defendants. Thus, history shows that if the amendment is valid as a matter of evidence, it should not be rejected just because the benefits are not evenly distributed.

When it comes down to it, most hearsay exceptions favor one side of the v. over the other. For example, the excited utterance exception favors the prosecution, because most often such statements identify the defendant as a perpetrator (e.g., a 911 call, "my brother just shot me"), and if there were no exception the statements could not be offered as proof of a fact. The same is true with dying declarations --- they are almost universally used by the prosecution, against the defendant. And the hearsay exception in Rule 801(d)(2)(D), for statements by an agent about a matter within the scope of authority, was in fact designed for use by plaintiffs in personal injury litigation. None of that provides a good reason for rejecting the hearsay exceptions.

In fact the *existing* Rule 801(d)(1)(A) favors the government over the accused in a criminal case. [10] The only inconsistent statements admissible substantively are those made under oath at a formal proceeding --- most commonly grand jury statements. Those statements are offered almost exclusively by the prosecution. Moreover, only the prosecutor can use the grand jury to lock in testimony from a wavering witness, thus assuring substantive admissibility of a statement favorable to the government. At least under the proposed rule, all prior inconsistent statements would be equally available to the parties.

[10] At an Advisory Committee Symposium in 2016, a U.S. Attorney stated that pretty much the only use of Rule 801(d)(1)(A) was to deal with "wobblers" --- who say one thing one week, and another thing the next. He stated that you catch them in the week where they are saying the defendant did it, and bring them before the grand jury, thereby boxing up the testimony so that you don't have to worry about a later wobble. Notably, no other party in the system has the ability to control wobblers in that way. Certainly not the accused.

The current rule is unfair to criminal defendants in another sense described by the National Association of Criminal Defense Lawyers (NACDL) in its public comment in support of the amendment:

> There is one more reason to support amending Rule 801(d)(1) that is not discussed in the [Advisory] Committee Report. That is the fact that the current rule, as applied in criminal cases, has long favored the government over the defense. Although the rule is neutral on its face and applies equally to both sides, the fact is that the overwhelming majority of witnesses at a criminal trial testify for the prosecution. That means that impeachment with a prior inconsistent statement is usually done by the defense, while rehabilitation of the witness with a prior consistent statement is usually attempted by the government. Because of the Rule's disparate treatment of the two types of statements, the prosecution is able to argue the substantive truth of the prior consistent statements that it relies on, while the defense can argue only that the prior inconsistent statement reflects negatively on the witness's credibility. As the Committee notes, this leads to complicated instructions that are confusing to many jurors. And when the judge tells them that they may consider the substantive truth of prior consistent statements, but not of prior inconsistent statements some jurors will undoubtedly conclude that the court is saying that the former are more reliable than the latter. NACDL respectfully submits that it is long past time to remove this unfair disparity from the Rule and to admit prior statements used for impeachment and for rehabilitation on an equal footing.

So it should not mean very much that the expansion of Rule 801(d)(1)(A) will assist the prosecution in some criminal cases. And even if there is some benefit to the government, it must be remembered that the defendant will benefit from an expanded Rule 801(d)(1)(A) as well. If the exemption is expanded, it will mean that the defendant, just like the government, will be able to present an inconsistent statement to the jury as proof of a fact. Moreover, if the defendant can use prior inconsistent statements of government witnesses substantively, a piece of substantive proof offered by the defendant strengthens the defense claim about the weakness of the government's case. And it is important to note, as NACDL has above, that substantive admissibility means that the prior inconsistent statement offered by the defendant is treated the same as the prior consistent statement offered by the government.

In the end, if the proposed amendment were tilted dramatically in favor of the prosecution, one would expect the Department of Justice to be in favor of the proposal. But so far that is not the case. When the proposal was brought before the Standing Committee for release for public comment, the Committee *unanimously* approved it --- except for the Department's abstention.

The beneficial effect to the defendant of more expansive substantive admissibility of prior inconsistent statements is demonstrated in the case of *United States v. McGirt,* 71 F.4th 755 (10th

Cir. 2023). McGirt was convicted of child sex abuse in an Oklahoma state court, but that verdict was vacated because the crime occurred in Indian country and the Supreme Court found that the state did not have jurisdiction to prosecute. At that state trial, the alleged victim and her grandmother testified. The grandmother's testimony, in particular, tended to favor McGirt, who was in a relationship with her at that time. At the federal trial, that relationship was over, and both the child and the mother testified against the defendant. Their testimony at the federal trial varied in a number of significant respects from their testimony at the state trial --- that was especially true of the grandmother. The defendant raised these inconsistencies on cross-examination and argued that the witnesses' prior statements should be admitted as proof of a fact. The trial court disagreed and instructed the jury that the inconsistencies could be used only for impeachment. That ruling was error, because the inconsistent statements were made under oath at the prior state proceeding. They (miraculously) fell within the narrow exception of the current Rule 801(d)(1)(A). The government argued that the error was harmless, but the Tenth Circuit disagreed and reversed the conviction. The court's analysis provides a compelling example of the importance of the defendant being able to use prior inconsistent statements of government witnesses as substantive evidence.

The court in *McGirt*, in assessing the harmfulness of the error, was required to consider the difference between substantive and impeachment evidence, as applied in this case to the defendant. It noted that if the inconsistent statements could have been used substantively, the jury could have found as a fact that the child did not act unusually after the alleged event; that the child's accusations had been concocted by the child's mother, who resented McGirt's relationship with the grandmother; and that the child and the defendant were rarely alone in the two week period in which the alleged abuse occurred. These were all important facts bearing on the defendant's innocence, and all testified to by the grandmother in the prior trial. Moreover, the court pointed out that "the prior [inconsistent] testimony of a witness would not only impeach the testimony of that witness; if used substantively, the prior testimony could also undermine the testimony of other witnesses" for the government. The court reversed the conviction.

For another example of the importance of substantive admissibility to the defendant, see *United States v. Kawleski,* 108 F.4th 592 (7th Cir. 2024). The defendant's motion for a new trial was based on the fact that a government witness had made a prior inconsistent statement that was excluded by the trial court. The motion was denied and the court of appeals affirmed. The court noted that the inconsistent statement could have been used only for impeachment; the defendant could find no hearsay exception to cover the statement and allow it to be admissible for its truth. The court conceded that the motion for a new trial was viable if the inconsistent statement had been admissible for its truth, but not if only for impeachment. Thus, the proposed amendment would have provided significant value to the defendant in *Kawleski.*

Any doubt about the supposed imbalance of the proposed amendment is belied by the fact that NACDL, as discussed infra:

"strongly supports the proposed amendment to FRE 801(d)(1)(A)."

B. The Concern in Civil Cases That Parties Will Avoid Summary Judgment by Filing an Affidavit with an Inconsistent Statement

At the Spring, 2024 meeting, the concern was expressed that if prior inconsistent statements are given substantive effect, a party could avoid summary judgment simply by filing an affidavit with an inconsistent statement. Here is an example, provided by a Committee member. The dispute is over whether there is a contract.

> • At the summary judgement stage, the Defendant files an affidavit stating that there is no contract because there was no meeting of the minds and he never signed the draft.
>
> • The Plaintiff files an affidavit stating that the Defendant's sister told him that the Defendant signed the contract, and the Plaintiff acted to his detriment in accordance with that belief. He admits he never saw a version that the Defendant had signed.
>
> • The Defendant's sister files an affidavit stating that she has no idea if the Defendant signed a contract and denies telling the Plaintiff that he did sign it.
>
> Here the sister's statement offered by the plaintiff is hearsay and we are assuming no other hearsay exception. That statement has no effect on the summary judgment motion under the current rule, because it would be admissible only to impeach the sister as a prior inconsistent statement. But under the amendment, the inconsistent statement might end up defeating summary judgment because it can be used substantively --- even though there is no witness with first-hand knowledge who will testify at trial that the defendant signed the contract.

This hypo does present a situation in which the grant of summary judgment might be forestalled by the amendment. But there are a number of responses to the concern that this will be a problem:

1) There can be many situations under current law where summary judgment must be denied even though there is nobody with personal knowledge testifying to a disputed fact --- indeed that is possible any time a hearsay statement is admissible under a hearsay exception. So, if the sister's statement were an excited utterance or a present sense impression heard by the affiant, that hearsay statement would be used substantively, and nobody with personal knowledge of the

underlying event will testify. It is difficult to see why expanding Rule 801(d)(1)(A) raises some kind of crisis. Criminal defendants get convicted on the basis of confessions they made, even though there is no testimony at trial that the defendant actually committed the crime.

2) The fact that the amendment might lead to a few more denials of summary judgment than previously is not necessarily a bad thing. Why shouldn't the party get to go to trial if they have a hearsay statement made by a witness who is testifying at trial subject to cross-examination? One could argue that the result is preferable to admitting hearsay under other exceptions, where the statement is made by a declarant who is not presented at trial. With all the talk about a vanishing trial, it is not evident that a rule leading to some small number of denials of summary judgment, and resolving the matter through cross-examination, is a bad thing.

3) It *would* be a negative development if a party, to forestall summary judgment, generates an inconsistent statement that would not otherwise be made (or was not in fact made). But the risk of strategic activity is quite attenuated for a number of reasons.

- First, no *party* needs expansion of the hearsay exception to forestall summary judgment by filing their own inconsistent statement. This is because an affidavit is an assertion that the affiant will testify at trial to what is in the affidavit, i.e., that it will be presented in admissible form at trial. Fed.R.Civ.P. 56(c). So if, for example, a party makes a statement at the deposition that he didn't read the prospectus, but then files an affidavit saying that he did, he is averring that he will testify at trial that he did. That will be substantive evidence at trial, regardless of Rule 801(d)(1)(A), and this inconsistent statement can be used to defeat summary judgment. The same would hold true if the statement presented to forestall summary judgment is in an affidavit of a non-party that contradicts a statement the non-party previously made. The non-party's averment of an inconsistent statement must be treated as substantive evidence because it will be provided in an admissible form at trial, i.e., as in-court testimony. That rule has nothing to do with the substantive admissibility of a prior inconsistent statement because the inconsistency will be presented at trial in the form of testimony. *So the concern is only applicable if a party files an affidavit fabricating a prior inconsistent statement of a non-party who has filed an affidavit.* It's hard to tell how often that will happen, but as stated it seems an especially narrow problem.

- Second, even if expanded substantive admissibility of prior inconsistent statements might lead a party in bad faith to think about forestalling summary judgment by creating or fabricating such a statement, that plan may well fail. There is already substantial case law in place to prevent parties from submitting "sham affidavits." Case law in every circuit establishes a "sham affidavit" rule. See Edward Brunet, John Parry, & Martin Redish, *Summary Judgment: Federal Law and Practice* § 8:10 (citing cases from every

circuit providing authority of district courts to strike sham affidavits). A sham affidavit "is an affidavit that is inadmissible because it contradicts the affiant's previous testimony . . . unless the earlier testimony was ambiguous, confusing, or the result of a memory lapse." *Pourghoraishi v. Flying J., Inc.,* 449 F.3d 751, 759 (7th Cir. 2006). If a party submits an affidavit solely to contradict a previous statement, it can be rejected on summary judgment, if found as a sham, even if it is substantively admissible. Factual issues created "solely by an affidavit crafted to oppose a summary judgment motion are not 'genuine' issues for trial." *Hayes v. New York City Dep't of Corr.,* 84 F.3d 614, 619 (2d Cir. 1996).

For example, in *In re Fosamax Prods. Liab. Litig*., 707 F.3d 189, 193 (2d Cir. 2013), an expert made a damaging concession in deposition testimony and then made a statement contradicting that testimony. The Court of Appeals held that the trial court properly disregarded the contradictory statement --- especially because it was made after the motion for summary judgment. That timing clearly increased the likelihood that it was intended solely to defeat the motion for summary judgment. *See also Latimer v. Roaring Toyz, Inc.*, 601 F.3d 1224, 1237 (11th Cir. 2010) ("[a] court may determine that an affidavit is a sham when it contradicts previous deposition testimony and the party submitting the affidavit does not give any valid explanation for the contradiction"); *Brown v. Henderson,* 257 F.3d 246, 252 (2d Cir. 2001) (affirming summary judgment for employer in a Title VII sex discrimination case, finding the trial court properly rejected the plaintiff's affidavit that was inconsistent with her own prior deposition testimony); *Martin v. Merrell Dow Pharmaceuticals, Inc.*, 851 F.2d 703 (3d Cir. 1988) (trial court properly disregarded the plaintiff's affidavit "submitted only after [she] faced almost certain defeat in summary judgment," finding that the affidavit "flatly contradicted no less than eight of her prior sworn statements"); *Halperin v. Abacus Technology Corp.,* 128 F.3d 191, 198 (4th Cir. 1997) (affirming summary judgment in an employment discrimination case and finding that the trial court properly disregarded the affidavit of the nonmovant that "contradicts his prior deposition testimony"); *Dotson v. Delta Consol. Industries, Inc.,* 251 F.3d 780, 781(8th Cir. 2001) (affirming summary judgment in a Title VII race discrimination case and rejecting nonmovant's argument that his affidavit created an issue of fact with his earlier conflicting deposition "because we have held many times that a party may not create a question of material fact, and then forestall summary judgment, by submitting an affidavit contradicting his own sworn statements in a deposition"); *Addisu v. Fred Meyer, Inc.*, 198 F.3d 1130, 1138 (9th Cir. 2000) ("[G]enerally, a nonmoving party may not create an issue of fact for summary judgment purposes by means of an affidavit contradicting that party's prior deposition testimony.").

Thus, the concern that expansion of substantive admissibility of prior inconsistent statements would lead to denials of summary judgment is belied both by the narrowness of the problem and by existing law that would prohibit a party from manufacturing an inconsistent

statement in an effort to forestall summary judgment. It seems clear that summary judgement denial caused by the amendment will arise in a very narrow band of cases, if at all. And to the extent that is a "cost", it can be argued that it is the tail wagging the dog, given the benefits of the rule, especially in criminal cases. Consider the benefit of not having to give an opaque limiting instruction; that is a substantial benefit that will apply across federal litigation under the amendment. It seems hard to conclude that a small number of summary judgment denials is a cost that outweighs that benefit.

It should be noted that there was not a single public comment expressing concerns about the impact of the amendment on summary judgment practice. Civil lawyers are certainly attuned to such risks, and they routinely weigh in on rule amendments that affect their practice (such as the almost 600 public comments on the 2023 amendment to Rule 702). The silence from civil lawyers was notable. In fact, as seen below, the only input on the civil side came from the American College of Trial Lawyers, and the Magistrate Judges Association. Both of those highly respected groups were in favor of the amendment, without qualification.

Nonetheless, if the concern remains, one possibility is to add a paragraph to the Committee Note to caution against suspiciously timed affidavits on summary judgment. Here is a possibility:

> *The amendment is not intended to allow parties to forestall summary judgment by offering affidavits describing statements of non-party witnesses that are inconsistent with adverse statements by those witnesses, without a showing of good cause.*

C. The Concern That a Conviction Might be Based Solely on a Witness's Prior Inconsistent Statement.

Some have argued that it is problematic to expand substantive admissibility of prior inconsistent statements because the end result could be that an accused could be convicted solely on the basis of a prior inconsistent statement. (This argument is made by Professor Colin Miller in the public comment, discussed below). A stark hypothetical would be something like a witness who makes a hearsay statement to his friend, "I saw the defendant set fire to the warehouse." Then at trial he testifies that the defendant was with him, bowling, that night. There is no other evidence pointing to the defendant's guilt. If the prior inconsistent statement is sufficient substantive evidence for a jury to find guilt beyond a reasonable doubt, and then the jury so finds, it would mean that a defendant would be convicted solely on the grounds of a prior inconsistent statement.[11]

[11] The fact situation is intentionally stark. If you assume that the statement is combined with other evidence, then that takes you back to the fact that the rule amendment does in fact help the party with the burden of proof to withstand motions for dismissal on the basis of insufficient evidence. The hypothetical deals with the more specific question of whether the prosecution can be based *solely* on prior inconsistent statements.

There are several responses to this expressed concern. First, the standard for sufficient evidence is whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the defendant guilty beyond a reasonable doubt. *Jackson v. Virginia,* 443 U.S. 307 (1979). It is impossible to speak categorically, but it seems unlikely that the standard could be met by a single inconsistent statement from a witness.[12] Not impossible, though. At any rate, the rest of the discussion proceeds with the background that we are addressing a rarely occurring problem.

Second, the fact is that the Evidence Rules are not about sufficiency. They are about admissibility. The justification for expansion of the rule is that a witness's testimony about a prior statement should be treated the same as that witness's testimony about a prior act --- it should be considered by the jury for its truth because there are guarantees of cross-examination, oath, and opportunity to view demeanor. That is the only question regulated by the Federal Rules of Evidence. After that, the questions of sufficiency take over in a review of all the evidence. Put another way, the Advisory Committee has never considered concerns about sufficiency when determining what evidence should be admissible. And that includes the original Advisory Committee. For example, in establishing the excited utterance exception, nobody worried about whether an accused could be convicted solely on the basis of an excited utterance. That's not the business of the Evidence Rules Committee. (If it were, I would suspect that a lot of the hearsay exceptions would need rethinking. Some might be more uncomfortable with the prospect of a conviction based solely on a dying declaration than a conviction based on a statement where the person who made it is subject to cross-examination.)

This very distinction between admissibility and sufficiency was raised in Congress when the Evidence Rules were first being considered, with respect to Rule 801(d)(1)(C), the hearsay exception for prior identifications. Subdivision (d)(1)(C) was included in the rule as prescribed by the Supreme Court, but was deleted by Congress. The Senate initially rejected the proposed Rule 801(d)(1)(C); the House acquiesced, in order to ensure passage of the Rules of Evidence. Statement of Rep. Hungate, Cong. Rec. H. 9653 (Oct. 6, 1975). The Senate deleted the provision because of strenuous objection by Senator Ervin. He was concerned that a conviction could be based solely on an unsworn hearsay statement in which the declarant identified the defendant. Cong. Rec. H. 9654 (Oct. 6, 1975).

But Congress then amended Rule 801(d)(1) in 1975 to add back the Advisory Committee's proposal. P.L. 94–113 (1975). The report from the Senate Judiciary Committee on the 1975 amendment found that Senator Ervin's concerns were "misdirected." The report makes three major points:

1) the rule is addressed to admissibility, not sufficiency;

[12] If it is an inconsistent statement of the accused, it is admissible today as substantive evidence, as a party-opponent statement.

2) most of the hearsay exceptions allow statements into evidence that were not made under oath (thus creating the same risk of a conviction on the basis of hearsay);

3) the declarant who made the identification must under the rule be testifying subject to cross-examination, assuring that "if any discrepancy occurs between the witness's in-court and out-of-court testimony, the opportunity is available to probe, with the witness under oath, the reasons for that discrepancy so that the trier of fact might determine which statement is to be believed." Report of the Committee on the Judiciary, Senate, 94th Cong., 1st Sess., No. 94–199 (1975).

Each of these points is applicable to Rule 801(d)(1)(A). So if the proposed expansion were to founder over the concern about a ruling on sufficiency, then the Committee should begin a project to consider elimination of Rule 801(1)(d)(1)(C) on prior identifications, and for that matter most or all of the hearsay exceptions in Rules 803 and 804.

D. The Concern About Problems of Proving Inconsistent Statements

Under current law, extrinsic evidence of a prior inconsistent statement, offered for impeachment under Rule 613(b), is admissible subject to Rule 403. The trial judge assesses the importance of the inconsistency as it bears on impeaching the witness, and the difficulties of proof in the particular case. *See, e.g., United States v. Winchenbach,* 197 F.3d 548 (1st Cir. 1999) (admission of extrinsic evidence of a prior inconsistent statement is considered under Rule 403). Some prior inconsistent statements are harder to prove than others, of course. Those that are written or recorded will be easier, those presented through disputed testimony will be more difficult. These relative difficulties are taken into account today when a court considers whether to allow extrinsic evidence of a prior inconsistent statement to impeach a witness under Rule 613(b).

If Rule 801(d)(1)(A) is expanded to allow substantive use of a prior inconsistent statement, that means the statement will have to be proved up at trial. Is this a cause for concern, especially where the proof of the statement may be complicated and disputed? What if the inconsistent statement was purportedly made on a video, but the witness claims that the video is a deepfake?

Here are some reasons to think that proof-of-statement concerns should not derail an amendment expanding admissibility of prior inconsistent statements:

1) Facts need to be proven. If a prior inconsistent statement is proof of a fact, there is no reason to treat it any differently than, say, proof that a certain weapon was used, or that a meeting occurred on June 5, 2022. Proving up statements is probably easier, generally speaking, than proving up other matters, such as a person's motivation, or causation in toxic tort cases.

2) Extrinsic evidence of prior inconsistent statements is often allowed to impeach witnesses today, again subject to Rule 403. *See, e.g., United States v. Meza,* 701 F.3d 411 (5th Cir. 2012) (audio recording of a prior inconsistent statement found properly admitted under Rule 403 even though the witness did not deny making it). So the burden on the courts and the system in allowing proof of all prior inconsistent statements may be marginal.

3) The Committee previously discussed the possible problems of proving up prior statements in its efforts to amend Rule 106, the rule of completeness. The rule originally covered only statements that were written or recorded. Oral unrecorded statements were not covered. The Advisory Committee's explanation for the exclusion was "practical considerations" --- presumably that meant a concern about difficulties in proving up oral unrecorded statements. But the 2023 amendment specifically allows completion through oral unrecorded statements. The Committee found that proving up such statements was no more difficult than proving any fact. The Committee Note to the amendment explains as follows:

> The original committee note cites "practical reasons" for limiting the coverage of the rule to writings and recordings. To the extent that the concern was about disputes over the content or existence of an unrecorded statement, that concern does not justify excluding all unrecorded statements completely from the coverage of the rule. *See United States v. Bailey*, 2017 WL 5126163, at *7 (D. Md. Nov. 16, 2017) ("A blanket rule of prohibition is unwarranted, and invites abuse. Moreover, if the content of some oral statements are disputed and difficult to prove, others are not—because they have been summarized . . . , or because they were witnessed by enough people to assure that what was actually said can be established with sufficient certainty."). A party seeking completion with an unrecorded statement would of course need to provide admissible evidence that the statement was made. Otherwise, there would be no showing that the original statement is misleading, and the request for completion should be denied. In some cases, the court may find that the difficulty in proving the completing statement substantially outweighs its probative value—in which case exclusion is possible under Rule 403.

The same analysis logically applies to oral, unrecorded prior inconsistent statements. Any difficulty in proof is taken into account under Rule 403, and a ban of all such statements because of difficulty in proving some is overkill. Indeed it is clear that the if a concern about proof tanks the amendment, then the Committee has taken inconsistent positions on provability of such statements, with respect to two rule amendments only two years apart.

4) As Professor Michael Graham points out in his public comment, set forth below, provability of statements is generally much easier today than it was in 1975, when provability concerned Congress. As he puts it, "now with cellphones, body cams, recorded witness interviews, etc., the instances where a statement to be offered has not been memorialized are few." In his view, technological advances have addressed the concern that Congress had in 1975 --- concern that the Advisory Committee did not have even back then, because the Advisory Committee took the sound

position that any difficulty in proving up an inconsistent statement was no greater than with any other statement.

5) One public comment of a lawyer, discussed below, opposes the rule amendment solely on the ground that someone could, through AI, generate a deepfake prior inconsistent statement. It should go without saying that the concern about deepfakes is not at all limited to prior inconsistent statements. There is nothing about a prior inconsistent statement that makes it more or less susceptible to deep fakery than, say, video evidence of an event, or an excited utterance, or any other proof that is proffered at a trial. So there is no justification for singling out evidence of prior inconsistent statements as a particular problem of deepfakes. If the concern over deepfakes tanks the amendment, then the Committee needs to go through the rules and abrogate all those that might lead to an admission of a deepfake. I am not sure that many rules would be left. Maybe Rules 103 and 1101.

III. State Variations on Prior Inconsistent Statement Admissibility

In deciding whether to expand the admissibility of prior inconsistent statements, there are many reference points provided in the State rules of evidence. It is particularly notable that a large number of states have rejected the Congressional limitation on substantive admissibility of prior inconsistent statements. The state deviation is greater than that with respect to most of the other Federal Rules of Evidence.

1. Rejection of Congressional limitation in Rule 801(d)(1)(A):

Many states have rejected the Congressional limitation on substantive admissibility of prior inconsistent statements. In the following states, all prior inconsistent statements are admissible for their truth:

Alaska
Arizona
California
Colorado
Georgia
Montana
Nevada
Rhode Island
South Carolina
Wisconsin. [13]

[13] See Alaska R.Evid. 801(d)(1)(A); Ariz. R. Evid. 801(d)(1)(a); Cal. Ev. Code §1235; Col.R.Evid. 801(d)(1)(A); Ga. R.Evid. 801(d)(1)(A); Montana R. Evid. 801(d)(1)(A); 4 Nev. Stat. §51.035 (2)(A); R.I. R. Evid. 801(d)(1)(A); S.C. R. Evid. 801(d)(1)(A).

2. All Prior Statements Admissible for Their Truth

Several states have gone even further to provide that *all* prior statements of witnesses are admissible for their truth. For example, Kansas **(**K.S.A. 60-460) states its hearsay rule and then provides an exception for all prior statements of testifying witnesses:

> **60-460. Hearsay evidence excluded; exceptions**
>
> Evidence of a statement which is made other than by a witness while testifying at the hearing, offered to prove the truth of the matter stated, is hearsay evidence and inadmissible except:
>
> (a) *Previous statements of persons present.* A statement previously made by a person who is present at the hearing and available for cross-examination with respect to the statement and its subject matter, provided the statement would be admissible if made by declarant while testifying as a witness. * * *

Similarly, Puerto Rico provides substantive admissibility for *all* prior statements of witnesses, in a hearsay exception:

> **Rule 63. Prior statement by witness**. As an exception to the hearsay rule, a prior statement made by a witness who appears at a trial or hearing and who is subject to cross-examination as to the prior statement is admissible, provided that such statement is admissible if made by the declarant appearing as witness.

Delaware has a similar provision. 11 Del. Code §3507 provides that any voluntary prior statement of a testifying witness "may be used as affirmative evidence with substantive independent testimonial value" and the party need not show surprise.

3. Variations that are more expansive than the Congressional limitation.

Other states provide less onerous alternatives to the Congressional restriction on substantive admissibility of prior inconsistent statements. For example:

Arkansas requires prior oath at a formal proceeding for civil cases only. [14]

Connecticut addresses the concern about whether the statement was ever made with a narrower limitation. The exception covers:

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[14] Ark. R.Evid. 801(d)(1)(A).

> A prior inconsistent statement of a witness, provided (A) the statement is in writing or otherwise recorded by audiotape, videotape, or some other equally reliable medium, (B) the writing or recording is duly authenticated as that of the witness, and (C) the witness has personal knowledge of the contents of the statement.[15]

Requirements (B) and (C) are surplusage because they are covered by other rules (authentication by Rule 901 and personal knowledge by Rule 602).

Hawaii, similar to Connecticut, expands the exception beyond the Congressional limitation, while still addressing concerns that the statement was never made. Besides statements under oath at a prior proceeding, Hawaii provides substantive admissibility for prior inconsistent statements when they are "reduced to writing and signed or otherwise adopted by the declarant" and also when they are "recorded in substantially verbatim fashion by stenographic, mechanical, electrical, or other means contemporaneously with the making of the statement." [16]

Illinois, similar to Connecticut, addresses the concern that the statement was never made. Prior inconsistent statements are admissible substantively if properly recorded, but Illinois also includes as a ground for admissibility that "the declarant acknowledged under oath the making of the statement either in the declarant's testimony at the hearing or trial in which the admission into evidence of the prior statement is being sought or at a trial, hearing, or other proceeding, or in a deposition."[17] Under the Illinois rule, the statement does not need to be recorded if the declarant acknowledges making the statement while testifying at trial. The idea is that there should be no doubt about the existence of the prior statement if the declarant actually acknowledges making it. The concern, though, is how to determine whether a witness has actually "acknowledged" the prior statement. If the witness says "yeah, I might have said something about this before" is that an acknowledgment?

Louisiana does not permit substantive use of prior inconsistent statements in a civil case. Prior inconsistent statements in Louisiana are admissible substantively in a criminal case "where there exists any additional evidence to corroborate the matter asserted by the prior inconsistent statement." [18]

Maryland has a provision similar to Connecticut, allowing substantive use of a prior inconsistent statement if there is assurance that it was actually made. Such statements are admissible if they have been "reduced to writing and * * * signed by the declarant" or "recorded in substantially verbatim fashion by stenographic or electronic means contemporaneously with the making of the statement."[19]

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[15] Conn. Code of Evid. R. 8-1.

[16] Hawaii R. Evid. 801(d)(1)(A).

[17] Ill. R.Evid. 801(d)(1)(A).

[18] La. Code Evid. 801(d)(1)(A).

[19] Md. R. Evid. 5-802.1

New Jersey provides for substantive admissibility of all prior inconsistent statements of a witness called by an opposing party. However, if the witness is called by the proponent, safeguards must be met. The proponent must show that the statement "(A) is contained in a sound recording or in a writing made or signed by the witness in circumstances establishing its reliability or (B) was given under oath subject to the penalty of perjury at a trial or other judicial, quasi-judicial, legislative, administrative or grand jury proceeding, or in a deposition."[20] It is unclear why, assuming there are risks of reliability and questions about whether the statement was ever made, those risks are raised only when the proponent calls the witness.

North Dakota applies the Congressional limitation in Rule 801(d)(1)(A) in criminal cases only.[21]

Pennsylvania, like Connecticut, expands beyond the Congressional limitation, but with an attempt to assure that the witness actually made the prior statement:

> **(1) Prior Inconsistent Statement of Declarant-Witness.** A prior statement by a declarant-witness that is inconsistent with the declarant-witness's testimony and:
>
> (A) was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition;
>
> (B) is a writing signed and adopted by the declarant; or
>
> (C) is a verbatim contemporaneous electronic, audiotaped, or videotaped recording of an oral statement.[22]

Utah rejects the congressional limitation and also treats prior statements as "not hearsay" when the witness denies or has forgotten the statement. So there appears to be no concern at all in Utah about whether the prior inconsistent statement was ever made:

> **(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 or the declarant denies having made the statement or has forgotten * * *[23]

Wyoming applies the Congressional limitation in criminal cases only.[24]

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[20] NJRE 801(d)(1)(A).

[21] N.D.R. Ev. 801(d)(1)(A).

[22] Pa.R. Ev. 801(d)(1).

[23] Utah R. Evid. 801(d)(1)(A).

[24] Wyo. R. Evid. 801(d)(1)(A).

All told, that is 22 states that treat prior inconsistent statements more expansively than Federal Rule 801(d)(1)(A). That is a very high variance in comparison to other rules in the Federal Rules of Evidence. For example, the variation for the excited utterance exception is three states.

IV. Public Comment on the Proposed Amendment

As stated above, only eight comments were received. This section summarizes and analyzes those comments.

Michael Ravnitsky, Esq. (Rules—EV—2024 – 0003) states that the proposed amendment "aims to streamline the use of prior inconsistent statements and eliminate confusing jury instructions." He is in favor of those ends, but suggests that language be added to the text of the amendment to require the court to consider whether the prior statement is being taken out of context.

> **Analysis:** By living in the world, we know that a statement meaning one thing can be taken out of context and thus mean another. This could certainly be true with respect to prior statements. A statement that appears inconsistent on its face may not be so if context is considered. This possibility, that an apparent inconsistency can be explained away once the circumstances of the prior statement are considered, is recognized by the courts today --- and is indeed one of the reasons that prior consistent statements may be admissible for rehabilitation.
>
> An example is *United States v. Iu,* 917 F.3d 1026 (8th Cir. 2019), a prosecution for child sexual abuse. The victim testified at trial that the defendant abused her. She was impeached with a prior statement in which she stated that she was assaulted by someone other than the defendant. That statement was admissible to impeach her, but she of course was given the opportunity to explain the inconsistency (as is required by Rule 613(b) before extrinsic evidence of the statement could be admitted). Her explanation was that she made the prior statement to a defense investigator, who harassed and intimidated her into making the statement. The trial court allowed the prosecution, as part of the explanation of context, to introduce another prior statement that was made to friends, in which she accused the defendant of sexual abuse. That statement was admitted as a consistent statement under Rule 801(d)(1)(B), as it helped to place the statement to the investigator in context, and it showed that it was not really inconsistent in any way that would impeach the declarant. There is nothing in the amendment that would alter this result.
>
> Besides allowing the witness to provide context to explain away an apparent inconsistency, the courts have held that "[i]t lies within the sound discretion of the court to determine whether an inconsistency exists." *United States v. Richardson,*515 F.3d 74 (1st Cir. 2008). Thus, the concerns expressed in the comment are already being addressed by

the courts under Rule 613(b). And all those processes in Rule 613(b) apply to admitting prior inconsistent statements for truth under Rule 801(d)(1)(A). All that Rule 801(d)(1)(A) does it make substantively admissible what is admissible already for impeachment under Rule 613(b). And the Committee Note, set forth below, specifies that all of the requirements set forth in Rule 613(b) are applicable to admitting prior inconsistent statements substantively.

In sum, it is not essential to add anything about "context" to the rule. But it would not hurt to add a sentence to the Committee Note to say something like this:

> The amendment does not change the Rule 613(b) requirements for introducing extrinsic evidence of a prior inconsistent statement. <u>As under Rule 613(b), the determination of whether a prior statement is actually inconsistent with the witness's trial testimony is dependent on context and is within the sound discretion of the trial court.</u>

This addition is included in the draft below.

Federal Magistrate Judges' Association (Rules—EV—2024 – 004): The Magistrate Judges' Association supports the proposed amendment to Rule 801(d)(1)(A). Here is the reasoning:

> FMJA Rules Committee members agree with the proposed change. First, the change would make Rule 801(d)(1)(A) consistent with Rule 801(d)(1)(B), which was similarly amended in 2014. Second, this change will helpfully eliminate the need for what is often a confusing limiting jury instruction related to the prior statement's use in jury deliberations.

The Magistrate Judges in the comment also seek to raise awareness of the risk that a prior inconsistent statement, like any other information, might be a deepfake. But they conclude that "the risks associated with artificial intelligence *impact the application of many rules,* [so] the FMJA Rules Committee does not believe any modification of the proposed rule is required to address this risk."

Analysis: Just so. The FMJA properly puts the deepfake risks in context. And the magistrate judges conclude that the instruction that must be given under the current rule is confusing.

The American College of Trial Lawyers (Rules—EV—2024 – 007) supports the proposed amendment. The College observes that the proposed Amendment "will revise FRE 801(d)(1)(A) so that it is consistent with FRE 801(d)(1)(B), which was similarly amended in 2014." The College "agrees that it will be beneficial to synthesize the substantive and credibility uses of prior inconsistent statements to dispense with the need for confusing limiting jury instructions regarding prior statements of a testifying witness."

Analysis: Avoiding a confusing limiting instruction, and providing a unified and simplified approach to prior consistent and inconsistent statements, are two of the most important benefits of the amendment.

Professor Michael Graham (Rules—EV—2024 – 008) supports the proposed amendment. He asked himself "what is different today from 1975 that supports simply having all prior inconsistent statements admissible as substantive evidence." His answer is that today, prior statements are almost always recorded and therefore the dispute about whether they were even made is very unlikely: "Now with cellphones, body cams, recorded witness interviews, etc., the incidents where a statement to be offered has not been memorialized are few. Moreover any trier of fact will certainly be more skeptical in assessing trustworthiness than in 1975." He concludes that "today, particularly with the set of disputes in federal court, I can see that having all prior inconsistent statements as substantive evidence makes sense." He finally states that another advantage of the rule is that it means that the court never has to rule on whether a party is introducing a prior inconsistent statement solely to impeach a witness that the party calls. The current rule gives rise to abusive conduct --- calling a witness to "impeach" them with a prior inconsistent statement, when the true goal is to have the jury misuse the statement for its truth. Professor Graham says that removing that risk of abuse is "a major step forward."

Analysis: Professor Graham is one of the foremost experts on evidence in the country. His point about the current problem of calling a witness solely to impeach them with a prior inconsistent statement is a good one. That will no longer be the case because the prior inconsistent statement will be admitted as substantive evidence. Put another way, after the amendment, the rule simply makes more sense, and there is no need to engage in sharp practices to end-run the senseless limitations in the rule.

Chris Corzo Injury Attorneys (Rules—EV—2024 – 009) understand the benefit of the amendment, stating that "even the clearest instruction from the trial court will not allow most jurors in deliberation to distinguish" between impeachment and substantive use. But the firm nonetheless opposes the amendment on the ground that some purported prior inconsistent statements will likely be deepfakes. According to the firm, the risk of deepfakes should cause the Advisory Committee to reject the benefits of the amendment.

Analysis: As stated above, and as emphasized in the comment from the Magistrate Judges Association, the risk of deepfakes is not at all targeted at prior inconsistent statements. If you are using AI to generate fake evidence, it would seem like videos of a crime occurring, or of a fight happening, or of a damaging admission of crime, would be your first targets. A prior inconsistent statement of a non-party would probably be a lesser priority. And at any rate, the argument reduces to exclusion of all evidence of a type that can be faked. That is, all evidence.

Professor Colin Miller (Rules—EV—2024 – 009) opposes the amendment on the ground that a defendant could be convicted on the basis of a witness statement that the witness herself does not stand by. He asserts that under the amendment, a defendant could be convicted solely on the basis of a prior inconsistent statement.

> **Analysis:** As stated above, the possibility of being convicted solely on the basis of hearsay is unlikely, but to the extent that it is possible, it is possible for *all* hearsay exceptions. As Congress stated in passing an amendment to add the hearsay exception for prior identifications, the concern about conviction on the basis of hearsay confuses admissibility and sufficiency.

Marisol Garcia (Rules—EV—2024 – 011), a law student, states that the proposed amendment "represents a positive step towards improving the fairness and efficiency of trials by expanding the admissibility of prior inconsistent statements as substantive evidence. The amendment addresses the concerns associated with hearsay and aligns with other rules of evidence, making it a logical and consistent change." She believes that the amendment "will contribute to a more equitable judicial process." She notes that the amendment "seeks to eliminate the need for confusing jury instructions that differentiate between substantive and impeachment uses of prior inconsistent statements" and that "[s]implifying these instructions can help jurors better understand and evaluate the evidence presented." She observes that "[t]he amendment aligns Rule 801(d)(1)(A) with Rule 801(d)(1)(B), which already allows prior consistent statements to be used substantively" and that "[t]his consistency promotes a more streamlined and logical application of the hearsay exceptions." Finally, she notes that "[t]here is no significant reason to believe that unrecorded prior inconsistent statements are more difficult to prove than other unrecorded facts. Rule 403 can account for any potential difficulties."

> **Analysis:** This commenter is not one of my students. But they must have a good Evidence professor at Vermont Law School.

The National Association of Criminal Defense Attorneys (NACDL) (Rules –EV --- 2024 –0012) "strongly supports" the proposed amendment to Rule 801(d)(1)(A). NACDL declares that the dangers presented by hearsay are "largely nonexistent" when the declarant of the out-of-court statement is present and can be examined about its contents. NACDL agrees with the Advisory Committee's analysis that the "premises for the present rule disallowing unsworn prior inconsistent statements as substantive evidence are not persuasive." First, the premise that a statement under oath is more reliable than one that is not, "is not sufficient to justify disparate treatment under Rule 801(d)(1)." NACDL notes that unsworn statements of identification come in as substantive evidence under Rule 801(d)(1)(C), and unsworn prior consistent statements come in as substantive evidence under 801(d)(1)(B) when offered to rebut an attack on a witness's credibility. NACDL is "unaware of any support for the proposition that unsworn prior inconsistent

statements are any less reliable than unsworn prior consistent statements, which have long been admitted as substantive evidence when offered for rehabilitation of the witness." NACDL notes that the perceived difficulty of proving unsworn prior inconsistent statements "provides scant support for the rule as currently framed" because many unsworn prior inconsistent statements "are contained in police reports or other writings" or "contained in written or recorded statements taken from witnesses." But "even when the prior inconsistent statement is not recorded anywhere, it is no harder to prove its content than that of any other unrecorded fact." NACDL concludes that "[t]here is no principled basis on which to allow some unrecorded statements to come in as substantive evidence, while barring others." NACDL also critiques the contention that a witness who denies that a statement is ever made is difficult to cross-examine. It notes that any such difficulty exists under the current rule, which allows impeachment but denies substantive effect. NACDL states that "[n]either the current rule nor the proposed amendment has any effect on the difficulty of a given cross examination."

As discussed earlier in this memo, NACDL argues that the current rule is unfair to criminal defendants because it "has long favored the government over the defense," and that the proposed rule remedies this unfairness. It explains as follows:

> Although the rule is neutral on its face and applies equally to both sides, the fact is that the overwhelming majority of witnesses at a criminal trial testify for the prosecution. That means that impeachment with a prior inconsistent statement is usually done by the defense, while rehabilitation of the witness with a prior consistent statement is usually attempted by the government. Because of the Rule's disparate treatment of the two types of statements, the prosecution is able to argue the substantive truth of the prior consistent statements that it relies on, while the defense can argue only that the prior inconsistent statement reflects negatively on the witness's credibility. As the Committee notes, this leads to complicated instructions that are confusing to many jurors. And when the judge tells them that they may consider the substantive truth of prior consistent statements, but not of prior inconsistent statements, some jurors will undoubtedly conclude that the court is saying that the former are more reliable than the latter. NACDL respectfully submits that it is long past time to remove this unfair disparity from the Rule and to admit prior statements used for impeachment and for rehabilitation on an equal footing.

Analysis: The NACDL submission dampens the assertion made by many that the amendment will favor the government in criminal cases. History indicates that if any rule amendment presents any negative consequence to criminal defendants, NACDL is right on it. (And that is not a criticism).

V. Proposed Rule Amendment and Committee Note

What follows is the amendment as issued for public comment, with three suggested additions to the Committee Note that were emphasized in the public comment: 1) That the instruction currently given is confusing; 2) That one of the benefits of the amendment is that it calls for equal treatment of consistent and inconsistent statements; and 3) That whether a statement is inconsistent depends on context.

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 given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition~~;

(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.

* * *

Committee Note

The amendment provides that a prior inconsistent statement by a witness subject to cross-examination is admissible over a hearsay objection, even where the prior inconsistent statement was not given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition. The Committee has determined, as have a number of states, that delayed cross-examination of the declarant under oath is sufficient to allay the concerns addressed by the hearsay rule. As the original Advisory Committee noted, the dangers of hearsay are "largely nonexistent" because the declarant is in court and can be cross-examined about the prior statement and the underlying subject matter, and the trier of fact "has the declarant before it and can observe the demeanor and the nature of his testimony as he denies it or tries to explain away the inconsistency." Adv. Comm. Note to Rule 801(d)(1)(A) (quoting California Law Revision Commission). A major advantage of the amendment is that it avoids the need to give a confusing jury instruction that seeks to distinguish between substantive and impeachment uses for prior inconsistent statements. The amendment thus

eliminates the distinction in treatment that currently exists between prior inconsistent and prior consistent statements. For both types of statements, if they are admissible for purposes of proving the witness's credibility, they are admissible as substantive proof.

The original rule, requiring that the prior statement be made under oath at a formal hearing, is unduly narrow and has generally been of use only to prosecutors, where witnesses testify at the grand jury and then testify inconsistently at trial. The original rule was based on three premises. The first was that a prior statement under oath is more reliable than a prior statement that is not. While this is probably so, the ground of substantive admissibility is that the prior statement was made by the very person who is produced at trial and subject to cross examination about it, under oath. Thus any concerns about reliability are well-addressed by cross-examination and the factfinder's ability to view the demeanor of the person who made the statement. The second premise was a concern that statements not made at formal proceedings could be difficult to prove. But there is no reason to think that an unrecorded prior inconsistent statement is any more difficult to prove than any other unrecorded fact. And any difficulties in proof can be taken into account by the court under Rule 403. See the Committee Note to the 2023 amendment to Rule 106. The third premise was that if a witness denies making the prior statement, then cross-examination becomes difficult. But there is effective cross-examination in the very denial. *See* Nelson v. O'Neil, 402 U.S. 622, 629 (1971) (noting that the declarant's denial of the prior statement "was more favorable to the respondent than any that cross-examination by counsel could possibly have produced, had [the declarant] affirmed the statement as his").

Nothing in the amendment mandates that a prior inconsistent statement is sufficient evidence of a claim or defense.

The amendment does not change the Rule 613(b) requirements for introducing extrinsic evidence of a prior inconsistent statement. As under Rule 613(b), the determination of whether a prior statement is actually inconsistent with the witness's trial testimony is dependent on context and is within the sound discretion of the trial court.

TAB 3

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Memorandum To: Advisory Committee on Evidence Rules
From: Daniel J. Capra, Reporter
Re: Artificial Intelligence, Machine-Learning, and Possible Amendments to the Federal Rules of Evidence
Date: April 1, 2025

Since its meeting in Fall 2023, the Committee has been considering the challenges posed by the development of artificial intelligence (AI) and its possible impact on evidence offered at a trial. The Committee has convened two separate panel discussions to obtain information from experts in the field. The Committee has focused on two separate concerns: 1) The problem of "deepfakes" and how to assure that the Evidence Rules on authenticity will work to prevent hard-to-detect fake video and audio evidence from being admitted at trial; and 2) The problem of machine learning and how to assure that machine learning output is reliable, if such evidence is admitted without the testimony of an expert.

While recognizing the legitimate concerns posed by AI and machine-learning, Committee members have expressed the concern that, given the length of the rulemaking process, there is a risk that any proposed amendments to deal with AI could become outmoded before they even go into effect --- and that any amendment written in terms so general as to avoid being outmoded might add little to the already general and flexible language in the Federal Rules of Evidence. On the other hand, the unprecedented interest in the Committee's work on AI, even at this preliminary stage, and the possible evidentiary risks posed by AI and machine learning, support action unless it is clear that a rule will not be helpful.

At its last meeting, the Committee, as discussed below, rejected a number of proposals for amending the Evidence Rules to account for AI. But it did agree to consider two proposals prepared by the Reporter. These will be discussed in detail below, but in brief, the Committee

agreed to consider a new Rule 707 to govern machine-learning evidence proffered without the accompaniment of an expert. And it agreed to consider a new Rule 901(c), that would impose a foundation requirement before the court would have to hear a charge that an item was a deepfake, and would require that once that foundation is met, the proponent would have to show authenticity by a preponderance of the evidence. But as to Rule 901(c), the Committee decided that it would be held in abeyance until it was found that deepfakes were reaching the courts and creating problems that would necessitate an amendment.

This memorandum is in ten parts. Part One discusses some of the recent cases and articles on AI and evidence since the last meeting. Part Two presents a discussion of the evidentiary problems raised by deepfakes and machine learning. Part Three describes the basic rules of authenticity in the Federal Rules of Evidence. Part Four describes prior Committee review of authentication of social media evidence.[1] Part Five describes what the States have been doing to address the evidentiary problems raised by deepfakes and machine learning. Part Six analyzes a new proposal on deepfakes submitted by Professor Rebecca Delfino. Part Seven discusses whether an amendment to the Federal Rules is necessary at this time to address the problem of deepfakes. Part Eight discusses what the Committee might do, if anything, about the "Liar's Dividend" --- the risk that parties will argue, in the absence of specific evidence, that items offered as evidence might be fake because you can't believe your eyes anymore. Part Nine provides a draft amendment and Committee Note for a new Rule 901(c) to deal with deepfakes. Part Ten provides draft alternatives for a new Rule 707 to deal with machine-learning.

Proposed Rule 707 is an action item for this meeting. The Committee must decide whether to recommend that the proposal be released for public comment.

I. New Information

Here is a list of new information and data points that have come to my attention since the last meeting.

Articles and Reports

1. Rebecca Delfino, *Pay-to-Play: Access to Justice in the Era of AI and Deepfakes,* 55 Seton Hall L. Rev. 789 (2025):

This article addresses the extra litigation costs that may arise due to having to litigate the authenticity questions involving deepfakes. Professor Delfino makes the plausible argument that

[1] But for a few changes, this section, and the section on basic authenticity rules, were included in the AI memo for last Fall's meeting.

experts are going to be required on both sides when credible claims of deep fakery are made. She notes that these increased costs due to litigating deepfakes will fall hard on those of limited means. She suggests two ways of addressing these increased costs:

> In cases involving deepfakes, the courts should use their sua sponte powers under Federal Rule of Evidence 706 to appoint independent expert witnesses to assist the court in understanding the deepfake evidence and allegations. In addition, in all deepfake cases, including those where the parties seek to retain their own digital forensic experts, the proponent of the deepfake allegation should bear the cost of proving it unless the court determines, based on financial need, that costs to litigate non-frivolous deepfake evidence claims should be allocated to the other party.

Professor Delfino does not call for an amendment to the Evidence Rules to deal with these costs. As she notes, an amendment to Rule 706 is not necessary, because that rule already authorizes allocation of the costs of a court-appointed expert according to wealth. She does not tie the suggestion that the moving party pay the costs to any evidence rule. But as Professor Delfino rightly notes, "deepfake allegations are easy to assert but costly to prove" and so "placing the burden on the proponent of the allegation will incentivize the exercise of diligence in investigating whether the evidence at issue is a deepfake and impose caution before asserting such allegations."

Of course, cost-shifting provisions are not ordinarily found in the Rules of Evidence. But there is a cost-shifting provision in Rule 706 --- though it is based on need, and is not intended to be a deterrent, as it would be if placed in Rule 901.

Professor Delfino's position is that the movant should pay all the costs of the proceeding. Perhaps a better rule is that the movant should pay the adversary's cost, unless the court finds that the item is a deepfake. Loser pays.

Professor Delfino argues that the proponent of a deepfake argument should be able to shift the costs to the adversary upon a showing of financial need. That contention is surely a bridge too far. It will actually incentivize deepfake arguments in order to shift costs to the adversary.

2. *How Bias Can Influence AI, h*ttps://www.cimplifi.com/resources/how-bias-can-influence-ai/

[This is a blog piece that provides a tutorial about what bias might exist in AI.]

> In the realm of machine learning and artificial intelligence, bias denotes systematic and unfair discrimination in model outputs, often stemming from non-representative training data, flawed algorithms, or subjective human decisions during model design. Such biases can lead to skewed results, perpetuating stereotypes or inaccuracies, and thereby affecting the fairness and trustworthiness of AI systems.

Examples of How Bias Can Impact AI

Here's one high-profile example of what bias can do to an algorithm. In March 2016, Microsoft released "Tay", which was an AI powered "social chatbot." Like the automated, text-based chatbots we see on numerous e-commerce and customer service sites, Tay could answer written questions. Microsoft unleashed Tay on Twitter to engage with the masses. Tay was designed to engage people in dialogue through tweets or direct messages, while emulating the style and slang of a teenage girl.

The plan was to release Tay online, then let the bot discover patterns of language through its interactions, which "she" would emulate in subsequent conversations. Eventually, her programmers hoped, Tay would sound just like the internet. At first, Tay engaged harmlessly with her growing number of followers with banter and lame jokes. Tay said things like "humans are super cool" and "why isn't national puppy day every day?"

However, after interacting with the Twitter masses and hammered by members of a troll-laden bulletin board, Tay went to hating feminists and denying the holocaust. All of that happened within just 16 hours before Microsoft pulled the plug on Tay. The warped nature of many Twitter trolls literally taught Tay to be a bigot. That's an example how bias can influence an algorithm.

* * *

Sources of AI Bias

AI algorithms can exhibit various types of biases, often reflecting the data they're trained on, or the methods used in their design. Bias can be introduced as part of evaluating the results from the algorithm. Here are three sources of AI bias:

1. Data Bias: If the result from the AI algorithm is skewed, a common reason is that the data used to train the algorithm is biased. The Microsoft Tay example above illustrates how quickly a set of inputs (data) can change how an algorithm performs. There are three types of data bias:

> *a. Sampling Bias:* Occurs when the training data is not representative of the population it's meant to model.
>
> *b. Imbalance Bias:* When some classes of data are underrepresented or overrepresented compared to others. [This has been a problem documented for facial recognition.]
>
> *c. Measurement Bias:* When there are systematic errors in the way data is collected or labeled.

2. Algorithmic Bias: Algorithmic bias is bias that emerges from the algorithms or procedures used, even when the data might be balanced or representative. When the result from the AI algorithm is skewed, this is another potential cause. * * *

3. Human Bias: Regardless of how the algorithm performs, the potential of bias exists from humans analyzing the results of the algorithm. There are three types of human bias:

> *a. Algorithm Aversion:* This occurs when humans are likely to reject the output from AI algorithms as invalid without validating the results.
>
> *b. Automation Bias:* This is the opposite scenario, where humans are likely to trust the output from AI algorithms as valid without validating the results. Automation bias is illustrated by the Avianca case earlier this year where an attorney filed a brief with several bogus case citations generated by ChatGPT – his approach to validation of the results was (believe it or not) to ask ChatGPT if they were real cases.
>
> *c.Confirmation Bias:* This occurs when humans are likely to only accept the results of an AI algorithm if it is consistent with the beliefs and opinions they already have. An example of confirmation bias could be a doctor who rejects an algorithmic diagnosis because it doesn't match their own experience or understanding.

Addressing the Challenge of Bias in AI Algorithms

With so many potential ways for bias to influence the results of an AI algorithm (or how those results are interpreted), expertise is needed to validate or authenticate the results. When applying that concept to litigation and eDiscovery, that generally means expert testimony to support or refute those results. There are two interrelated mechanisms within the U.S. legal system that a court can consider before it accepts or admits evidence.

[The author discusses Rule 702 and *Daubert*. Then the author quotes a Judicature article by Maura Grossman, who lists the following questions that should be asked with regard to AI at a Rule 702 hearing]:

> 1.Was the AI tested?
>
> 2. Who tested it?
>
> 3. How was it tested?
>
> 4. How arm's length was that testing?
>
> 5. Is there a known error rate associated with the AI, and is that an acceptable error rate depending on the risk of the adverse consequences of a ruling based on invalid or unreliable information?

6. Was the methodology generally accepted as reliable in the relevant scientific and technical community?

7. Has the methodology been subject to peer review by other people other than the AI developer?

8. Have standard procedures been used to develop the AI where applicable?

3. Bijan Ghom, *Identifying Deepfakes During Evidence Collection, Discovery* Law360, January 2, 2025

[This is an interesting technical article about deepfakes.]

A deepfake is a piece of manipulated media that convincingly mimics real people and real events. * * * Some of the practices and strategies that apply to fighting fake evidence generally apply to deepfakes. That said, sticking to your old habits might not be enough to keep a deepfake from the jury, and may even prevent you from spotting the deepfake until it is too late.

Deepfake Creation Tools

* * *

Deepfakes have an advantage over fake evidence: They are created by an AI model that is trained for the very purpose of deceiving the human eye. In fact, and as discussed below, the AI model goes through internal rounds of testing to make sure it is realistic enough to deceive you, and it will even restart the process if it is not. * * *

Below is a list of several of the more well-known and sophisticated platforms in the deepfake world:

• Synthesia offers an AI video-creation platform that enables users to generate synthetic videos using avatars. The company seems to focus on corporate training and marketing videos. A deepfake video can be created by entering a simple text prompt.

• Zao is a popular Chinese application that allows users to swap faces in videos and pictures. Unlike Synthesia, Zao focuses more on user-generated content for personal or entertainment use.

• DeepFaceLab is an open-source tool that is available for free to anyone who wants to create a deepfake video. Whereas Zao is made to be user-friendly and perhaps fun, DeepFaceLab is said to be the most realistic face-swapping video tool available. It is marketed to developers, and developers are free to use the code to create their own versions and train their models with little restrictions.

- FaceApp is a popular application known for its filters and transformations of existing videos or images. Although FaceApp does not create deepfakes like the other platforms discussed, it can enhance or alter images and videos. While FaceApp is known most for its ability to modify lighting or fix imperfections in a video, it can also change the hair color, age or gender expression of a person.

- Avatarify allows users to create a live impersonation of a person with just an image of that individual. Avatarify may be integrated with popular video conferencing platforms, and thus has the potential to be used for deception in remote court proceedings like virtual hearings.

- Descript, including its Lyrebird division, and Resemble AI are two different platforms that offer voice cloning to generate synthetic audio of the original speaker. Only a few minutes of audio is needed for these platforms, and the synthetic audio can be generated by inputting text of the desired audio.

- VoiceAI is a modulation tool that can alter voices in real time for free. VoiceAI can modify live audio streams. This is a powerful tool for impersonation, and a concern for virtual hearings, depositions and even remote testimony at trial.

These products are frequently marketed as easy to use, with no skills or training required. You thus have to be on guard for the use of such applications in your cases, including situations where your own clients may offer up deepfakes.

Deepfake Detection Tools

Several deepfake detection technologies are currently available, and they can be divided based on their underlying methodology and technology.

Deep Learning Approaches

Deep learning approaches, such as convolutional neural networks or recurrent neural networks, are types of machine learning programs that use large datasets to learn patterns characteristic of genuine media. These models then analyze new media to identify similar patterns or detect anomalies that may indicate manipulation. In other words, the type of technology making the deepfakes is also being used to detect them.

These programs include Sensity AI, which is a popular technology used to scan videos and images for signs of manipulation, such as unnatural movements or inconsistencies in background elements.

FaceForensics++, although not a commercial solution for detection like Sensity AI, is a research-based tool to train detection technologies like Sensity AI. FaceForensics++ offers companies and developers a large dataset of manipulated videos to train deep learning networks to detect deepfakes.

Biometric and Behavioral Analysis

Biometric and behavioral analysis focuses on human traits that are difficult to fake, such as voice biometrics. Phoneme-viseme mismatch analysis, for instance, checks if lip movements match the corresponding spoken audio. This analysis can be done manually with the human eye or supported by machine learning.

Intel's FakeCatcher works by analyzing blood flow in video pixels to determine if the person is real — when a heart pumps blood, veins change in color.[2]

Digital Forensic Techniques

Digital forensic techniques use tools that focus their analysis on signs of media alteration or tampering — usually by examining the metadata or visual inconsistencies.

Amped Authenticate, for instance, is self-described as a photo and video analysis and tampering detection tool. The software is designed to unveil the processing history of a digital image or video to determine whether a media is an unaltered original, an original generated by a specific device, or the result of manipulation using editing software. Amped Authenticate generates a detailed scientific report that it claims is admissible in court.

Pindrop analyzes audio to provide a so-called liveness score. Pindrop also offers a tool called Phoneprinting, which detects subtle anomalies in acoustic features. Similarly, the company offers Toneprinting, which allows for the authentication of customers by pinpointing their devices and matching phone numbers.

Best Practices for Evidence Collection and Discovery

At the outset of a case, you should have discussions with your staff about potential fabricated evidence and how other evidence can be obtained to prove it. You should collect and preserve corroborating evidence, such as geolocation data and phone records. For example, you may need your client's telephone records to help authenticate a recording with the defendant if it is called into question. Chain-of-custody information is crucial for supporting or challenging the authenticity of digital evidence. How the witness obtained and maintained the evidence can be best shown through metadata. To obtain metadata, you must obtain the files in native form.

Talk to your client about the potential evidence in the case to help you identify any specific evidence to look out for. If there is any anticipation of a deepfake, do not delay — have a list of forensic experts ready, and work with one as soon as the need arises.

Make sure your client understands that an allegation of deepfake evidence can increase costs. In addition, you should pursue deepfake detection tools, such as the examples above, for an initial assessment of the questionable evidence.

[2] That’s pretty amazing.

4. Article: *Bill Would Make California Courts Screen for Deepfakes,* The National Law Journal, January 26, 2024

This article is about a bill in California that would require California's judicial system to screen for deepfake evidence. It also talks about federal developments:

> Senate Bill 970 by Sen, Angelique Ashby, D-Sacramento, would direct the Judicial Council to determine a method for identifying synthetic media, which the bill defines as AI-generated audio, video and images commonly referred to as deepfakes. The judicial branch's administrative arm would also be tasked with producing educational materials to help judges, attorneys and law enforcement officers spot AI-generated evidence. * * *
>
> SB 970 also would require the sellers of AI technology to warn consumers that misuse of the product could result in civil or criminal liability. Additionally, the bill would clarify that using a deepfake of a person's image or voice without that person's consent could subject the user to civil liability. * * *
>
> Amid the legislation and litigation, Chief Justice Patricia Guerrero announced at last week's Judicial Council meeting that she has appointed Administrative Presiding Justice Mary Greenwood of the Sixth Appellate District and Alameda County Superior Court Judge Arturo Castro "to spearhead research efforts for our branch on the opportunities and challenges associated with AI."
>
> * * *
>
> At the federal level, some in the legal community have called for the expansion of evidence admissibility rules to address generative artificial intelligence. Paul Grimm, a former U.S. district judge in Maryland, recently told a federal advisory committee on evidence rules that regulations should be changed to require AI-created submissions to be found reliable and not just accurate. "Artificial intelligence algorithms are already being used right now in every facet of our lives," Grimm said. "And it's inevitable that what's going to happen is in the litigation of cases, judges are going to have to deal with the admissibility of this evidence."
>
> Companies have begun offering screening products designed to detect AI-generated content, but they aren't always accurate. Last summer, The New York Times tested five AI-detection services and found they can falter, especially with low-quality or reproduced images.

Comment: California seems to be thinking about having the judiciary deal with deepfakes in a way that is not dependent on some amendment to the Evidence Rules.

5. Article: Waxman, Court and Barros, *Proving Admissibility of AI Outputs Centers on Authenticity,* Bloomberglaw.com 2/25/25

[This article assesses the Evidence Rules and how they might apply to AI outputs. It discusses the Advisory Committee work on the subject.]

A patient walks into a clinic with an unspecified malady. The patient provides a tiny sample of blood, answers some questions, then artificial intelligence generates a medication regimen tailored to the patient's unique metabolic profile. Or a patient's incipient tumor, otherwise undetectable by human pathologists, is diagnosed by AI image processing tools.

This isn't far-fetched science fiction. Artificial intelligence is increasingly pervasive across various sectors, aiding in information gathering, analyses, predictions, and content generation. Consequently, AI generated outputs will increasingly become substantive evidence in litigation. Their admissibility, however, may raise novel issues under the Federal Rules of Evidence: particularly the authenticity of AI-generated evidence, and whether such evidence, if offered for the truth of the matter asserted, is hearsay under the FRE.

Authenticity

Introducing AI-generated evidence presents significant challenges for authenticity. Authentication requires that the proponent proffer sufficient evidence to find that the evidence is what the proponent claims it to be under Rule 901. Rule 901(b) provides examples of authenticating evidence that meet this standard, including testimony of a witness with knowledge, or evidence describing a process or system showing that it produces "an accurate result."

Outputs from generative AI may not prove easy to authenticate precisely because it generates outputs independently, and it's often not clear how the content was generated, even to an expert. That is what led at least one New York state court to hold that prior to admission of AI-generated evidence and "due to the nature of the rapid evolution of artificial intelligence and its inherent reliability issues," a hearing should be held to test the reliability of any outputs. (Generative AI is a type of artificial intelligence capable of generating new content in response to a submitted prompt by learning from a large reference database of examples).

The importance of establishing the reliability of AI-generated evidence has also caught the attention of the US Courts Advisory Committee on the FRE. Recognizing the unique nature of AI and the new challenges it poses for the evidentiary system, the committee offered proposed amendments to the FRE to address authenticity and the unique problems stemming from deepfakes. The committee proposed expanding Rule 901(b)(9) to require proponents of AI-generated outputs to produce evidence that the outputs are "reliable"—in contrast to "accurate," the current term. The proponent would have to additionally produce evidence that "describes" the

training data and software or program, and to show that the AI system produced reliable results "in this instance."[3]

The proposed amendments also address the growing concern for deepfakes. The committee formulated a two-step burden shifting test. First, the objecting party must establish that a jury could reasonably find the evidence manipulated. If successful, the evidence becomes admissible only if the proponent shows that the evidence is, more likely than not, authentic. The committee recognized that, given the pervasiveness of claims of deepfakes, the party objecting must show that a jury could reasonably find that evidence has been altered. In turn, if such a showing has been made, the proponent of the evidence would need to show it more likely than not authentic.

While proposing these rules on authenticity, the committee recognized there may be some tension when injecting concepts of reliability into questions of authenticity: there may be times when a proponent intends to offer unreliable evidence. Authenticity is only intended to determine whether the evidence is what the proponent says it is, separate from reliability. Some on the committee favored treating the unique admissibility issues of AI-generated evidence to align with the rules governing the admissibility of expert evidence rather than the rules governing authenticity.

Thus, a new rule was proposed, Rule 707, which would subject AI-generated outputs to the same requirements as the admissibility of expert testimony, governed by Rule 702. To ensure Rule 702's requirements are met, the committee contemplates that the courts would examine the inputs used by the AI system, guarantee that the objecting party has adequate access to the AI system to assess its functionality, and determine whether the process has been validated under sufficiently similar circumstances.

Hearsay

Although AI-generated outputs may face reliability challenges because they are machine-generated, this same characteristic helps machine results overcome hearsay objections. That is because the hearsay rule and its exceptions imply a human declarant, whereas an AI statement has no such declarant. For example, in *United States v. Washington*, statements made by diagnostic machines were not considered "out-of-court statements made by declarants" and "[otherwise] subject to the Confrontation Clause" in the criminal context. The Fourth Circuit further found that "[o]nly a *person* may be a declarant and make a statement," and outputs from machines are not hearsay.

Similarly, in *United States v. Channon,* machine-generated transaction records were deemed outside the parameters of Rule 801. A New Mexico court also held that because the "programs make the relevant assertions, without any intervention or modification by a person using the software," hearsay rules don't apply. Thus, so long as the output is AI-generated and

[3] Note: This proposal was considered by the Committee, but not adopted. The Committee opted for a reliability-based approach, grounded in Article 7 of the Federal Rules. See the proposed Rule 707, later in this memo.

lacks human intervention, litigants seeking to offer the output in evidence, even for the truth of the matter asserted, are likely to overcome hearsay objections.

As AI technology continues to evolve, so too will the legal frameworks governing admissibility in court. Understanding the nuances of authentication and reliability as well as hearsay will be essential when dealing with AI-generated evidence. Given AI's complexity, its outputs may increasingly be subject to standards that mirror expert testimony but remain outside the reach of any hearsay objections.

6. Article: ***Business and Commercial Litigation in Federal Courts 5th | November 2024 Update American Bar Association Section of Litigation*** by David Boies, Stephen Zack, James Lee, and Andrew Beyda

[This is a short introduction to deepfakes and considers the possibility of watermarking.]

Videos may be forged using artificial intelligence in ways that are difficult to recognize. A video can now be manipulated to show, for example, a defendant making incriminating statements that, if seen by a jury, would likely be highly prejudicial. These videos which can be created inexpensively and with minimal education or training, known as "deepfakes"— a portmanteau of "deep learning" and "fake"—can be virtually indistinguishable from authentic videos. If introduced into evidence at a trial, counsel for the defendant would ideally move to strike the evidence. However, because "deepfakes" are increasingly difficult to recognize even by experts, judges in such cases may have trouble determining whether to strike the video evidence or allow it in. Normally, an expert would be required to prove the authenticity of the video in court or the video might be authenticated by looking at its digital signature.

"Deepfakes," however, provide a unique challenge to the verification of a video's authenticity because methods of digitally authenticating videos can also be manipulated such that there is essentially no method to conclusively determine the authenticity of video evidence. There may still be some subtle indicators that a video is fake, such as a face not blinking normally, lip synching being off, teeth that look unnatural, patchy skin, and hair that may not move naturally. Analyzing content for inconsistencies is a fine passive approach in dealing with deepfakes, but a more active approach in the future could better assist authenticating content. Using a digital inspection company to watermark recordings at the time they are captured with a unique digital fingerprint that no one, including the company, can alter is one way that could help authenticating content. The image could be investigated to determine if the content is consistent with the digital signature captured at the time of recording. Inconsistencies could prove that the image was tempered with. Attorneys should be cognizant of "deepfakes" which will certainly become a more prominent evidence issue in the near future.

7. Article, Bridget Grathwohl, *Preserving Truth on the Prairie: Navigating Deepfake Challenges to Self-Authenticating Evidence in North Dakota Courts,* 99 N.D. L. Rev. 657 (2024).

[This article points up that deepfakes may extend to raising questions about items that are self-authenticating.]

Deepfakes are particularly harmful to self-authenticating evidence because they are easily fabricated by AI technology. Newspapers are categorized as self-authenticating evidence. Using image-manipulating technology, creating a deepfake of a Bismarck Tribune headline would be a simple and affordable task. Further, in response to the growing practice of equipping law enforcement officers with body cameras, and recording depositions and interrogations, tech companies have developed tools that can upload authenticating data at the time of the video's capture. This process relies on generating hashes to a blockchain so that if the content is altered, the data will not match the hashes on the blockchain. This process is categorized as a self-authenticating procedure by allowing for "a record [to be] generated by an electronic process or system that produces an accurate result," which removes the requirement to provide extrinsic evidence.

Therefore, videos and other digital evidence, are susceptible to deepfake manipulation because of their authentication process. Included in this category of self-authenticating evidence, could be "GPS data, cell phone photos, text messages, and other electronic evidence, if the proponent introduced an authentication certificate ... showing that the ESI [electronically stored information] was obtained from systems that produced reliable results." [quoting Rule 902(13)]. The problem lies in deepfake's ability to digitally manipulate the authentication certificate, thus potentially tainting the evidence, and the trial's outcome.

Rules 901 and 902 must be amended to bring North Dakota's evidentiary rules in sync with modern technology. A proposed addition to Rule 901 is as follows:

> "(Proposed New) Rule 901(b)(11): Before a court admits photographic evidence under this rule, a party may request a hearing requiring the proponent to corroborate the source of information by additional sources."

By codifying an existing authentication method, this proposed rule would provide parties an avenue to address deepfake allegations. Upon the allegation of a deepfake, a preliminary evidentiary hearing could be granted so parties can present additional evidence from approved categories to support or debunk the deepfake allegation. Categories of additional evidence may include metadata or a digital certificate, testimony from a records custodian or expert on

identifying deepfakes, and relevant circumstantial evidence. Following the hearing, the court would determine sufficiency, which is "merely a preliminary question of conditional relevancy" that the evidence truly is what it is claimed to be. The jury still ultimately determines credibility and weight of the evidence that is admitted. * * *

Judges need to make sure that experts summoned to verify AI evidence either have direct experience with the facts they're authenticating or are qualified to use information from reliable sources beyond their personal knowledge in their testimony. Courts could also delegate tasks such as determining the admissibility of a proposed deepfake to a judicial referee. Determining the admissibility of AI-involved evidence is not the type of issue that is well suited to be resolved in the middle of a trial, or on the fly. To compensate for the time-intensive inquiry in discerning allegedly AI-manipulated evidence, the modified rule should include a timing requirement. For instance, parties alleging the opponent's evidence is fabricated by AI may challenge the evidence through pre-trial motions; this would avoid delay or misleading the jury. A specified amount of time before the trial should be allowed so the judge can hear competing arguments, review the materials, and render a decision.

By amending the rules of evidence to include enhanced authentication standards or using specially appointed experts to decipher an alleged deepfake, courts may add another layer of security to ensure the admitted evidence is properly authenticated and not manipulated. While there are no easy solutions, it is crucial to develop procedures to reliably litigate the provenance of disputed content. * * *

With deepfake's increased pervasiveness and believability, it becomes imperative to strike a balance between embracing technology's benefits and preserving the fundamental principles of justice underpinning North Dakota's legal system. * * * An amendment to North Dakota's authentication procedures should be made so allegations of deepfake evidence can be tested at a preliminary hearing to determine its authenticity. By proactively addressing these challenges, North Dakota can protect its courtrooms from the harmful effects of digitally manipulated evidence to preserve truth on the prairie.

Comment: The author makes a good point that self-authenticating items are as susceptible to deepfakery as are items authenticated under Rule 901. Any rule regarding deepfakes should apply to self-authenticating items as well. The draft amendment on deepfakes, set forth later in this memo, has been changed to clarify that it applies to authentication under both Rule 901 and 902.

The article's suggested amendment – a complicated hearing after a mere allegation of a deepfake, is problematic, for reasons already discussed by the Committee. If there is going to be a rule, it must first set out a requirement that a mere allegation of deep

fakery is insufficient to justify a special authentication enquiry. The draft rule, set forth later in this memo, requires the proponent to provide evidence that would allow a reasonable person to find that there has been fakery.

8. Article: *Federal Judicial Conference to Revise Rules of Evidence to Address AI Risks,* Debevoise & Plimpton, March 20, 2025

[This is a good article that accurately describes the Advisory Committee's work on AI. It also provides good examples of how deepfakes and machine learning may raise evidentiary problems.]

Important changes to the Federal Rules of Evidence ("FRE") regarding the use of AI may be on the horizon, including a proposal before the Federal Judicial Conference's Advisory Committee on Evidence Rules that would require federal courts to apply FRE Rule 702 standards to machine-generated evidence. In this In Depth, we discuss how litigants can begin taking steps now to appropriately leverage powerful AI tools in courtroom presentations.

Key takeaways include:

Meeting the New Standards for Admission of AI-Generated Evidence: Litigants who want to rely on AI-generated evidence should be prepared to show that the AI system generates reliable and consistently accurate results when applied to similar facts and circumstances and that the methodology underlying the results is reproduceable, including by opponents and peer reviewers. Expectations for Authentication of Audio, Video, or Photographic Evidence: Considering the federal judiciary's concerns around the impact of deepfakes on litigation and the potential for increased evidentiary disputes around AI-generated evidence, litigants should be planning ahead for disputes on authentication of evidence that may (or may not) have been altered or generated using AI.

As the first quarter of 2025 draws to a close and we look ahead to the spring, important changes to the Federal Rules of Evidence ("FRE") regarding the use of AI in the courtroom are on the horizon. Specifically, the Federal Judicial Conference's Advisory Committee on Evidence Rules (the "Committee") is expected to vote on at least one AI-specific proposal at its next meeting on May 2, 2025. The Committee has been grappling with how to handle evidence that is a product of machine learning, which would be subject to Rule 702 if propounded by a human expert.

At the Committee's last meeting in November 2024, it agreed to develop a formal proposal for a new rule—which, if adopted, would become Rule 707 of the FRE—that would require federal courts to apply Rule 702's standards to machine-generated evidence. This means that the proponent of such evidence would, among other things, need to demonstrate that the evidence is

the product of reliable principles and methods, and that those principles and methods were reliably applied to the facts of the case.

The Committee is also expected to continue its discussion of a second issue: how to safeguard against AI-generated deepfake audio or video evidence. For now, the Committee is likely to continue to take a wait-and-see approach because existing rules may be sufficiently flexible to deal with this issue. That being said, the Committee is likely to assess language for a possible amendment, so as to be able to respond if problems do arise.

Reliability of AI-Generated Evidence

Proposed new Rule 707 aims to address the reliability of AI-generated evidence that is akin to expert testimony—and therefore comes with similar concerns about reliability, analytical error or incompleteness, inaccuracy, bias, and/or lack of interpretability. * * * Those concerns are heightened with respect to AI-generated content because it may be the result of complex processes that are difficult (if not impossible) to audit and certify. Examples of AI-generated evidence could include:

> • In a securities litigation, an AI system analyzes stock trading patterns over the last ten years to demonstrate the relative magnitude of the stock drop as a percentage of the Dow Jones Industrial Average, or to assess how likely it is that the drop in price was caused by a particular event.
>
> • An AI system analyzes keycard access records, iPhone GPS tracking, and Outlook calendar entries to demonstrate that an individual did not attend any of the senior management meetings over a period of time where alleged wrongdoing occurred.
>
> • In a copyright dispute, an AI system analyzes image data to determine whether two works are substantially similar.
>
> • An AI system assesses the complexity of an allegedly stolen software program in a trade secret dispute and renders an assessment of how long it would take to independently develop the code based on its complexity (and without the benefit of the allegedly misappropriated code).

Under the current rules, the methodologies that human expert witnesses employ and rely on are subject to Rule 702, which requires them to, among other things, establish that their testimony is based on sufficient facts or data; is the product of reliable principles and methods; and that those principles and methods are reliably applied to the facts of the case. See FRE Rule 702 (a)-(d). However, if machine or software output is presented on its own, without the

accompaniment of a human expert, Rule 702 isn't obviously applicable, see Reporter's Proposal at 51. This leaves courts and litigants to craft case-by-case frameworks for deciding when and whether AI-driven software systems can be allowed to make predictions or inferences that can be converted into trial testimony.

As a result, at its May 2, 2025 meeting, the Committee is expected to vote on proposed new Rule 707, Machine-Generated Evidence, drafted by the Committee's Reporter, Professor Daniel J. Capra of Fordham School of Law. (If approved, the Rule will be published for public comment.) The text of the proposed Rule provides:

> Where the output of a process or system would be subject to Rule 702 if testified to by a human witness, the court must find that the output satisfies the requirements of Rule 702 (a)-(d). This rule does not apply to the output of basic scientific instruments or routinely relied upon commercial software.

For instance, if a party uses AI to calculate a damages amount without proffering a damages expert, then they would need to prove that adequate data were used as the inputs for the AI program; that the AI program used reliable principles and methods; and that the resulting output is valid and reflects a reliable application of the principles and methods to the inputs, among other things. If adopted, Rule 707 analysis could require a determination of whether the training data is sufficiently representative to render an accurate output; whether the opponent and independent researchers have been provided sufficient access to the program to allow for adversarial scrutiny and sufficient peer review; and whether the process has been validated in sufficiently similar circumstances.

That the Committee is likely to approve this proposal underscores the federal judiciary's concerns about the reliability of certain AI-generated evidence that litigants have already sought to introduce in courtrooms. For example, U.S. District Judge Edgardo Ramos of the U.S. District for the Southern District of New York admonished a law firm for submitting ChatGPT-generated responses as evidence of reasonable attorney hourly rates because "ChatGPT has been shown to be an unreliable resource*." Z.H. v. New York City Dep't of Educ*., 2024 WL 3385690, at *5 (S.D.N.Y. Jul. 12, 2024). U.S. District Judge Paul Engelmayer similarly rejected AI-generated evidence because the proponent did "not identify the inputs on which ChatGPT relied" or substantiate that ChatGPT considered "very real and relevant" legal precedents. *J.G. v. New York City Dep't of Educ.,* 719 F. Supp. 3d 293, 308 (S.D.N.Y. 2024).

State courts also are beginning to grapple with the reliability of AI-generated evidence. For example:

In *Washington v. Puloka*, No. 21-1-04851-2 (Super. Ct. King Co. Wash. March 29, 2024), a trial judge excluded an expert's video where AI was used to increase resolution, sharpness, and definition because the expert "did not know what videos the AI-enhancement models are 'trained' on, did not know whether such models employ 'generative AI' in their algorithms, and agreed that such algorithms are opaque and proprietary." Id. at Par. 10.

In Matter of Weber as Tr. of Michael S. Weber Tr., 220 N.Y.S.3d 620 (N.Y. Sur. Ct. 2024), a New York state judge rejected a damages expert's financial calculations in part because he relied on Microsoft Copilot—a large language model generative AI chatbot—to perform calculations but could not describe the sources Copilot relied upon or how the AI tool arrived at its conclusion. In doing so, the judge reran the expert's inquiries on Copilot getting different results each time, and queried Copilot regarding its reliability, to which Copilot self-reported that it should be "check[ed] with experts for critical issues."

Reports indicate that a Florida state judge in Broward County recently donned a virtual reality headset provided by the defense to view a virtual scene of the crime from the perspective of the defendant who is charged with aggravated assault. The parties are likely to litigate the reliability of the technology before the judge decides if it can be used by a jury.

In both *Puloka* and *Weber,* the state courts emphasized that their respective jurisdictions follow the *Frye* standard, requiring scientific evidence to be generally accepted in its field, and found no evidence supporting the general acceptance of AI-generated evidence. These initial judicial reactions indicate that experts should be prepared to satisfy the jurisdiction-specific reliability standards for AI technologies they rely on when rendering their expert opinions.

Keeping Deepfakes Out of the Courtroom

A related but distinct concern involves rules for handling AI-generated deepfakes. Although some scholars have warned of a coming "perfect evidentiary storm" due to the difficulty for even computers to detect deepfakes, see Reporter's Proposal at 5, the Committee—at least for now—is unconvinced that the existing Rules need to be immediately amended (or new ones introduced) to deal with this issue. Those expressing skepticism recalled that, when social media and texting first became popular, there were similar concerns about a judicial quagmire arising from parties routinely challenging admission of their texts/social media posts on the grounds that the accounts had been hacked and the texts/posts were not, in fact, their own. But the feared flood of litigation never arrived and FRE's Rule 901 proved up to the task of adjudicating the relatively few challenges that did come up.

In light of that history, the Committee has developed—but does not yet plan to vote on—text that would amend Rule 901 to add a subsection (c) as follows:

> If a party challenging the authenticity of computer-generated or other electronic evidence demonstrates to the court that a jury reasonably could find that the evidence has been fabricated, in whole or in part, by artificial intelligence, the evidence is admissible only if the proponent demonstrates to the court that it is more likely than not authentic.

This addition would constitute a proactive approach to addressing the potential misuse of AI-generated deepfakes in the courtroom, which would allow an opponent of the evidence to challenge the authenticity of an alleged deepfake and would cover all evidentiary deepfake disputes. But, as some Committee members have pointed out, creating a distinct "right-to-challenge" could itself invite unnecessary sparring among litigants and encourage them to refuse to enter into otherwise routine stipulations. Nor is it clear how far litigants could push any new rule in challenging other types of AI-generated materials as "inauthentic" even if they are not intentionally deceptive including, for example:

- Unofficial transcripts or summaries of meetings produced by AI that are largely, but not entirely, accurate.

- AI-simulated or altered evidence such as a video that recreates a crime scene for a jury to demonstrate how dark it was and how difficult it could have been for a witness to view the crime from a certain distance.

- AI-enhancements to otherwise unaltered videos or photographs to increase their resolution.

- Evidence that was altered by AI for some reason that is not material for the purpose for which it is being offered (e.g., a photo that was altered to remove someone in the background, that later becomes relevant in a litigation).

Because of the potential for increased evidentiary disputes stemming from the proposed amendment, the Committee has also discussed whether to address bad-faith evidentiary challenges by potentially issuing guidance to courts regarding the issuance of sanctions for such bad-faith challenges. This is another area to watch at the upcoming May meeting.

Practical Considerations

Even if new Rule 707 is approved for public comment in May, formal adoption of the Rule is still likely years away. That being said, even now litigators can begin thinking through steps to

ensure they can appropriately leverage potentially powerful AI tools in courtroom presentations, including:

Conducting Robust Diligence Before Attempting to Admit AI-Generated Evidence. Litigants who want to rely on AI-generated evidence should consider how to establish that the AI generates reliable, consistently accurate results when applied to similar facts and circumstances, and that the methodology underlying those results is reproduceable, including by opponents and peer reviewers.

Preparing to Disclose AI Systems for Adversarial Scrutiny. The draft Committee Note to proposed Rule 707 implies an expectation that proponents of AI-generated evidence will provide their opponents and independent researchers with access to the AI technology for adversarial scrutiny—the validation studies conducted by the developer or related entities are unlikely to suffice. Litigants should think carefully now about the legal, commercial, and reputational implications of having to disclose their AI technologies both before significantly investing in them and before seeking to admit AI-generated evidence.

Developing Methods to Efficiently Authenticate Audio, Video, or Photographic Evidence. In light of the federal judiciary's concern with possible use of deepfakes in litigation and the potential for increased evidentiary disputes over AI-generated evidence, litigants should consider developing strategies and capabilities to authenticate evidence that could have, but has not been, altered or fabricated by AI. Examples could include chain of custody record-keeping, use of software to detect image or audio manipulation, as well as retaining qualified forensic experts that can identify AI-generated alterations (or, conversely, testify to their absence).

9. Article: *Changes Proposed to the Federal Rules of Evidence to Address AI Usage, law.com* November 15, 2024

[This is another article about the outcome of the Committee's Fall 2024 meeting.]

The U.S. Courts Advisory Committee on the Federal Rules of Evidence has offered proposed amendments to the rules of evidence to address the use of artificial intelligence (AI) in litigation. The proposed amendments would expand upon Rule 901 (Authenticating or Identifying Evidence) and would create a new rule – Rule 707, "Machine-generated Evidence."

Changes to Rule 901

Rule 901(a) provides that "to satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." Subsection (b) then provides specific examples of the types of

evidence that satisfy the requirements of section (a). The proposed amendments would add language to the list of examples that describes what is needed to demonstrate the authenticity of evidence that is "generated by artificial intelligence." Under the amended rule, the proponent of such evidence would need to produce evidence that, among others "(i) describes the training data and software or program that was used; and (ii) shows that they produced reliable results in this instance."[4]

Additionally, the proposed amendment adds a new section – subsection (c) – to directly address "deepfakes" and the burden for advancing or opposing evidence that is suspected of being "altered or fabricated, in whole or in part, by artificial intelligence." This section would include a two-step test, with a shifting burden, when the opponent of a piece of evidence alleges alteration or fabrication by artificial intelligence. Initially, the opponent of the evidence must demonstrate "to the court that a jury reasonably could find" that the evidence has been altered. Upon such a showing, the burden then shifts to the proponent, and the evidence is "admissible only if the proponent demonstrates to the court that it is more likely than not authentic."

New Rule 707

The proposed amendments also seek to subject AI outputs to the same standard used to assess the admissibility of expert witness testimony, namely Rule 702. Under proposed Rule 707, "[w]here the output of a process or system would be subject to Rule 702 if testified to by a human witness, the court must find that the output satisfies the requirements of Rule 702 (a)-(d)." For example, a damages expert in a business dispute would normally look at factors that relate to the business' performance and would apply those figures through a formula. The expert would then testify as to the reasonableness and reliability of the methodology. However, AI cannot testify for itself as to how it arrives at its output.

Therefore, if AI is used to calculate the final damages amount, then the proponent would need to demonstrate: a) that the output would help the trier of fact, b) sufficient facts or data were used as the inputs for the AI program, c) the AI program used reliable principles and methods, and d) that the output reflects a reliable application of the principles and methods to the inputs.

To demonstrate that these requirements are met, the committee noted courts would consider what inputs are used, ensure that the opponent has sufficient access to the AI program to evaluate its functioning, and consider whether the process has been validated in sufficiently similar circumstances.

[4] Note: This amendment was considered but not proposed by the Committee. The Committee determined that the problem the rule would address is one of reliability, not authenticity, and so the concerns should be treated under Article 7.

There are several purposes for subjecting AI-outputs to the standard of reliability applied to expert witnesses: to prevent against function creep, analytical error, inaccuracy or bias, and lack of interpretability.

The proposed amendment specifically exempts "basic scientific instruments or routinely relied upon commercial software," which the committee noted would include outputs of non-AI tools such as "a mercury-based thermometer, battery-operated digital thermometer, or automated averaging of data in a spreadsheet."

Takeaways

As the use of AI tools in litigation expands, courts and rules committees are addressing how best to manage the use of AI generated information as evidence. These proposed amendments, which are still being considered, are designed to ensure the authenticity and reliability of evidence presented to the trier of fact.

10. Article: James Bickford *AI Is Coming, But the Rules Aren't Ready,* https://georgetownlawtechreview.org/ai-is-coming-but-the-rules-arent-ready/GLTR-01-2025/

[This is an overheated article that critiques the Committee, but mainly the Reporter, for refusing to go forward immediately with a rule on deepfakes. It talks about the Grimm-Grossman proposal, and about the Delfino proposal, but says nothing about the proposal that was actually crafted by the Advisory Committee. So, whatever.]

In 2024, the Advisory Committee on Evidence Rules considered amendments to Rule 901 that would address potentially AI-generated evidence. The Committee declined to adopt these proposals. Daniel J. Capra, a Fordham Law professor who serves as the reporter to the Committee, believes that a cautious approach is preferable while the technology is so rapidly advancing: "It surely makes sense to monitor the case law for (at least) a year to see how the courts handle AI-related evidence under the existing, flexible, Federal Rules."

The Committee's "cautious approach" of doing nothing is, in fact, a reckless one. The Committee even acknowledged this when discussing amendments to Rule 702 that dealt with evaluating AI as an "expert witness," during which Capra recognized the importance of having a rule "in the bullpen" to deal with AI in the courtroom. The rapid advance of AI technology is not a reason to postpone new rules but to create them as soon as possible. Given the unique challenges presented by AI-generated content, the Committee must change course and amend Rule 901 in 2025 or risk the courts wading through a deluge of AI-related evidentiary questions unguided.

AI-Generated Evidence Presents Unique Challenges in the Courtroom

AI presents unprecedented evidentiary challenges, and it is imprudent not to provide some rules by which courts can evaluate the validity of evidence. The proliferation of AI tools enables almost anyone to create false videos, audio, or photos that can later appear in court. Despite the best efforts of the tech community, there are no consistently reliable tools to detect AI-generated images and media. As it stands, questions on the authenticity of evidence will often have to be determined by the jury. This creates two risks: juries may believe that false evidence is real, and they may believe that real evidence is false.

By and large, people have difficulty identifying deepfakes. Recently, a Baltimore principal was the subject of a social media firestorm due to a purported recording of him engaging in a racist rant about Black students. A police investigation later determined that the recording was a fake created by a school employee with whom the principal had a payment dispute. While in that case the police were able to determine the origin of the recording, defendants will not always benefit from a thorough investigation to determine whether evidence against them is faked.[5]

On the other hand, as public awareness of AI proliferates, it will become easier for anyone to claim that any evidence is a machine-generated fake. High-profile defendants are already alleging that evidence against them is AI-generated. While courts are so far unconvinced by such claims,[6] the opportunity for defendants to make them presents what digital forensics expert Harry [it's Hani] Farid calls a classic "Liar's Dividend" – as photos, videos, and recordings become easier to fake, the less faith the public will have in them, which bad actors can take advantage of to discredit any evidence against them.

Rule 901 Needs a New Subsection for Authentication of AI Evidence

In light of the difficulties juries may face in determining the authenticity of evidence, the Committee must approve changes to Rule 901 as soon as possible. This should take the form of a new subsection, 901(c), to specifically address the authentication of AI evidence. Two proposals for such a subsection were brought before the Committee this year, one proposed by Paul W. Grimm and Maura R. Grossman and the other by Professor Rebecca Delfino. While the Committee did not move forward with either, each proposal has ideas that the Committee should consider for next year.

[5] Note: to illustrate the crisis by giving, as the only example, a case where the deepfake was found out --- tells you something.

[6] Again, examples but no problem yet.

Grimm and Grossman's proposal for 901(c) centers around what to do in the case of uncertainty regarding the authenticity of evidence. The proposed rule would allow judges to revoke the jury's duty of determining the authenticity of computer-generated evidence if there was some real controversy between the parties so long as doing so does not overly burden the proponent's case. While this could mitigate some of the prejudicial effects that AI-generated evidence has on juries, it does little to solve the issue of the "Liar's Dividend," and it does nothing to assure the jury that the evidence introduced is, in fact, authentic.

Professor Delfino's proposal is significantly stricter. Delfino's proposed 901(c) would take judgments about the authenticity of all audiovisual evidence out of the jury's hands altogether, as judges would engage in mandatory evaluations of authenticity outside of the presence of juries.[7] Delfino explains that juries would be instructed that evidence deemed authentic by the court must be considered authentic by the jury. This would nearly eliminate the "Liar's Dividend" as parties would no longer be able to exploit the skepticism of the jury towards the authenticity of evidence.[8] This is a more effective rule than Grimm and Grossman's but is likely too harsh, as it applies to all audiovisual evidence rather than specifically electronic evidence. This rule would apply to both modern digital video recordings and video cassettes from the 1980s, and it could bog down the court in authenticity determinations beyond what is necessary to guard against AI-manipulated evidence. Moreover, instructing a jury to dismiss its judgment and skepticism is both hard to enforce for the court and hard to obey for a juror.

Conclusion

To be maximally effective, the Committee must draw on both proposals to form a rule that addresses the problems with AI evidence. The new proposal must be more lenient than Delfino's and stricter than Grimm and Grossman's. This can be achieved by taking the basic structure of Delfino's proposal and limiting its scope to only electronic evidence, like in Grimm and Grossman's proposal. Additionally, rather than prohibiting juries from considering whether authenticated evidence might be false, it would be more effective to prohibit the parties from alleging that evidence is false after it has been authenticated. This would significantly limit the effectiveness of the "Liar's Dividend" while not being so overbroad as to be too burdensome.

Regardless of what rule the Committee ultimately adopts, courts need to have a rule "in the bullpen" to deal with the authentication of AI evidence as soon as possible before AI-generated images and video become so lifelike as to be entirely indistinguishable from the real thing.

[7] Professor Delfino is no longer advocating this position. Her modified proposal can be found in Section VI, infra.

[8] This assertion assumes that the jury follows the instruction not to consider the possibility of a deepfake. That assumption is dubious.

Comment: Where do you put a rule that would "prohibit the parties from alleging that evidence is false after it has been authenticated?" That rule is not about evidence. See the discussion later in the memo about the Liars' Dividend.

One of the problems with prohibiting arguments to the jury is that at least under the current rules, authenticity is ultimately for the jury. An opponent can in fact bring in evidence (and argument supported by the evidence) once it has passed the judge's screening. So it is a real sea-change to say that authenticity is usually for the jury, but not at all for the jury when it comes to audios and videos.

11. Article: https://gizmodo.com/how-to-we-stop-deepfakes-from-tricking-juries-2000521201

[This is an article about the threat posed by the use of deepfakes as evidence, and it discusses the Advisory Committee's work.]

Reflecting on the evidence that passes through her Phoenix, Arizona courtroom, superior court judge Pamela Gates says she's becoming less confident that the average person can sort out the truth.

Say a victim presents a photograph showing bruises on their arm and the defendant argues that the injuries were digitally added to the image. Or perhaps a plaintiff submits an incriminating recording and the defendant protests that while the voice sounds identical to theirs, they never spoke the words. In an era where anyone can use free generative AI tools to create convincing images, video, and audio, judges like Gates are increasingly worried that courts aren't equipped to distinguish authentic material from deepfakes.

"You had a better ability to assess [evidence in the past] just using your common sense, the totality of the circumstances, and your ability to verify the authenticity by looking at it," said Gates, who is chairing an Arizona state court workgroup examining how to handle AI-generated evidence. "That ability to determine based on looking at it is gone."

The explosion of cheap generative AI systems has prompted some prominent legal scholars to call for changes to rules that have governed court evidence in the U.S. for 50 years. Their proposals, including several that were reviewed by a federal court advisory committee earlier this month, would shift the burden of determining authenticity away from juries and place more responsibility on judges to separate fact from fiction before trials begin.

"The way the rules function now is if there's any question about whether the evidence is authentic or not it should go to the jury," said Maura Grossman, a computer science and law

professor who, along with former federal judge Paul Grimm, has authored several proposed changes to the federal rules of evidence aimed at deepfakes. “We’re saying wait a second, we know how impactful this stuff is on the jury and they can’t just strike that [from their memory], so give the court more power. And that’s a big change”

Jurors find audio-visual evidence convincing and hard to forget. Rebecca Delfino, an associate dean and law professor at Loyola Law School who has proposed her own changes to evidentiary rules, points to studies showing that exposure to fabricated videos can convince people to give false testimony about events they witnessed and that jurors who see video evidence in addition to hearing oral testimony are more than six times as likely to retain information than if they just heard the testimony.

Judges already have some power to exclude potentially fake evidence, but the standard parties must meet to get contested evidence before a jury is relatively low. Under current federal rules, if one party were to claim that an audio recording wasn’t their voice the opposing party would need only call a witness familiar with their voice to testify to its similarity. In most cases, that would satisfy the burden of proof necessary to get the recording before a jury, Grossman said.

Given the current quality of deepfaked audio and images—which, as scammers have demonstrated, can trick parents into believing they’re hearing or seeing their children—the proponents of new court rules say AI fabrications will easily pass that low barrier.

They also want to protect juries from the opposite problem: litigants who claim that legitimate evidence is fake. They worry that the glut of AI-generated content people encounter online will predispose jurors to believe those false accusations, which scholars have dubbed the liar’s dividend.

Several defendants have already attempted that argument in high-profile cases.[9] Lawyers for rioters who stormed the U.S. Capitol building on Jan. 6, 2021, argued that critical video evidence in the trials may have been fake. And in a civil trial involving a fatal Tesla crash, attorneys for Elon Musk suggested that videos of Musk boasting about the safety of the car brand’s autopilot feature may have been AI-generated.

“Any time you have an audio-visual image in a trial, which is the most common type of evidence presented at any trial, there’s a potential for someone to make that claim,” Delfino said. “There’s a real risk that it’s not only going to extend and prolong trials but utterly befuddle and confuse juries. And there’s a strong risk that smart attorneys are going to use it to confuse juries until they throw up their hands and say ‘I don’t know.’”

[9] Note by Reporter: Attempted but without success.

On November 8, 2024, the federal Advisory Committee on Evidence Rules reviewed the latest rule proposal from Grossman and Grimm, which would empower judges to exert a stronger gatekeeping role over evidence. Under their new rule, a litigant challenging the authenticity of evidence would have to provide sufficient proof to convince a judge that a jury "reasonably could find" that the evidence had been altered or fabricated. From there, the burden would shift back to the party seeking to introduce the contested evidence to provide corroborating information. Finally, it would be up to the judge in a pre-trial hearing to decide whether the probative value of the evidence—the light it sheds on the case—outweighs the prejudice or potential harm that would be done if a jury saw it.

Delfino's proposals, which she laid out in a series of law journal articles * * * would take deepfake questions entirely out of the hands of the jury. Her first rule would require that the party claiming a piece of evidence is AI-generated obtain a forensic expert's opinion regarding its authenticity well before a trial began. The judge would review that report and other arguments presented and, based on the preponderance of the evidence, decide whether the audio or image in question is real and therefore admissible. During the trial, the judge would then instruct the jury to consider the evidence authentic.[10]

Additionally, Delfino proposes that the party making the deepfake allegation should pay for the forensic expert—making it costly to falsely cry deepfake—unless the judge determines that the party doesn't have sufficient financial resources to cover the cost of the expert and the other party should pay instead.

No quick fix

Any changes to the federal rules of evidence would take years to be finalized and first need to be approved by a variety of committees and, ultimately, the Supreme Court. So far, the Advisory Committee on Evidence Rules has chosen not to move forward with any of the proposals aimed at deepfakes. Fordham Law School professor Daniel Capra, who is tasked with investigating evidence issues for the committee, has said it may be wise to wait and see how judges handle deepfake cases within the existing rules before making a change. But in his most recent report, he added that "a [new] rule may be necessary because deepfakes may present a true watershed moment."

In Arizona, Gates' committee on AI-generated evidence has been considering whether there's a technological solution to the deepfake problem that courts could quickly implement. Academic researchers, government forensics experts, and big tech companies are in an arms race

[10] Reporter's note: Again, that position has been abandoned.

with generative AI developers to build tools that can detect fake content or add digital watermarks to it at the point it's created.

"I don't think any of them are ready for use in the court," Gates said of the AI-detection tools she's seen.

V.S. Subrahmanian, a computer science professor and deepfake expert at Northwestern University, and his colleagues recently tested the performance of four well-known deepfake detectors. The results weren't encouraging: the tools labeled between 71 and 99 percent of fake videos as real. Subrahmanian said that, at least in the near term, he doesn't expect watermarking technologies to be widespread or reliable enough to solve the problem either. "Whatever the protection is, there's going to be somebody who wants to figure out how to strip it out."

Access to Justice

So far, there have been few publicized cases where courts have had to confront deepfakes or claims that evidence was AI-generated. * * * The judges and legal scholars Gizmodo spoke to said they're most concerned about cases that are unlikely to make headlines, particularly in family courts where litigants often don't have attorneys or the financial resources to hire expert witnesses.[11]

"What happens now when a family court judge is in court and I come in and I say, 'my husband's threatening me and the kids … I have a tape of him threatening us.'" Grossman said. "What on earth is that judge supposed to do under those circumstances? What tools do they have? They don't have the tools right now."

12. Article: Daniel Garrie and Jennifer Deutsch, *Deepfakes In Court Proceedings: How To Safeguard Evidence* Law360 (November 18, 2024)

[This is another article on deepfake generation and detection.]

* * *

This article delves into the latest technologies and methodologies for detecting deepfakes, examines the legal challenges of integrating these tools into courtrooms, and outlines essential steps to safeguard the reliability of evidence in an era of digital deception.

[11] Reporter's note: It's not about making "headlines"; it's about being the subject of a court ruling. The point is, as the article recognized, this has rarely happened to date.

Technologies and Methodologies

Digital Forensic Analysis

Digital forensic tools analyze the digital fingerprints left by deepfake generation processes. These tools scrutinize videos and images for inconsistencies in pixel patterns, compression artifacts and editing traces that are not perceptible to the human eye. Forensic techniques can also detect irregularities in lighting, shadows and reflections that are often overlooked by deepfake algorithms.

Biometric Analysis

Biometric analysis focuses on the physiological and behavioral characteristics that are difficult for AI to replicate accurately. This includes the analysis of eye movements, pulse and subtle facial expressions. AI-generated content often fails to accurately mimic the complex and nuanced behaviors exhibited by real humans, providing a potential avenue for detection.

AI-Based Detection Tools

Leveraging AI to fight AI, researchers have developed detection models that can differentiate between genuine and manipulated content. These models are trained on vast datasets of real and fake videos to learn and identify the subtle differences that characterize deepfakes. However, as deepfake technology evolves, these models require continuous updates to remain effective.

Challenges

The integration of deepfake detection technologies into the legal system is fraught with challenges that extend beyond the mere identification of manipulated content. These challenges underscore the complexities of ensuring that justice keeps pace with technological advancements.

Evolving Technology

The foremost challenge is the rapid evolution of deepfake technology itself. As AI algorithms become more sophisticated, they produce manipulations that are increasingly difficult to detect. Legal systems, characterized by procedural deliberateness and a reliance on precedent, may find it challenging to adapt swiftly to these technological advancements. This lag can create windows of opportunity for deceptive evidence to influence legal outcomes.

Standardization and Validation

Another significant hurdle is the lack of standardization and validation of deepfake detection technologies. For a technology to be accepted in court, it must undergo rigorous testing to establish its reliability and accuracy. However, given the nascent state of deepfake detection, consensus on what constitutes a reliable test or an acceptable error rate is still developing. This absence of standardized protocols can lead to disputes over the admissibility of evidence, with defense and prosecution potentially challenging the validity of detection methods.

Training and Expertise

The effective deployment of deepfake detection technologies in legal settings also demands specialized knowledge and expertise. Legal professionals, including judges, lawyers and forensic experts, must be conversant with the principles underlying these technologies to evaluate their applicability and limitations in specific cases. This necessitates ongoing education and training, which can be resource-intensive.

Cost Implications

A critical and often overlooked challenge is the cost associated with accessing and utilizing deepfake detection technologies. High-quality detection tools often require significant computational resources and expertise, which can be prohibitively expensive. This raises considerations regarding equal access to justice, as parties with more resources may be better positioned to utilize these technologies, which could affect the fairness of trials. Smaller law firms and public defenders, in particular, may find it difficult to bear these costs, placing them at a disadvantage.

* * *

Conclusion

As deepfake technology continues to evolve, it presents tangible risks to the integrity of court proceedings by enabling the creation of highly convincing fraudulent evidence. By embracing the latest detection technologies, developing comprehensive legal frameworks and fostering education and collaboration, the legal community can better prepare to confront the challenges posed by digital deception.

13. Article: Maura Grossman and Paul Grimm, *Judicial Approaches to Acknowledged and Unacknowledged AI-Generated Evidence,* 24 Columbia Journal of Law & Technology (forthcoming)

The authors state that AI-related issues can arise in the presentation of evidence in four ways: 1) A party relies on AI to engage in conduct, and the dispute is over whether that reliance was reasonable in light of biases, hallucinations, etc.; 2) An expert uses AI to assist in reaching an opinion, such as by using AI to verify calculations; 3) Machine-learning is admittedly used to enhance a video or to alter a piece of evidence to make it easier to assess; and 4) A party is offering as genuine what is actually a deepfake. The authors basically agree with the approach of the Advisory Committee, that the first three examples raise questions of reliability, and are thus *Daubert*-like questions; and that the deepfake question is one of authenticity, not reliability.

The authors describe the proposals they submitted to the Advisory Committee.

Finally, the authors note that deepfakes are going to lead to more expert testimony. They elaborate as follows:

> Given the fact that the evaluation of AI evidence is, by definition, scientific, technical, or specialized, and ferreting out deepfake evidence is beyond the capabilities of lay witnesses and jurors, it is almost unavoidable that expert witnesses will be involved in cases where acknowledged and unacknowledged AI-generated evidence is presented. In both instances, the party offering the evidence will need experts to authenticate the evidence in order for it to be admitted, and the opposing party will need them to evaluate and potentially challenge the evidence, either as to authenticity (in the case of unacknowledged AI-generated evidence) or validity, reliability, and bias (in the case of acknowledged AI-generated evidence).
>
> Both the Federal Rules of Civil Procedure and Criminal Procedure have rules dealing with expert witness disclosures. Expert disclosures should be detailed and not conclusory and must address the evidentiary issues that judges have to consider when ruling on evidentiary challenges, such as the Rule 702 reliability factors and the *Daubert* factors * * *. Further, the expert needs to be sufficiently qualified to be able to testify about the AI application at issue. For example, while a law enforcement officer may be sufficiently well trained on how to use a particular AI application (e.g., a facial recognition technology), that does not mean they have the knowledge, training, or experience needed to explain how the application was developed, trained, and tested.
>
> The more troublesome situation will be the one where the parties cannot afford to hire experts. In those cases, the court should consider engaging its own expert under

Fed. R. Civ. P. 706, but there may well not be funds available to pay for that. In such cases, courts might seek out forensic practitioners who are willing to volunteer a limited amount of their time pro bono or local districts might arrange for a pool of funds to provide for experts when necessary and appropriate.

14. Article: Rebecca Wexler, Hany Farid, et. al., https://www.lawfaremedia.org/article/ai-generated-voice-evidence-poses-dangers-in-court

[The authors argue for a change to Rule 901(b) due to the risk that an identifying witness will be fooled by deepfakes.]

* * * AI-generated voices are a problem not only for fraud but also for the legal system. Indeed, accusations of AI-generated voice clones have now made their way into the courts, and the way the courts deal with audio recording evidence needs to catch up.

Under the current Federal Rules of Evidence, someone trying to introduce an audio recording of a voice can satisfy the authentication standard for admissibility merely by putting a witness on the stand who says they are familiar with the person's voice and the recording sounds like them. Specifically, Rule 901 states that the following evidence "satisfies the requirement [for admissibility]: ... An opinion identifying a person's voice—whether heard firsthand or through mechanical or electronic transmission or recording—based on hearing the voice at any time under circumstances that connect it with the alleged speaker." The rule presumes that this evidence will be "sufficient to support a finding that the item is what the proponent claims it is."

In the age of artificial intelligence, this presumption is no longer tenable. The Evidence Rulemaking Committee should amend the rules to make the enumerated examples in Rule 901(b) permissive, not mandatory. The examples should illustrate circumstances that may satisfy the authentication requirement while still leaving judge's discretion to exclude an item of evidence if there is other proof that it is a fake.

Realism of AI-Powered Voice Clones

Over the past few years, AI-powered voice synthesis and cloning has improved at an impressive clip, culminating this past year in dramatic breakthroughs. Perhaps most striking is the ability to convincingly clone a person's voice from as little as 30 seconds of reference audio using easily-accessible and low-cost commercial services.

Indeed, a recent suite of perceptual studies highlights the current realism of voice cloning. In a large-scale online study, we asked 300 people to listen to pairs of audio clips of people speaking. We then asked them a simple question: Were these clips from the same person, or a

different person? People were actually quite good at performing this discrimination when presented with audio clips of real human beings. When the two clips came from the same person, listeners correctly detected this fact with a median accuracy of 100 percent. At the same time, they were fooled only about 10 percent of the time into thinking two similar-sounding voices from different identities were the same.

The issue, however, arises when listeners hear a pair of voices comprising one real person and an AI clone of that person (generated with ElevenLabs, a voice-cloning service that is easy for anyone to use). In this case, listeners judged the real person and their AI clone to be the same person about 80 percent of the time, with one in four participants tricked by every single AI clone used in the study.

The upshot is clear: People can no longer reliably distinguish between a real voice of someone and the person's AI clone. In a second study, we also asked listeners to explicitly make a real versus AI-generated judgment on audio clips. While they performed above chance (50 percent), the average performance across listeners (64 percent) was still well below what might be desired for definitive evidence. We are not the only researchers to find evidence of this deficiency. Others have reported similar issues, although performance can vary depending on the study details. For example, two other research groups recently reported accurate real/AI discrimination superior to our findings (although still falling short of 100 percent, with rates around 70-80 percent). However, these studies did not employ current state-of-the-art AI-clone technology, which is constantly improving.

* * *

Policy Recommendation

Given these technological developments, it should not be the case that parties are entitled to introduce a voice recording to a jury merely by calling a witness to the stand who says they can identify the speaker because they are familiar with the voice. * * * Yet, under the current, mandatory version of Federal Rule of Evidence 901(b)(5), even if the party opposing that evidence were to introduce reliable forensic proof that the audio is an AI-generated fake, the rules would arguably require the judge to admit the recording. That's ridiculous.

The Evidence Rulemaking Committee should fix this problem by adding the word "may" to Rule 901(b) so that it reads: "The following are examples only—not a complete list—of evidence that may satisfy the requirement [of authenticity]" (emphasis added). This would shift admissibility for all the enumerated examples, including the option to authenticate the identity of a person's voice by calling a witness to the stand who says they recognize the speaker, to a permissive rule rather than a mandatory one.

Other aspects of the authentication rule need not change for AI specifically. To be sure, one might criticize the low sufficiency standard that makes it easy to admit all kinds of physical evidence as long as you have some basis to think it is authentic, the lack of a distinct reliability analysis for expert "machine-generated evidence," or the fact that—as with evidence law generally—it is the opposing party's burden to object in a timely fashion or forever hold their peace. Yet, if these other aspects of the rules are problematic, then they are problematic for lots of physical evidence, not just AI-generated content.

What recent perceptual studies of AI-powered voice clones do show is that a mandatory route to authentication can quickly become outdated.

Hence, it would be better for authenticating all kinds of evidence to give judges discretion to decide on a case-by-case basis whether the party offering the evidence has made a sufficient showing that it is what they claim it is. Judges would still apply the low sufficiency standard, so they would not be substituting their judgment for that of the jury, raising the burden on parties seeking to introduce evidence, or opening the floodgates to a morass of evidentiary disputes. But the rules would no longer force judges to admit evidence when there is compelling proof that the evidence is fake.

This is not a recommendation to future-proof the law: It is a need to present-proof it.

Comment: Assuming the Committee finds it necessary to deal with the risks of audio deepfakes, the better solution is to have a new Rule 901(c), as discussed later in this memo. The article seems to require a special showing from the proponent for every single audio admitted at trial. Surely the better procedure is to require the opponent to establish a foundation before something special is required of the proponent. Under the Committee's draft, assuming that the opponent provides a foundation of fakery, the evidence would not be admitted simply because the proponent has a witness who identifies the voice. The proponent in this situation would have the burden of showing authenticity by a *preponderance of the evidence.* While Rule 901(b) says that self-identification is enough to establish authenticity under the lower Rule 104(b) standard, it doesn't say that it is enough under the higher standard. Thus, the Committee draft is flexible enough to allow courts to give as much or little credit to the identification witnesses as is justified under the circumstances.

Moreover, the current provision is nowhere near as mandatory as the authors suggest. No court is going to say, "I am bound by one person's identification of the voice, even if it is clear to all that the recording is not authentic."

B. New Cases

1. *Matter of Gabriel H.,* 229 A.D.3d 1048, 215 N.Y.S.3d 613 (4th Dept. (2024).

This case concerns videos that demonstrated that a man was abusing his girlfriend's children. The defendant claimed that the videos should be given little weight, as they could be deepfakes. However, the court rejected this argument as without foundation. The court emphasized the similarities in a video of the girlfriend's room to the photographs taken by the police when they searched her home, which included the "same couch, afghan, end table, and lamp." Additionally, the court emphasized that the mother and children were all identifiable in the videos and that their "actions, dialog, and behavior" and the lack of "visible cuts or edits, or jumps in the time stamps on the videos" suggest that there was no tampering with the evidence. As such, the court found that the videos were admissible evidence.

Comment: This case is part of a trend in which courts are handling unfounded claims of "deepfake" pretty easily, in the absence of a rule. The analysis looks much like what the courts have applied to arguments that "my Facebook account was hacked." Some foundation is required before such an argument will be entertained.

2. *Gray v. Experian Information Solutions, Inc.,* 2024 WL 4945023 (W.D. Tex. 2024).

This is a case involving a delinquent bank account, and the plaintiff argued that an AI-generated document was evidence that the account was not delinquent on a certain date. The court analyzed the AI issue as follows:

> In support, Gray points to a "transcribed phone call" with Chase that he argues demonstrates that this account was not delinquent in January 2023 and January 2024. Experian disputes the veracity of this "transcribed phone call" and whether the phone call supports Gray's argument. The Court agrees with Experian. The transcription is a one-and-a-half-page document that identifies an alleged conversation that Gray had with a Chase employee simply identified as "Chase." The document does not identify the date or time of this alleged conversation. Nor does the document contain any other information verifying that it is an accurate depiction of the alleged conversation. Instead, there is an indication that the transcription is the result of an artificial intelligence program. This "transcribed phone call" is unverified and unauthenticated.

Comment: This is another case in which the AI issue is easily handled. This case involves authenticating a document that is concededly generated through AI. It is not enough simply that it exists. The plaintiff made no attempt to authenticate the document, therefore it was easily found inadmissible.

3. *Kohls v. Ellison*, 2025 WL 66514 (D.Minn. 2025):

The plaintiffs challenged a state law limiting the use of deepfakes to influence the electoral process. The Attorney General, seeking to regulate the process, submitted a declaration from an AI expert who relied on ChatGpt, and included in his report citations to articles that were hallucinations. Because of this, the court excluded the expert. The court noted the irony of the fact that the witness was an expert on the dangers of AI and misinformation, and "has fallen victim to the siren call of relying too heavily on AI—in a case that revolves around the dangers of AI, no less." The court concluded as follows:

> [A]t the end of the day, even if the errors were an innocent mistake, and even if the propositions are substantively accurate, the fact remains that Professor Hancock submitted a declaration made under penalty of perjury with fake citations. It is particularly troubling to the Court that Professor Hancock typically validates citations with a reference software when he writes academic articles but did not do so when submitting the Hancock Declaration as part of Minnesota's legal filing. One would expect that greater attention would be paid to a document submitted under penalty of perjury than academic articles. Indeed, the Court would expect greater diligence from attorneys, let alone an expert in AI misinformation at one of the country's most renowned academic institutions.
>
> The Court thus adds its voice to a growing chorus of courts around the country declaring the same message: verify AI-generated content in legal submissions! See *Mata v. Avianca, Inc*., 678 F. Supp. 3d 443, 466 (S.D.N.Y. 2023) (sanctioning attorney for including fake, AI-generated legal citations in a filing); *Park v. Kim*, 91 F.4th 610, 614–16 (2d Cir. 2023) (referring attorney for potential discipline for including fake, AI-generated legal citations in a filing); *Kruse v. Karlan*, 692 S.W.3d 43, 53 (Mo. Ct. App. 2024) (dismissing appeal because litigant filed a brief with multiple fake, AI-generated legal citations). * * *
>
> Professor Hancock's citation to fake, AI-generated sources in his declaration -- even with his helpful, thorough, and plausible explanation —shatters his credibility with this Court. * * * To be sure, the Court does not believe that Professor Hancock intentionally cited to fake sources, and the Court commends Professor Hancock and Attorney General Ellison for promptly conceding and addressing the errors in the Hancock Declaration. But the Court cannot accept false statements—innocent or not—in an expert's declaration submitted under penalty of perjury. Accordingly, given that the Hancock Declaration's errors undermine its competence and credibility, the Court will exclude consideration of Professor Hancock's expert testimony in deciding Plaintiffs'preliminary-injunction motion.

Comment: The decision extended to experts those cautions that had been visited on lawyers who submitted briefs with AI hallucinations. The court cited Rule 702, and that would be the locus of authority to regulate the expert's misuse of AI.

***4. Matter of Weber,* 2024 WL 4471664 (N.Y. Surr. Ct. 2024):**

This is a case in which the court found fault with an expert who relied on Microsoft AI to reach a conclusion, and excluded the opinion on Rule 702-type grounds (New York is a *Frye* state). Here is the court's discussion:

> The testimony revealed that Mr. Ranson relied on Microsoft Copilot, a large language model generative artificial intelligence chatbot, in cross-checking his calculations. Despite his reliance on artificial intelligence, Mr. Ranson could not recall what input or prompt he used to assist him with the Supplemental Damages Report. He also could not state what sources Copilot relied upon and could not explain any details about how Copilot works or how it arrives at a given output. There was no testimony on whether these Copilot calculations considered any fund fees or tax implications.
>
> The Court has no objective understanding as to how Copilot works, and none was elicited as part of the testimony. To illustrate the concern with this, the Court entered the following prompt into Microsoft Copilot on its Unified Court System (UCS) issued computer: "Can you calculate the value of $250,000 invested in the Vanguard Balanced Index Fund from December 31, 2004 through January 31, 2021?" and it returned a value of $949,070.97 — a number different than Mr. Ranson's. Upon running this same query on two (2) additional UCS computers, it returned values of $948,209.63 and a little more than $951,000.00, respectively. While these resulting variations are not large, the fact there are variations at all calls into question the reliability and accuracy of Copilot to generate evidence to be relied upon in a court proceeding.
>
> Interestingly, when asked the following question: "are you accurate", Copilot generated the following answer: "I aim to be accurate within the data I've been trained on and the information I can find for you. That said, my accuracy is only as good as my sources so for critical matters, it's always wise to verify." When asked "are you reliable", Copilot responded with: "[y]ou bet. When it comes to providing information and engaging in conversation, I do my best to be as reliable as possible. However, I'm also programmed to advise checking with experts for critical issues. Always good to have a second opinion!" When the follow-up question of "are your calculations reliable enough for use in court" was asked, Copilot responded with "[w]hen it comes to legal matters, any calculations or data need to meet strict standards. I can provide accurate info, but it should always be

verified by experts and accompanied by professional evaluations before being used in court."

It would seem that even Copilot itself self-checks and relies on human oversight and analysis. It is clear from these responses that the developers of the Copilot program recognize the need for its supervision by a trained human operator to verify the accuracy of the submitted information as well as the output.

Mr. Ranson was adamant in his testimony that the use of Copilot or other artificial intelligence tools, for drafting expert reports is generally accepted in the field of fiduciary services and represents the future of analysis of fiduciary decisions; however, he could not name any publications regarding its use or any other sources to confirm that it is a generally accepted methodology.

It has long been the law that New York State follows the *Frye* standard for scientific evidence and expert testimony, in that the same is required to be generally accepted in its relevant field (see *Frye v. United States*, 293 F. 1013 [D.C. Cir. 1923]).

The use of artificial intelligence is a rapidly growing reality across many industries. The mere fact that artificial intelligence has played a role, which continues to expand in our everyday lives, does not make the results generated by artificial intelligence admissible in Court. Recent decisions show that Courts have recognized that due process issues can arise when decisions are made by a software program, rather than by, or at the direction of, the analyst, especially in the use of cutting-edge technology (*People v. Wakefield*, 175 A.D.3d 158, 107 N.Y.S.3d 487 [3d Dept. 2019]). The Court of Appeals has found that certain industry specific artificial intelligence technology is generally accepted (*People v. Wakefield*, 38 N.Y.3d 367, 174 N.Y.S.3d 312, 195 N.E.3d 19 [2022] [allowing artificial intelligence assisted software analysis of DNA in a criminal case]). However, *Wakefield* involved a full *Frye* hearing that included expert testimony that explained the mathematical formulas, the processes involved, and the peer-reviewed published articles in scientific journals. In the instant case, the record is devoid of any evidence as to the reliability of Microsoft Copilot in general, let alone as it relates to how it was applied here. Without more, the Court cannot blindly accept as accurate, calculations which are performed by artificial intelligence. * * *

In reviewing cases and court practice rules from across the country, the Court finds that "Artificial Intelligence" ("A.I.") is properly defined as being any technology that uses machine learning, natural language processing, or any other computational mechanism to simulate human intelligence, including document generation, evidence creation or analysis, and legal research, and/or the capability of computer systems or algorithms to imitate

> intelligent human behavior. The Court further finds that A.I. can be either generative or assistive in nature. The Court defines "Generative Artificial Intelligence" or "Generative A.I." as artificial intelligence that is capable of generating new content (such as images or text) in response to a submitted prompt (such as a query) by learning from a large reference database of examples. A.I. assistive materials are any document or evidence prepared with the assistance of AI technologies, but not solely generated thereby.
>
> In what may be an issue of first impression, at least in Surrogate's Court practice, this Court holds that due to the nature of the rapid evolution of artificial intelligence and its inherent reliability issues that prior to evidence being introduced which has been generated by an artificial intelligence product or system, counsel has an affirmative duty to disclose the use of artificial intelligence and the evidence sought to be admitted should properly be subject to a *Frye* hearing prior to its admission, the scope of which should be determined by the Court, either in a pre-trial hearing or at the time the evidence is offered.

Comment: This is just the kind of analysis that one would hope to get under a new Rule 707. There is an expert here, but he knows nothing about the reliability of the AI that he uses. The reliability of the AI would have to be established, and under Rule 707 the basic rules of reliability set forth under Rule 702 would be applied.

***5. United States v. Whitehead*, No. 22 CRIM. 692 (LGS), 2024 WL 3085019, at *9 (S.D.N.Y. June 21, 2024):** This is a case in which an unsupported "deepfake" allegation was rejected, with the court finding that exclusion of evidence was not justified on the mere claim of deepfake. The court declared as follows:

> Defendant challenged the reliability of the recordings before the jury -- both during a *voir dire* of Special Agent Loizias before the recordings were admitted, and during Special Agent Loizias's cross-examination regarding his inability to confirm whether the recordings had been altered before being turned over to the FBI or were "deepfakes." The jury reasonably could choose to accept the reliability of the recordings despite Defendant's arguments at trial.

Comment: This court follows the important principle that it is not the proponent's duty to prove that the item is not a deepfake. The burden is on the opponent to show the likelihood of a deepfake.

6. *Pittman v. Commonwealth*, No. 0681-22-1, 2023 WL 3061782, at *6–7 (Va. Ct. App. Apr. 25, 2023)

The court held that the defendant's mere allegation of deepfake was insufficient to warrant an enquiry into whether a video was electronically manipulated. The court stated that "there is no evidence of or contention that would call into question the veracity of the video or the possibility of a 'deep fake.' And we reiterate that where there is mere speculation that contamination or

tampering could have occurred, it is not an abuse of discretion to admit the evidence and let what doubt there may be go to the weight to be given the evidence."

Comment: There is now a growing file of cases rejecting general claims of "deepfake" and requiring the opponent to provide a foundation before a deepfake analysis is required.

II. Evidentiary Problems Raised By Deepfakes and Machine-Learning

As far as the rules of evidence are concerned, the problems raised by AI fall into two categories: 1. The use of AI to generate a deepfake; and 2. The use of machine-learning to generate probative evidence, assist expert testimony, or alter evidence so that it purportedly makes the evidence more clear or easy to understand. This is a brief primer on the two problems.

A. Deepfakes [12]

A deepfake is an inauthentic audiovisual presentation prepared by software programs using artificial intelligence. California, by statute, defines deepfakes "audio or visual content that has been generated or manipulated by artificial intelligence which would falsely appear to be authentic or truthful." CAL. GOV'T CODE § 11547.5(a)(1) (West 2023).

Of course, photos and videos have always been subject to forgery, but developments in AI make deepfakes much more difficult to detect.[13] Software for creating deepfakes is freely available online and fairly easy for anyone to use.[14] As the software's useability and the item's apparent genuineness keep improving over time, it will likely become harder for lay jurors, and even judges, to tell real from fake.

Generally speaking, there is an arms race between deepfake technology and the technology that can be employed to detect deepfakes. Currently most deepfakes involve machine learning algorithms that are simultaneously pitted against one another.[15] One of these programs is a generative model that creates candidate data samples; the other is a discriminator model, which evaluates the candidates for accuracy. The discriminator model estimates the probability that the candidate came from the generative model (a machine creation) or sample data (a real-world original). These two models operate in a cyclical fashion and learn from each other. The generative model constantly improves its ability to create candidates that have a lower probability of failing

[12] This section is pretty much the same as that submitted for the last meeting.

[13] Robert Chesney & Danielle Keats Citron, *Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security,* 107 Calif. L. Rev. 1753, 1760 (2019).

[14] See *12 Best Deepfake Apps and Websites That You Can Try for Fun,* https://beebom.com/best-deepfake-apps-websites.

[15] Chris Nicholson, *A Beginner's Guide to Generative Adversarial Networks (GANs),* PATHMIND, https://pathmind.com/wiki/generative-adversarial-network-gan [https://perma.cc/JEY9-K283].

the detection algorithm as the discriminator model learns to keep up, a process that continuously improves the apparent genuineness of the creation. So when a new method is developed to detect fakes, deepfake creators can use that to their advantage in their discriminator models. A New York Times reporter reviewed some of the currently available programs that try to detect deepfakes. The programs varied in accuracy. None was accurate 100% of the time.[16]

It is important to note that various digital tools have been introduced for authenticating video recordings that a party has prepared. These tools allow the proffering party to vouch for video recordings' authenticity through an electronic seal of approval.[17] While the use of such methods increases the costs of litigation, they do appear, generally, to answer most "deepfake" claims from the opponent. While watermarks can be evaded, Professor Hany Farid states that the use of watermarks together with an identifying fingerprint is an effective way to combat the threat of deepfakes.[18] The limitation on the software is that the electronic stamp of genuineness occurs during the process in which the video is being generated; it does not work with videos, say, taken off the internet.[19]

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[16] See *How Easy Is it to Fool A.I. Detection Tools?* https://www.nytimes.com/interactive/2023/06/28/technology/ai-detection-midjourney-stable-diffusion-dalle.html?smid=nytcore-ios-share&referringSource=articleShare. See also *Another Side of the A.I. Boom: Detecting What A.I. Makes,* https://www.nytimes.com/2023/05/18/technology/ai-chat-gpt-detection-tools.html ("Detection tools inherently lag behind the generative technology they are trying to detect. By the time a defense system is able to recognize the work of a new chatbot or image generator, like Google Bard or Midjourney, developers are already coming up with a new iteration that can evade that defense. The situation has been described as an arms race or a virus-antivirus relationship where one begets the other, over and over.").

[17] *Ticks or It Didn't Happen: Confronting Key Dilemmas in Authenticity Infrastructure for Multimedia,* at 6, WITNESS (December 2019), https://lab.witness.org/ticks-or-it-didnthappen/ ("The idea is that if you cannot detect deepfakes, you can, instead, authenticate images, videos and audio recordings at their moment of capture."); Riana Pfefferkorn, *Deepfakes in the Courtroom,* 29 Public Interest Law Journal 245, 259 (2020) ("So-called verified media capture technology can help to ensure that the evidence users are recording is trusted and admissible to courts of law. For example, an app called eyeWitness to Atrocities allows photos and videos to be captured with information that can firstly verify when and where the footage was taken, and can secondly confirm that the footage was not altered, all while the company's transmission protocols and secure server system create a chain of custody that allows this information to be presented in court. That information, paired with the app-maker's willingness to provide a certification to the court or send a witness to testify if needed, could satisfy a court that the video is admissible, even if the videographer is unavailable.").

[18] See Hany Farid, *Artificial Intelligence: A Primer for Legal Practitioner*s at 17 ("Therefore, in addition to embedding watermarks, a creator can extract an identifying fingerprint from the content and store it in a secure centralized ledger. . . . The provenance of a piece of content can then be determined by comparing the fingerprint of any image or video to the fingerprint stored in the ledger. Both watermarks and fingerprints can be made cryptographically secure, making it difficult to forge.").

[19] See, e.g., *A New Tool Protects Videos From Deepfakes and Tampering,* https://www.wired.com/story/amber-authenticate-video-validation-blockchain-tampering-deepfakes/ ("Called Amber Authenticate, the tool is meant to run in the background on a device as it captures video. At regular, user-determined intervals, the platform generates 'hashes'—cryptographically scrambled representations of the data—that then get indelibly recorded on a public blockchain. If you run that same snippet of video footage through the algorithm again, the hashes will be different if anything has changed in the file's audio or video data—tipping you off to possible manipulation.").

Besides the challenge of determining whether a video or audio is faked, many commentators are concerned about a "reverse CSI effect." Jurors, knowing about deepfakes, "fake news", etc., may start expecting the proponent of a video to use sophisticated technology to prove to their satisfaction that the video is not fake.[20]

As an evidentiary matter, the problem created by deepfakes is one of authenticity. If a deepfake item is presented as an accurate reflection of an event, it is not what the proponent says it is, because it is fake. Proposals to amend the authenticity rules to handle the risk of deepfakes have been considered by the Committee in previous meetings, and some are presented below.

B. Machine-Learning[21]

"Machine learning is a subfield of artificial intelligence, which is broadly defined as the capability of a machine to imitate intelligent human behavior. Artificial intelligence systems are used to perform complex tasks in a way that is similar to how humans solve problems."[22] Probably the most famous example of machine learning is ChatGPT. Other examples include probabilistic genotyping in DNA testing, facial recognition technology, programs designed to alter audios and videos to provide a different and hopefully better perspective, and predictive coding to determine whether electronic information is subject to discovery.

Machine learning starts with data — numbers, photos, or text, such as bank transactions, pictures of people, sentencing records, repair records, time series data from sensors, x-rays, MRI's, and sales reports. The data is gathered and prepared to be used as training data --- the information the machine learning model will be trained on. The more data, the wider the base, the better (generally) is the output of the machine learning. From there, programmers choose a machine learning model to use, supply the data, and let the computer model train itself to find patterns or make predictions. Over time the human programmer can also adjust the model, including changing its parameters or adding to the database, to help push it toward more accurate results. The result is a model that can be used in the future with different sets of data.

Machine learning can have three distinct functions. A machine learning system can be *descriptive,* meaning that the system uses the data to explain what happened (like the "AI Overview" that pops up in Google searches); *predictive,* meaning the system uses the data to predict a result (like predictive coding in discovery); or *prescriptive*, meaning the system will use

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[20] Rebecca Delfino, *Deepfakes on Trial: A Call to Expand the Trial Judge's Gatekeeping Role to Protect Legal Proceedings from Technological Fakery,* 74 Hastings L.J. 293 (2023).

[21] This section is new.

[22] https://mitsloan.mit.edu/ideas-made-to-matter/machine-learning-explained.
Another definition is that machine learning is "a computer system that is able to learn and adapt without explicit instructions, by using algorithms and statistical models to analyze and draw inferences from patterns and data." Oxford Dictionary.

the data to make suggestions about what action to take (like Netflix figuring out what you want to watch next).

A machine learning system can vary depending on the input the machine receives from humans. One possibility is *supervised machine learning*, where the models are trained with labeled data sets, which allow the models to learn and grow more accurate over time. For example, as explained by Maura Grossman in her presentation to the Committee, an algorithm could be trained with pictures of dogs and other things, all labeled by humans, and the machine would learn ways to identify pictures of dogs on its own. Supervised machine learning is the most common type used today.

In an *unsupervised machine learning* system, a program looks for patterns in unlabeled data. Unsupervised machine learning can find patterns or trends that people aren't explicitly looking for. For example, an unsupervised machine learning program could look through online sales data and identify different types of purchases or clients.

Reinforcement machine learning trains machines through trial and error to take the best action by establishing a reward system. For example, autonomous vehicles can be trained to drive by telling the machine when it made the right decisions, which helps it learn over time what actions it should take.

Important Factors Affecting the Validity of the Product of Machine Learning

There are several important considerations that must be taken into account in determining whether machine learning will reach a helpful and valid result:

1. Explainability

One area of concern is what some experts call explainability, or the ability to understand what the machine learning models are doing and how they make decisions. Machine learning systems can be fooled and undermined, or just fail on certain tasks, even those humans can perform easily. For example, adjusting the metadata in images can confuse computers. Also it is well known that generative AI can hallucinate (as shown in the Minnesota case set forth in Part I).[23] An understanding of how the models come to their conclusion can help spot errors in results. For example, in one case an algorithm examined X-rays, but it did so by correlating results with the machines that were used. But it turns out that developing countries usually have older machines. So the algorithm concluded that if the data came from an older machine, the patient was more likely to have a disease associated with developing countries (such as tuberculosis). That is correct information, but not helpful, and not the information that the developers were seeking.

[23] In February, ChatGPT launched a new model with the promise that it drastically reduced the risk of hallucination.

2. Bias

Machines are trained by humans, and human biases can be incorporated into algorithms — if biased information, or data that reflects existing inequities, is fed to a machine learning program, the program will learn to replicate it and perpetuate forms of discrimination. An article set forth in Part One describes the forms of bias that can lead to bad results from machine learning, and recounts how one program became crazy and racist when it was exposed to the internet.

3. Input Deficiencies

If the data entered into the system is deficient or flawed, the ultimate result will be tainted. For example, the validity of facial recognition is dependent on the database of pictures entered into the system. Such defects in databases have accounted for the fact that errors in facial recognition are higher with respect to women of color.[24] Similarly, a program making predictions of the probability of recidivism will not be accurate unless it takes account of the fact that some crimes are more often investigated and prosecuted than others. And Amazon abandoned an Al employment tool after three years of use because it was based on ten-year data favoring male applicants and ended up perpetuating the skewed workforce.[25]

4. Function Creep

Sometimes machine learning programs have been applied to solve problems that they were not designed to solve. That is, the algorithm reached reliable results in doing one thing, but it failed when applied to an unrelated problem. An example is *Washington v. Puloka*, No. 21-1-04851-2 (Super. Ct. Kings Co. Wash. 2024). The defendant wanted to present a video that was AI-enhanced. The source video had "motion blur" and the defense expert used a Topaz Labs AI program to increase its resolution, add sharpness and definition, and smooth out the edges of the video images. But Topaz was not developed for adding sharpness and definition while retaining the original images. Its purpose was to allow the operator to alter the video, by creating "false image detail." It was valid for that purpose. But not for the purpose of enhancing a video without changing it. The court therefore found it unreliable under *Frye.*

Another example of function creep involves the risk-assessment software COMPAS (Correctional Offender Management Profiling for Alternative Sanctions), which was used to make sentencing recommendations, even though it wasn't designed for that – it was originally designed to provide insight into the types of treatment (e.g., drug or mental health treatment) an offender

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[24] Steve Lohr, *Facial Recognition is Accurate, if You're a White Guy*, N.Y. TIMES (Feb. 9, 2018) www.nytimes.com/2018/02/09/technology/facial-recognition-race-artificial-intelligence.html.

[25] Jeffrey Dastin, *Amazon Scraps Secret AI Recruiting Tool That Showed Bias Against Women,* REUTERS (Oct. 10, 2018), www.reuters.com/article/us-amazon-com-jobs-automation-insight/amazon scraps-secret-ai-recruiting-tool-that-showed-bias-against-women-idUSKCN1MKO8G [https://perma.cc/4TTF-YDAQ].

might need. It turned out that COMPAS was twice as likely to classify black defendants as high-risk and vice versa with white defendants as low risk.

5. Source Codes

There may be flaws in the source code of the machine learning system, which of course will mean that the output is unsound. Daniel Seng, in *Artificial Intelligence and Evidence*, 33 Singapore Law Journal 241 (2024), notes the "brouhaha" involving breathalyzers, where defense lawyers sought inspection of their codes and were rebuffed, until discovery was granted in a particular case and it was determined that there were calibration and calculation errors in the coding of the machines that resulted in results that were 20% to 40% too high. He also notes coding errors discovered by adversaries in cases involving Toyotas that cause sudden acceleration, and in the environmental sensors in Uber self-drive cars.

One question involving source codes, discussed in prior memos, is whether the opponent is entitled to discovery of those codes. Seng concludes that it is important to provide disclosure of source codes, and that concerns about trade secrets can be handled by protective orders. Grossman and Grimm have made the same point.

At the last meeting, the Committee determined that whether an opponent is entitled to source codes presents a question of discovery in the first instance, and not evidence. The Criminal Rules and Civil Rules Committees have taken the source codes question under their advisement.

What is the Evidentiary Problem Raised by Machine Learning

As discussed above, machine learning output could come to court in at least four ways: 1) It could be substantively important because some party relied on machine learning to reach a conclusion that is in dispute (e.g, fired the plaintiff); 2) It could be used by experts to assist them in reaching a conclusion (as in *Matter of Weber,* above, where Microsoft Copilot was used by the expert to check the expert's assessments, or where probabilistic genotyping is used to assist a DNA expert's determinations); 3) It could be used (either with an expert or not) to enhance video and audio presentations; and 4) A party might seek to enter the machine product directly into evidence as proof of a fact.

If the case is *about* the use of machine learning, as in example 1, it would seem that the basic rules of evidence are applicable. If someone is run over by a self-driving Tesla, then any evidence about the algorithms, biases, etc. would clearly be proveable at trial subject to standard evidentiary principles. If the machine learning is, instead, used as the basis of expert testimony, the governing evidentiary principles would be derived from Rule 702. The expert's opinion will not be reliable if the underlying machine learning is not reliable. If machine learning is used for enhancement of video and audio, and an expert is presented to validate the process, again Rule 702 would be applicable. But where the product of machine learning is entered into evidence without the accompaniment of an expert, there is a problem. The concern is, of course, that the product is

unreliable, but in the absence of an expert witness, Rule 702 is not directly applicable. That is why the Committee has tentatively approved a new rule to cover the situation in which machine evidence is introduced without the accompaniment of an expert --- Rule 707, discussed below.

It is critical to note that the evidentiary issues of machine learning (as opposed to deepfakes) do not lie in authentication. Generally, the product of machine learning is what the proponent says it is (e.g,, a report based on probabilistic genotyping, or a video enhanced by use of a computer program). That is what the proponent says it is, but the real question is whether it is a reliable account. That is why machine learning problems are best handled in Article 7, while the problem of deepfakes is best handled in Article 9.

At a Committee meeting last year, Professor Andrea Roth proposed changes to the Federal Rules to give courts the tools to regulate machine-learning output. In broad summary, her basic concern is that now many machines are thinking like people, and are making out of court statements like people would. For real people, the solution to such out of court statements is cross-examination. But the hearsay rule does not work well for machine-based ouputs, because machines cannot be cross-examined. So in the absence of hearsay regulation, what can be added to the rule that would regulate the reliability problems inherent in machine-generated information? The Committee's solution is a new Rule 707, discussed below.

III. Basic Rules on Authenticity[26]

Under Rule 901(a), the standards for authenticity are low. The proponent must only "produce evidence sufficient to support a finding that the item is what the proponent claims it is." Under the rule, the question of authenticity is one of conditional relevance—an item of evidence is not relevant unless it is what the proponent purports it to be. (For example, a sexually harassing statement in an email, purportedly sent from the plaintiff's supervisor, is probative only if it is the supervisor who sent it). As a question of conditional relevance, the admissibility standard under Rule 901 is the same as that provided by Rule 104(b): Has the proponent offered a foundation from which the jury could reasonably find that the evidence is what the proponent says it is. This is a mild standard—favorable to admitting the evidence. The drafters of the rule believed that authenticity should generally be a jury question because, if a juror finds the item to be inauthentic, it just drops from the case, so no real damage is done; Rule 901 basically operates to prevent the jury from wasting its time evaluating an item of evidence that clearly is not what the proponent claims it to be.

The structure of the Rule is as follows: 1) subdivision (a) sets the general standard for authenticity—enough admissible evidence for a juror to believe that the proffered item is what the proponent says it is; 2) subdivision (b) provides examples of sufficient authentication; if the standard set forth in any of the illustrations is met, then the authenticity objection is overruled and

[26] This section is substantially the same as was provided in the memo to the Committee for the last meeting.

any further question of authenticity is for the jury; and 3) the illustrations are not intended to be independent of each other, so a proponent can establish authenticity through a single factor or combination of factors in any particular case. Finally, it should be noted that Rule 902 provides certain situations in which the proffered item will be considered self-authenticating—no reference to any Rule 901(b) illustration need be made or satisfied if the item is self-authenticating.[27]

In order for the trier of fact to make a rational decision as to authenticity, the foundation evidence must itself be admissible. If the opponent still contests authenticity at trial, as it has every right to, the proponent will need to present admissible evidence of the authenticity of the challenged item. This means that the judge's role when an authentication issue arises differs from the judge's role when other issues arise involving the admissibility of evidence at a Rule 104(a) hearing (under which the rules of evidence other than privilege are inapplicable). When authentication evidence is offered, a jury must be provided sufficient admissible evidence for it to find that it is what the proponent claims, or the requirement of authentication is not satisfied. A judgment as to whether a reasonable jury will find evidence to be authentic can only be made by examining the evidence that the jury will be permitted to hear.[28]

Applying the current authentication rules to deepfakes raises the concern that because the standard of admissibility is so low, and deepfakes are hard to detect, many deepfakes will probably satisfy the low standards of authenticity.

IV. Prior Committee Decision on Special Authentication Rules for Electronic Evidence.[29]

The rise of deepfakes is not the only technological advancement that has challenged the existing rules on authentication. In 2014, the Advisory Committee undertook a project to consider whether rules should be added to Article 9 to address digital communications and social media postings. The proposal considered was to have special rules on authenticating emails, texts, social media postings, and so forth. After significant discussion, the Committee decided not to proceed with the project. According to the Minutes of the Fall 2014 meeting, the reasons for rejection were as follows:

[27] As will be discussed below, the problem of deepfakes affects authentication under both Rules 901 and 902. The items that can be self-authenticating are as subject to deep fakery as the items offered under Rule 901. See, e.g., Rule 902(5) (official publications) and 902(6) Newspapers and Periodicals).

[28] See *United States v. Bonds,* 608 F.3d 495 (9th Cir. 2010) (records could not be authenticated where the only basis for authentication was a hearsay statement not admissible under any exception); *Lorraine v. Markel American Ins*., 241 F.R.D. 534, 537 (D.Md. 2007) ("Because, under Rule104(b), the jury, and not the court, makes the factual findings that determine admissibility, the facts introduced must be admissible under the rules of evidence.").

[29] This section is substantially similar to that included in the memo to the Committee for the last meeting.

1) The current rules are flexible enough to handle questions about the authenticity of digital communications. These rules give the court all the tools it needs to determine the authenticity of digital evidence.

2) Any rules directed specifically toward digital communications would likely overlap with the provisions already in Rule 901(b). Certainly, distinctive characteristics would be important for authenticating digital evidence; and authentication of, say, email would use analogous principles of authenticating telephone conversations. This overlap, between new and old rules, would likely cause confusion.

3) Listing factors relevant to authentication would run the risk of misleading courts and litigators into thinking that all of the listed factors can or should be weighed equally, when in fact a case-by-case approach is required.

4) Given the deliberateness of rulemaking --- three years minimum --- there was a risk that any rule on digital communications could be dead on arrival. I called it the MySpace problem.[30]

In hindsight, it is fair to state that the Committee's decision to forego amendments setting forth specific grounds for authenticating digital evidence was the prudent course. Courts have sensibly, and without extraordinary difficulty, applied the grounds of Rule 901 to determine the authenticity of digital evidence.[31] *Courts have specifically rejected blanket claims like "my account was hacked" --- because such an argument can always be made.* Courts properly require some showing from the opponent before inquiring into charges of hacking and falsification of

[30] It should be noted that the Committee did propose two new rules to deal with authenticating digital evidence --- Rules 902(13) and (14), which became effective in 2017. But these rules do not add or change any grounds of authentication for digital evidence. Rather they allow the existing grounds to be established by a certificate of a person with knowledge, thus dispensing with the requirement of in-court testimony.

[31] See, e.g., *United States v. Fluker*, 698 F.3d 988 (7th Cir. 2012) (the court, in outlining the variety of ways in which an email could be authenticated, stated that testimony from a witness who purports to have seen the declarant create the email in question was sufficient for authenticity under Rule 901(b)(1)); *United States v. Barnes*, 803 F.3d 209 (5th Cir. 2015) (government laid a proper foundation to authenticate Facebook and text messages as having been sent by the defendant; the defendant was a quadriplegic, but the witness who received the messages testified she had seen the defendant use Facebook, she recognized his Facebook account, and the Facebook messages matched the defendant's manner of communicating: "[a]lthough she was not certain that Hall [the defendant] authored the messages, conclusive proof of authenticity is not required for admission of disputed evidence"); *United States v. Lundy*, 676 F.3d 444 (5th Cir. 2012) (testimony by one party to chat that the chats are as he recorded them is enough to meet the low threshold for authentication); *United States v. Needham*, 852 F.3d 830, 836 (8th Cir. 2017) ("Exhibits depicting online content may be authenticated by a person's testimony that he is familiar with the online content and that the exhibits are in the same format as the online content. Such testimony is sufficient to provide a rational basis for the claim that the exhibits properly represent the online content. . . [The witness] testified that he personally viewed the [webpages] and that the screenshots accurately represented the online content of both sites. Thus, the district court did not abuse its discretion by admitting the screenshots."); *United States v. Recio*, 884 F.3d 230 (4th Cir. 2018) (the government sufficiently tied the "Facebook User" to the defendant by showing that: (1) the user name associated with the account was Larry Recio; (2) one of the four email addresses associated with the account was larryrecio20@yahoo.com; (3) more than 100 photos of Recio were posted to the account, and (4) one of the photos posted to the user timeline was accompanied by the text "Happy Birthday Larry Recio").

digital information. Thus, courts have consistently held that "the mere allegation of fabrication does not and cannot be the basis for excluding ESI as unauthenticated as a matter of course, any more than it can be the rationale for excluding paper documents."[32] That is to say, courts did not need a new rule to hold that broad claims of fakery do not justify a special inquiry into electronic fabrication. Rather, the party claiming "it was hacked" has to provide some specific justification supporting that assertion before the court will consider questions of electronic fakery.

It is true that litigators have to know what they are doing when they try to authenticate digital evidence, and it is also true that authenticating digital evidence can be costly, but no rule of evidence would change that.[33] Moreover, some costs of proving authenticity can be saved by the affidavit procedures established for authentication of digital evidence in Rules 902(13) and (14).[34]

The fact that the Committee decided not to promulgate special rules on digital communication is a relevant data point, but it is not necessarily dispositive of amending the rules to treat deepfakes.[35] While a special rule setting forth the grounds for possible authentication of audiovisual evidence runs a similar risk of overlap, a rule of procedure --- such as the requirement of a special showing made to the court and a higher standard of proof --- might well be useful. And a rule may be necessary because the difficulty of detecting deepfakes, as well as their widespread use, may well require a new approach. The dangers of deepfakes, and the ease of making them, is greater than the risks of fabrication of social media evidence.

The draft of a new Rule 901(c), discussed below, does employ different procedural requirements to handle deepfake claims.

V. State Activity on AI and Evidence[36]

Several states are making efforts to address the evidentiary concerns related to AI. These efforts are mainly directed to deepfakes, but some states look more broadly at issues involving machine learning as well.

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[32] *United States v. Safavian*, 435 F. Supp. 2d 36, 38 (D.D.C. 2006).

[33] *See* Jeffrey Bellin and Andrew Guthrie Ferguson, *Judicial Notice in the Information Age,* 108 Nw. U. L.Rev. 1137, 1157 (2014) ("Although much is made of [the authentication] hurdle in the Information Age, it is … an easy one to surmount. Success generally depends not on legal or factual arguments, but rather the amount of time and resources a litigant devotes to the problem.").

[34] Tara Vassefi, "*A Law You've Never Heard of Could Help Protect Us From Deceptive Photos and Videos,"* UC Berkeley School of Law Human Rights Center (Nov. 30, 2018), https://medium.com/humanrightscenter/a-law-youve-never-heard-of-could-help-protect-usfrom-fake-photos-and-videos-df07119aaeec. (noting that Rules 902(13 and (14) "streamlin[e] authentication for those with limited legal resources").

[35] For one thing, it is not stare decisis. The Committee has proposed amendments to rules that it rejected in the first instance. The amendments to Rule 106 and new Rule 107 are just two examples.

[36] This section is new.

Most states are in early stages of addressing the admissibility concerns of AI-generated evidence through task forces and judicial committee formations rather than enacting formal rule changes through the legislative process. (Which makes one wonder how so much fire can be directed at the Advisory Committee, which has in fact developed evidentiary responses to AI).

Here is a short description of the state efforts that I have found:

Arizona

The Arizona Steering Committee on Artificial Intelligence and the Courts was created by the Arizona judiciary in January 2024. The Committee has been tasked with developing and recommending rules and procedures for the use of AI technologies by judicial officers and legal practitioners. Recent meeting agendas indicate that Evidence rules are under discussion, but no rules have been issued at this point.

California

Assembly Bill 8110 and its companion bill Senate Bill 8390 would prohibit the admissibility of AI-generated evidence unless the "evidence is substantially supported by independent and admissible evidence." The proponent must also demonstrate the reliability and accuracy of the specific AI process that was used to generate the evidence. A8110 was referred to the Assembly Codes Committee on January 3, 2024, and S8390 was referred to the Senate Codes Committee on January 26, 2024, with no further legislative action recorded publicly.

Delaware

In October 2024, the Delaware Supreme Court implemented an interim policy which permits the use of AI tools with caution, ensuring that judicial officers and personnel are responsible for the accuracy of their work and that AI does not replace human decision-making. This venture may or may not be directed toward the use of AI evidence in court.

Georgia

As of August 13, 2024, the Georgia Supreme Court has established a committee to study the impacts of AI on the judiciary. The Judicial Council Ad Hoc Committee on Artificial Intelligence and the Courts has been tasked to understand and manage the influence of AI on the legal system. One of its tasks is to examine the "impact of AI on trial evidence related to authentication and matters related to digitally enhanced (audio, visual and image) evidence and

adequacy of current evidentiary rules, and the emergence and threat of deepfakes." The Committee will exist until June 30, 2025 unless extended further.

Hawaii

In April 2024, the Supreme Court of the State of Hawaii formed a Committee on Artificial Intelligence and the Courts. One of the Committee's objectives is to "[d]etermine how to approach, incorporate, and/or implement A.I. technology into court operations." Thus, this process may ultimately include updates to the Hawaii Rules of Evidence.

Illinois

The Illinois Supreme Court formed a task force, the Illinois Judicial Conference (IJC) Task Force on Artificial Intelligence, to study the implications of generative AI in the legal field. The Task Force is reviewing court rules and procedures to determine whether amendments are warranted, given the rise in AI-generated content.

On January 1, 2025, the Illinois Supreme Court, with help of the Task Force, released a policy and a reference sheet for judges to better understand the technology. The policy states that "[t]he Illinois Courts will be vigilant against AI technologies that jeopardize due process, equal protection, or access to justice." The "Judicial Reference Sheet" outlines key factors for judges to consider when evaluating AI-generated evidence, which could eventually serve as a basis for formal amendments or additions to the state's evidence rules. The reference sheet also includes authenticity and reliability concerns with AI-generated evidence, but no specific rule changes are proposed as yet.

New Jersey

The New Jersey Supreme Court issued a press release on September 23, 2023, detailing that a Supreme Court Committee "comprised of experts within and outside the Judiciary met," to assess the legal and ethical considerations that Artificial Intelligence can have on the practice of law. There have been no updates since this press release.

New York

New York State Assemblyman Clyde Vanel has introduced a bill, A 8110, which amends both the Criminal Procedure Law and the CPLR, regarding the admissibility of evidence created or processed by artificial intelligence. As stated in the bill, evidence is "created" by AI when AI produces new information from existing information. Evidence is "processed" by AI when AI produces a conclusion based on existing information.

Simplified greatly, the bill requires that evidence "created" by AI would not be received at trial unless independent admissible evidence establishes the reliability and accuracy of the AI used to create the evidence. Evidence "processed" by AI similarly requires the proponent of the evidence to establish the reliability and accuracy of the AI used. The bill is not near passage.

VI. A New Proposal to Regulate Deepfakes

At the last meeting, the Committee rejected a number of rule proposals submitted by members of the public, mostly law professors. **The following proposals were rejected**:

--- A proposal by Professor Rebecca Delfino to take the question of authenticity of video and audio evidence completely away from the jury. It was rejected as unworkable because the jury would still speculate about authenticity, but without any information on which to base their conclusion.

--- A proposal that all video evidence be corroborated before a finding of authenticity can be made. It was rejected because it was not tied to AI-related problems, and because an item may be authentic even without corroboration.

--- A proposal by Hon. Paul Grimm and Professor Maura Grossman to amend Rule 901(b)(9), by requiring the proponent of evidence admittedly generated by AI to disclose the program and establish its reliability. This was rejected not on the merits, but on the ground that reliability concerns about AI-generated evidence are best addressed under the reliability requirements of Article VII, as the authenticity standards are not grounded in reliability of the evidence. (For example, a plaintiff may wish to offer a deepfake video that the defendant prepared, precisely because it is unreliable).

--- A proposal by Grimm and Grossman for a new Rule 901(c) to deal with deepfakes. The proposal would require the opponent claiming a deepfake to provide enough evidence for a reasonable person to find that the item is manipulated or manufactured by AI. If that burden of going forward is met, then the proponent must refute the showing by establishing that the probative value of the item outweighs its prejudicial effect. The first part of the proposal (establishing a burden of going forward) was *adopted* by the Committee in its own draft of a new Rule 901(c). The second part (the balance of probative value and prejudicial effect) was rejected because it ended up double-counting a Rule 403-type analysis: first at the authenticity level and then in assessing the item as proof of a fact in dispute. The Committee found the solution confusing, and also misplaced --- because authenticity is about whether the item is what the proponent says it is, not about how probative its content is. Once the authenticity standard has been met, *then* the item can be

assessed for probative value and prejudicial effect. The risk that a deepfake might improperly persuade the jury is not a question of probative value. It is a question of authenticity. The concerns about easy admissibility of deepfakes as an authenticity matter are best answered by raising the standard of proof for deciding whether an item is authentic.

--- A proposal by Professor Roth to add admissibility requirements to Rule 702 to deal with machine-learning evidence. This proposal was rejected not on the merits but on the ground that, while the reliability concerns about machine-learning evidence were justified, it is better to address those concerns in a separate rule, because Rule 702 is 1) a rule of general applicability, and 2) very recently amended.

--- A proposal by Professor Roth to add reliability requirements to Rule 901(b)(9) to regulate items that are the product of machine-learning. These were rejected, not on the merits, but, again, because Article 7 is the proper place for regulating the reliability problems presented by machine-learning. Because the machine-learning will likely be treated as infallible expertise, it should be vetted in the way of a human expert.

--- A proposal by Professor Roth to amend Rule 806 to allow impeachment of a product of machine learning. This was rejected because the impeachment methods allowed under Rule 806 are not all applicable to impeachment of a machine-learning program. And modes of impeachment that could apply --- such as prior inconsistent statements --- would be available without any change to Rule 806.

New Proposal

Since the last meeting, a proposal to regulate deepfakes (not machine-learning) has been received from Professor Rebecca Delfino. This is a modification of her proposal that was previously rejected by the Committee. Professor Delfino (like Grossman and Grimm) is at the top of this field, and her views are worthy of serious consideration. Accordingly, the remainder of this section is devoted to her proposal, her explanation, and the Reporter's comments and reactions.

The proposal is for a new Rule 901(c) to deal with deepfakes.

Revised Proposed FRE 901(c) from Professor Delfino:

Notwithstanding subdivision (a), if a party challenging the authenticity of computer-generated or other electronic evidence presents evidence sufficient to support a factual finding that the challenged evidence has been manipulated or fabricated, in whole or in part,

by generative artificial intelligence, the proponent of the evidence must authenticate the evidence under subdivision (b) and provide additional proof establishing its reliability. The court must decide the admissibility of the challenged evidence under Rule 104(a).

Here is Professor Delfino's explanation for the proposal (with some redactions):

The Necessity of the Revised Proposal

The challenge presented by deepfakes requires a heightened authentication standard because traditional evidence verification techniques were not designed to address highly sophisticated AI-generated falsifications. Without a new rule to address fraudulent AI-generated evidence, fake evidence could be admitted based on authentication methods that are ineffective in addressing the challenges presented by the technology, increasing the risk that jurors will be exposed to convincing but entirely false evidence. The lack of explicit procedural safeguards also risks inconsistent application of authentication requirements to AI-generated content, leading to evidentiary confusion and unfair trial outcomes. * * *

Analysis and Comparison to Other Proposals

The Revised Proposal differs from previous frameworks, including the Original Proposal in *Deepfakes on Trial*, as well as alternative proposals put forth by Professor Paul Grimm and Professor Maura R. Grossman ("Grimm & Grossman Proposal") and the Committee Reporter's Amendment to the Grimm & Grossman Proposal ("Reporter's Amendment"). The key distinctions are as follows:

1. The Revised Proposal Establishes a Clear Burden Shifting Framework and Appropriate Burdens on the Challenger and the Proponent of the Evidence

Like the Grimm & Grossman Proposal and the Reporter's Amendment, the Revised Proposal requires the party challenging the authenticity to present evidence sufficient to support a factual finding that the challenged evidence has been altered or fabricated *before* requiring the proponent of the evidence to come forward to demonstrate the evidence is genuine.

However, the Revised Proposal differs from the alternative proposals. It articulates a clear proponent's burden, thus creating a structured approach to evaluating AI-manipulated evidence by establishing a burden-shifting framework. Also, unlike the balancing test in the Grimm & Grossman Proposal that presumes authenticity and requires courts to weigh probative value against prejudicial effect, the Revised Proposal introduces a clear and structured burden-shifting framework to evaluate alleged deepfake evidence. The Revised Proposal's burden-shifting

mechanism is grounded in authenticity rules to ensure that generative AI-manipulated evidence meets authenticity and reliability standards before admission. [37]

A. The Challenger's Burden: "Presents Evidence Sufficient to Support a Factual Finding"

Under the Revised Proposal, the party challenging the authenticity of AI-generated evidence must provide sufficient evidence to support a factual finding that AI manipulation may have occurred. This standard aligns with Rule 104(b) and deters frivolous challenges to legitimate digital evidence. A challenger must provide expert testimony, forensic evidence, or AI-detection analysis that suggests the evidence could be AI-generated. Requiring the challenger to make a threshold showing that the evidence is a deepfake is a crucial regulatory check against deepfake claims that might be raised in every case involving digital audio-visual evidence. This threshold requirement ensures that authentication challenges are legitimate while preventing unnecessary litigation.[38]

B. The Proponent's Burden: "Authenticate the Evidence Under 901(b) and Provide Additional Proof Establishing Its Reliability."

Although FRE 901 has historically been concerned only with authenticity, deepfake evidence presents unique authentication challenges that traditional standards fail to address. Because AI-generated evidence can be so convincingly realistic, traditional authentication alone does not ensure the evidence is genuine. Thus, under the Revised Proposal, once a credible challenge is made, the proponent of the evidence must meet a heightened authentication standard by first authenticating the evidence under traditional Rule 901(b) methods, such as metadata or witness verification. Second, the proponent must provide additional proof of reliability.

The unique risks of AI-generated evidence justify a heightened standard. Deepfakes and AI-generated content are fundamentally different from traditional manipulated evidence. Unlike traditional altered photos, which at least start with real images, deepfakes can be entirely fabricated from scratch. Moreover, deepfakes can mimic real individuals with near-perfect accuracy—posing unique risks of deception. They can also be mass-produced quickly and spread widely, raising concerns about their impact on judicial truth-seeking. Because AI-generated evidence can so convincingly mimic reality, requiring additional proof of reliability ensures that courts apply a heightened evidentiary standard to AI-generated content. FRE 901(b) alone cannot address the unique risks AI-generated deepfakes pose.

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[37] Reporter's Note: The Committee draft does this as well, with different language, as will be discussed below.

[38] Reporter's Note: This first step is identical to the draft that the Committee reviewed at the last meeting (referred to by Professor Delfino as the Reporter's draft).

* * * First, the traditional FRE 901(b) standard is too lenient for AI-generated evidence. Many traditional authentication methods under FRE 901(b) do not work well for AI-generated deepfakes. For example, witness testimony (901(b)(1)) may be unreliable; AI can generate false but hyper-realistic content, making it hard even for eyewitnesses to detect manipulation. In addition, metadata (901(b)(4)) can be easily falsified. AI-generated content can be inserted into real files, and metadata can be modified to make it appear legitimate. Finally, expert comparison (901(b)(3)) may be difficult because AI-generated videos, images, and audio can be nearly indistinguishable from real content. Requiring an extra layer of scrutiny ensures that authentication is not just a formal check-box process but instead that courts actually evaluate whether the evidence is trustworthy.[39]

Second, FRE 901(b) concerns authentication (showing that evidence is what it purports to be), but it does not necessarily establish reliability. For example, a perfectly forged AI-generated video may technically be authenticated under 901(b)(4) (appearance, contents, substance), even if it is entirely fake. Under traditional authentication rules, if a witness testifies, "Yes, this looks like what I saw," the evidence could pass authentication—even if it is unreliable. Courts need a reliability check beyond authentication to ensure that AI-generated evidence is not just technically authenticated but also truthful and accurate. This safeguard is analogous to the *Daubert* standard for expert testimony under Rule 702, which requires that expert evidence be relevant and reliable (*Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589 (1993)).

Finally, requiring additional proof of reliability does not burden proponents of legitimate AI-enhanced evidence unnecessarily. The Revised Proposal does not impose a heightened burden on all electronic evidence; it applies only when a credible challenge has been made that generative AI manipulated the evidence. If no such challenge exists, the proponent may authenticate the evidence as usual under Rule 901(b). * * *

2. The Revised Proposal Employs exact terminology: "Generative AI" Targets the Type of AI That Creates Fabricated Evidence

* * *

The Revised Proposal uses the term "generative artificial intelligence" to ensure clarity and precision in discussions concerning AI-generated evidence. Unlike the broader and more ambiguous phrase "artificial intelligence by an automated system," used in the Grimm & Grossman Proposal and the Reporter's Amendment, "Generative Artificial Intelligence" accurately identifies the specific type of AI technology responsible for creating fabricated content.

[39] Given all these concerns, it is not apparent why a rule should require that these subdivisions be satisfied. The Committee's draft does not require the 901(b) examples to be met. Rather it simply requires a showing that the item is more likely than not authentic.

This specificity is essential in avoiding ambiguity and unnecessary overbreadth in legal and regulatory discussions.

Generative artificial intelligence refers to AI models that create new content, including synthetic videos, images, and audio, that can fabricate events that never occurred. Technologies such as deepfake generators, text-to-image models like DALL·E and Midjourney, AI voice cloning, and synthetic video editing tools fall within this category. The primary concern in authentication disputes is the ability of generative AI to create evidence that appears real but is entirely fabricated. Other AI-driven enhancements, such as AI-powered photo enhancement, voice amplification, and predictive text tools, do not pose the same risk. However, the term "artificial intelligence by an automated system" used in other proposals under consideration could mistakenly encompass these legitimate AI tools, subjecting them to undue scrutiny. This proposal avoids unnecessary complications in authenticating digital evidence by specifically targeting generative AI.

In comparison, the alternative phrase, "artificial intelligence by an automated system," is broad and imprecise. "Artificial intelligence" broadly includes all machine-learning systems, even those that do not generate synthetic content. The additional phrase "by an automated system" further expands the scope to include any AI-driven process, such as predictive analytics, automated transcription, machine vision analysis, and digital forensics tools. This lack of specificity increases the risk of misapplication, leading to situations where AI-enhanced evidence, rather than AI-created evidence, is subjected to unnecessary scrutiny. For instance, a security camera video enhanced using AI-based sharpening filters could be wrongly challenged as synthetic evidence despite being legitimate. Similarly, AI-powered speech-to-text transcription of court proceedings could be mistakenly classified under this vague definition, imposing unnecessary authentication burdens on standard transcription evidence.

Furthermore, judicial and legislative trends favor "generative artificial intelligence" as a distinct category. Courts and regulators are already differentiating between generative AI and other AI applications. The European Union AI Act and discussions surrounding U.S. * * * The Federal Trade Commission (FTC) has also issued guidance addressing generative AI fraud, demonstrating that "generative AI" is already well-established in legal and regulatory discussions. Aligning with these emerging legal and technological standards ensures consistency and clarity in judicial interpretation. Conversely, using the vague phrase "artificial intelligence by an automated system" risks confusion, as courts would be tasked with determining what falls under this broad term. Using "generative AI" aligns with emerging legal frameworks that distinguish generative AI from other forms of AI, ensuring that courts apply the rule consistently and avoid evidentiary confusion.

3. The Revised Proposal Retains the Requirement for Judicial Determination Under FRE 104(a) of Authenticity

* * *

In *Deepfakes on Trial,* I argued that in comparison to lay juries, available research suggested that judges were better suited to assess the authenticity of digital audiovisual evidence because of their training and ability to engage in disciplined evaluation. * * * Their professional experience in assessing legal evidence enables them to filter out misleading arguments and focus on technical indicators of authenticity. Moreover, I pointed out that judges can develop expertise in forensic technology and deepfake detection outside the context of a specific case, allowing them to apply more informed scrutiny when evaluating evidence. Given these advantages, reallocating authenticity determinations to judges under Rule 104(a) would enhance the accuracy of evidentiary assessments and help safeguard the integrity of judicial proceedings.

The Revised Proposal retains the requirement from the Original Proposal to reallocate the final decision on questions related to authenticity to the court. New experimental computer science research confirms the argument in *Deepfakes on Trial* that the task of detecting deepfakes is a task better suited to judges than juries.

In mid-2024, Alena Birrer and Natascha Just, research scholars from the University of Zurich, published a review of recent experiments and research on deepfake detection Alena Birrer & Natascha Just, *What We Know and Don't Know About Deepfakes: An Investigation into the State of the Research and Regulatory Landscape,* New Media & Society (2024), https://doi.org/10.1177/14614448241253138.) Birrer and Just described 22 experimental computer science studies that explored the effectiveness of both humans and artificial intelligence in identifying deepfake images and videos. * * * The findings revealed that human participants could correctly identify deepfakes with an average accuracy of 63.3%. However, their success rate varied depending on several factors, including image resolution, familiarity with the person depicted, and demographic similarities between the observer and the deepfake subject

* * *

Birrer and Just's report also evaluates various interventions designed to improve deepfake detection. * * *

Among the tested interventions, the most effective was offering participants a detailed walkthrough of examples, helping observers recognize specific deepfake artifacts. This structured and intensive training proved beneficial in enhancing detection skills. Gamification and literacy-based training also showed promise. The type of training needed to increase deepfake detection rates is likely more time-consuming and resource-intensive than what an average trial would allow.

However, judges are well suited to receive such training on deepfake detection in connection with judicial training and continuing education requirements. As argued in *Deepfakes on Trial*, the investment in judicial training on deepfake detection would yield benefits in multiple cases.

[Professor Delfino notes several lines of cases where courts act as gatekeepers, such as with privilege determinations and arguments that a confession is coerced.]

* * *

The reallocation of the admissibility determination to the court maintains the integrity of the trial process. If the jury were left to determine whether highly questionable evidence is authentic, there is a significant risk that jurors would be misled by sophisticated deepfakes, undermining the fairness of the trial. Courts must exercise their gatekeeping function to protect the integrity of the fact-finding process—just as they do with coerced confessions, unreliable expert testimony, or improperly obtained evidence.

V. Conclusion

The proposed amendment to FRE 901(c) offers a necessary and balanced solution to the challenges posed by AI-generated evidence. It ensures that digital evidence is authenticated and reliable before admission, prevents fraudulent AI-generated content from misleading jurors, and establishes a clear procedural framework for courts. Finally, by reallocating authenticity determinations to the court under FRE 104(a), this amendment aligns with existing judicial safeguards against prejudicial and unreliable evidence. For these reasons, I urge the Advisory Committee to consider adopting the Revised Proposal as a necessary modernization of the Federal Rules of Evidence in response to the evolving threat of generative AI falsifications.

Reporter's Comments on the Delfino Proposal

1) "Generative" AI: Professor Delfino's proposal to limit the amendment to "generative AI" seems sound. Her examples of what does not need to be covered by a deepfake rule are persuasive. Deepfakes are a product of *generative* AI. She also has a good point that the term is used in other areas, and so the terminology will be more consistent, and understandable, across disciplines. One of the major concerns of writing amendments in this area is that the terminology is fuzzy and fluid, so avoiding an over-description, to the extent possible, is a high priority.

One concern is whether the term "generative Artificial Intelligence" is sufficiently well-understood to be included in a rule. It's certainly not as well-understood as "unfair prejudice" or "hearsay." It is not an evidentiary term. This is a conundrum for rulemaking in the deepfake space, as even the term "deepfake" may not be clear enough for a rule. The fact that what you are trying

to describe might be described differently by the time the rule is enacted is one more reason for caution.

The possible solution as to "generative Artificial Intelligence" --- if it is going to be used in rule text --- is to define it in the Committee Note. One problem with that definitional task is that most of the definitions provided in the literature use the term "generate" in the definition itself. It's like defining "forensic evidence" as "evidence used for a forensic purpose." But here is a possibility:

> "Generative Artificial Intelligence" is a type of artificial intelligence technology that can produce various types of content, including text, imagery, audio and synthetic data. While traditional AI is typically designed to perform a narrow range of tasks repetitively, Generative AI creates new content in response to a wide variety of user inputs.

This paragraph will be added to the Committee's working draft of a new Rule 901(c).

2) The trigger that is necessary to justify a deepfake inquiry: A rule in this area, to be helpful, must address the possibility that an opponent will simply yell "deepfake" and demand an inquiry rife with experts and metadata. Both the Committee's draft and the Delfino proposal do address this problem, and despite Professor Delfino's argument above, there is not much daylight between the two proposals when it comes to the foundation requirement necessary to justify a deepfake enquiry.

The Delfino proposal provides:

> **Notwithstanding subdivision (a), if a party challenging the authenticity of computer-generated or other electronic evidence presents evidence sufficient to support a factual finding that the challenged evidence has been manipulated or fabricated, in whole or in part, by generative artificial intelligence, * * ***

The Committee draft provides (with the added word "generative":

> **If a party challenging the authenticity of computer-generated or other electronic evidence demonstrates to the court that a jury reasonably could find that the evidence has been fabricated, in whole or in part, by [generative] artificial intelligence, * * ***

There is not much to choose from here. There is a good argument that the Committee proposal is more understandable, by using the term "that a jury reasonably could find." That is better, probably, than the legalese of "evidence sufficient to support a factual finding." Moreover, the "notwithstanding" clause should not be necessary because subdivision (c) is dealing with a

specific problem (as opposed to the more general subdivision (a)) and clearly applies to that problem--- but at any rate that can be left to the style consultants.

3. What happens when the trigger is met?

Professor Delfino makes an extensive and detailed argument for why the Rule 104(a) standard should apply to the question of authenticity after the opponent has shown enough to raise a legitimate question about the possibility of a deepfake. The Committee proposal also applies the Rule 104(a) standard at that point. The basic argument is that a judicial gatekeeper is required because the jury is not in a position to figure out whether an item is a deepfake when there is credible claim of fakery; and judges are better than juries in figuring it out, at least over time. The obvious analogy is expert testimony. Moreover, if the proponent establishes, under the Rule 104(b) standard, that there is a real risk of a deepfake, it makes no sense to apply that same 104(b) standard to the proponent's ultimate burden; it would mean that both parties could provide the same quantum of evidence, and what would you do then?

There are differences in the articulation of the ultimate standard of proof. Here is the Delfino proposal:

> * * * **the proponent of the evidence must authenticate the evidence under subdivision (b) and provide additional proof establishing its reliability. The court must decide the admissibility of the challenged evidence under Rule 104(a).**

Here is the Committee draft:

> * * * **the evidence is admissible only if the court finds that the item is more likely than not authentic.**

There is a very good argument that the Committee's version is preferable. As to the Delfino proposal:

> a. An item is not authenticated "under subdivision (b)." Subdivision (b) gives examples of authentic information, and in fact many items are authenticated under a combination of those subdivisions. As they are examples, and nonexclusive, it would be better to say that the proponent must establish authenticity under subdivision (a). But why even refer to subdivisions? Why not just say, as the Committee version does, that the proponent must show the court that the item is authentic?

b. Under the Delfino proposal, the court would have to go to the trouble of finding that an option under Rule 901(b) was met, and then engage in a separate inquiry as to whether there is "additional proof of reliability." This seems excessively complicated.

c. The reference to Rule 104(a) is not ideal because if an unschooled lawyer looks to Rule 104(a), they won't really see a standard of proof there. That was the whole problem that led to the amendment of Rule 702 in 2023. The textual solution that was employed in the Rule 702 amendment should be employed here, because it is more helpful to lesser lawyers, and it promotes consistency across the rules. That language is "more likely than not."

d. There would not appear to be a reason to specify that the proponent must "provide additional proof establishing its reliability." The proponent will by definition have to make an additional showing of authenticity once the opponent has met its initial burden of showing fakery. That is because the more likely than not standard becomes applicable. Plus, it is not really about whether the item is "reliable." In a deepfake situation, the software has acted "reliably" in making a super good fake. Rather, the question is about whether the item is *genuine.*

4. Taking the Authenticity Question Away from the Jury

Professor Delfino, in making her Rule 104(a) requirement, seems to imply that the result is that jurors have no say on the question of deepfakes. That is surely true if the court finds that the Rule 104(a) standard has *not* been met. That takes the question away from the jury, most obviously, because the item is never admitted at trial. But jurors *will* have a say if the court finds that the item is more likely than not authentic. Once the court finds that the Rule 104(a) threshold is met, the evidence is admitted over an authentication objection, but that does not prevent the opponent from then presenting evidence of inauthenticity to the jury. It is the same with expert testimony, found admissible under Rule 702 --- after passing the gatekeeper, the opponent is allowed, subject to other rules of evidence, to attack the expert's testimony as unfounded or unreliable. And it is so with another example she provides --- the involuntariness of a confession. Once the court finds the confession is voluntary, the defendant is still allowed to introduce evidence of coercion at the trial.

None of these situations are problematic. It may be true in each of these cases that the jury is not in a great position to evaluate the evidence. But the risks of jury misapplication are substantially, and comfortably, reduced because the evidence has passed the significant gatekeeping function established by Rule 104(a).

If, as with Professor Delfino's previous proposal, the question of authenticity is taken away from the jury even *after* the court finds it admissible, the results would be quite unsatisfactory. The

jury would have to be instructed that they could not consider whether the item is genuine. But this would only be true for items that might be deepfakes. The risks of deepfakes would have to be considered so substantial that possible deepfakes would be the only type of evidence that could not be questioned by a jury once the evidence has been found genuine by a court. Ironically, the only authenticity questions taken from the jury are as to those items which the opponent has shown might be deepfakes.

More importantly, the jury is quite unlikely to comply with a limiting instruction to essentially ignore authenticity questions. And if they ignore the instruction, as seems likely, they will be deciding about authenticity without any evidence of authenticity presented at trial. That is a bad state of affairs. It appears that Professor Delfino has dropped that part of her previous proposal which would totally exclude the jury from evaluating authenticity. And if she has not abandoned it, her position should be rejected by the Committee as it was previously.

5. Conclusion

Professor Delfino's proposal largely supports the position so far taken by the Committee: specifically that a foundation requirement must be imposed on the opponent before a deepfake inquiry is to be conducted, and if that foundation requirement is met, the proponent's burden of proving authenticity rises from the Rule 104(b) standard to the Rule 104(a) standard. The differences from the Committee's draft within that two part structure are not that significant --- but with one exception, the Committee's draft seems preferable because it is simpler and will be easier to apply. That exception, where the Committee draft can be improved, is with the addition of the word "generative" before "artificial intelligence."

VII. Do We Need a Deepfake Amendment?[40]

The proposed Rule 901(c) addresses an important problem: how to regulate an automatic objection "it's a deepfake" for every offered audio or visual presentation. A question for the Committee is whether those blanket claims present a problem that might be handled by the courts under the existing Rule 901. As discussed above, a similar concern arose during the rise of texts and social media: the concern that every opponent would argue "my Facebook post was hacked, my text was hacked" and so on. It turned out that courts handled that wave of objections by holding that something more than a mere assertion was necessary before an inquiry would be taken into the authenticity of texts and social media. Courts have specifically rejected blanket claims like "my account was hacked" --- because such an argument can always be made. Thus, courts have consistently held that "the mere allegation of fabrication does not and cannot be the basis for excluding ESI as unauthenticated as a matter of course, any more than it can be the rationale for

[40] This section has been changed from the prior memo.

excluding paper documents."[41] Courts properly require some showing from the opponent before inquiring into charges of hacking and falsification of digital information.[42] The opponent has a burden of going forward.

The question is whether courts will similarly be able to handle blanket claims of "it's a deepfake" under the existing rules. There are good arguments on both sides. The argument for no change is that courts handled the previous wave just fine, so there is no need to be concerned about such blanket arguments when it comes to deepfakes.

The argument for a new rule is that deepfakes are extremely hard to detect, and while hacking Facebook posts might be a rare occurrence, the potential use of deepfakes could well be broader and wider. Moreover, a concrete standard for justifying an inquiry --- such as that set forth in the proposal --- could be more useful to the court than the general standards that can be found only in the case law.

It appears, though, that the courts have required a foundation before going forward in the few cases that have raised the issue. And they did that without a rule change. See, e.g., *United States v. Whitehead*, No. 22 CRIM. 692 (LGS), 2024 WL 3085019, at *9 (S.D.N.Y. June 21, 2024) (an unsupported "deepfake" allegation was rejected, with the court finding that an inquiry into AI was not justified on the mere claim of deepfake), and other cases set forth in Part One of this memo.

The other reason for a new Rule 901(c) is to raise the standard of proof for authenticity when credible deepfake allegations have been made. If deepfakes are going to be flooding the courts, there is an excellent argument, made by Professor Delfino above, that courts are going to be better than jurors at figuring it out, and so a Rule 104(a) standard will be critical.

But, are deepfakes going to be flooding the courts? The undeniable fact is, not yet. All the articles cite the same three examples of deepfakes, and none of them actually resulted in improper admission of the deepfake. This stuff moves fast though. It seems entirely possible that this year's drought is next year's flood.

One could argue that resolving the argument about the necessity of the rule should be delayed until courts actually start dealing on a regular basis with deepfakes. At that point it can be determined how necessary a rule amendment really is. Moreover, the possible prevalence of deepfakes might be countered in court by the use of watermarks and hash fingerprints that will

[41] United States v. Safavian, 435 F. Supp. 2d 36, 38 (D.D.C. 2006).

[42] See Grimm, Capra and Joseph, *Authenticating Digital Evidence,* 69 Baylor Law Review 1, 3-5 (2017) (reviewing the showing necessary for an inquiry into falsification of digital evidence).

assure authenticity. Again, the effectiveness of these countermeasures will only be determined after a waiting period.

That said, the slowness of the rulemaking process might ironically be a factor that would justify action at this meeting. The Committee could propose a rule for public comment at this meeting, and it would be another whole year before the Committee would revisit the rule. If there was no significant deepfake activity in the courts by then, that would be a reason to pause. If courts were having trouble with deepfakes during that year, that could be a reason to keep going. And the public comment on an AI proposal is sure to be massive and hopefully helpful. So there is much to be said for agreeing upon language and putting out a proposal at this meeting.

At any rate, at the last meeting, the consensus was against proceeding on a Rule 901(c) proposal, but rather to wait until the attempted admission of deepfakes is more frequent than it currently is. At this meeting, the Committee will revisit the question of the necessity of proposing this amendment at this time. If the Committee decides not to move forward, it would nonetheless be very useful to at least provisionally approve a draft amendment and Committee Note. That way, when the Committee does determine that there is a need to go forward, much of the hard work will already have been done.

VIII. What to Do About the Liar's Dividend?[43]

It has often been argued that a byproduct of the age of deepfakes will be the Liar's Dividend: that a party will be able to argue persuasively that even authentic items are fake because it is so easy to create fake documents, and so "you can't believe what you see."[44] The question is what, if anything, the Committee can or should do to address the possibility that a party will rely on a Liar's Dividend at trial.

At the outset, it seems that there is an inherent inconsistency in arguing on the one hand that deepfakes are a crisis because the jury will believe they are real, and on the other that the liar's dividend is a crisis because the jury will believe that every video is fake. The poster child example of the danger of deepfakes is one in which an event was deepfaked and the person in the fake video admitted to committing an act even though he did not do it. How is that person going to turn around

[43] This section is new.

[44] The term was coined by a Fordham grad, Danielle Citron, together with Bobby Chesney, in *Deepfakes: A Looming Challenge for Privacy, Democracy, and National Security,* 107 Calif. L. Rev. 1753, 1785 (2019):

> As the public becomes more aware of the idea that video and audio can be convincingly faked, some will try to escape accountability for their actions by denouncing authentic video and audio as deep fakes. Put simply: a skeptical public will be primed to doubt the authenticity of real audio and video evidence. This skepticism can be invoked just as well against authentic as against adulterated content. Hence what we call the liar's dividend: this dividend flows, perversely, in proportion to success in educating the public about the dangers of deep fakes.

and disbelieve all videos? Perhaps the concern is that some people will end up believing everything and some will end up believing nothing. At any rate, the doomsday scenario painted by many writers seems a bit overwrought, to the point of inconsistency.

It is true that in a few cases (such as in one of the January 6 prosecutions) a lawyer argued that a video was fake because, essentially, "you never know anymore." So is an amendment to the Evidence Rules necessary to prohibit parties from benefiting from the liar's dividend?

A liar's dividend argument can be presented in two ways. First, a lawyer might simply argue to the jury, without any specific basis, that a video or audio is fake. Second, a lawyer might seek to present demonstrative evidence of how easy it is, in general, to fake videos, audios, etc. [Note that if a party is proffering evidence that the particular item at issue is fake, that is not a liar's dividend problem. That is a problem of authenticity which is discussed elsewhere in this memo.]

As to argument by lawyers: argument by lawyers is of course not evidence, and so one would not look immediately to the Federal Rules of Evidence for regulation. Though it might be argued that the new Rule 107 regulates the use of illustrative aids, which are not evidence, so it wouldn't be the first time if a rule were adopted to regulate abusive lawyer argument that is not itself evidence.

It turns out, though, even without a Federal Rule, there is plenty of precedent holding that trial courts have inherent authority to regulate, prohibit, and sanction lawyer argument that is without basis in the evidence. For example, in *Lee v. City of Troy,* 339 F.R.D. 346, 367–68 (N.D.N.Y. 2021), the parties presented two versions of an important video. The defense counsel argued to the jury, without basis, that the plaintiff's version was "manufactured" and the defendant's version was "official." The court reversed the judgment for the defendant, finding that it was error to make an argument that was not supported by any evidence. It stated that "in the Second Circuit, attorneys may not make comments to the jury that are so inflammatory or so unsupported by the record as to affect the integrity of the trial."[45] The court found that "there is no discernible support in the record for defendants' counsel's repeated assertion that P-12 was manufactured" so the "nine statements to that effect were improper." [46]

[45] Citing *Marcic v. Reinauer Transp. Cos.,* 397 F.3d 120, 127 (2d Cir. 2005) (stating that attorney comments unsupported by the record might merit new trial under Rule 59).

[46] Lawyer argument is often controlled for other reasons, such as for raising prejudicial inferences. Thus, it is well-known that a prosecutor commits error if she, in argument, vouches for the credibility of government witnesses. See, e.g., *United States v. Alexander*, 741 F.3d 866 (7th Cir. 2014) (It is not proper for the prosecutor to argue that the professional oath taken by law enforcement officers is somehow proof of their veracity; moreover, it is not proper to argue that a police officer has no "incentive" to lie or falsely implicate the defendant. This argument implies that there is some undisclosed punishment that would occur if the officer testified falsely). See also *Pappas v. Middle Earth Condominium,* 963 F.2d 534 (2nd Cir. 1993) (reversing where the defendant's counsel in argument stressed that the plaintiff was coming from a different state to win an exorbitant sum from the locals).

So it is not at all clear that a rule amendment is necessary to regulate lawyer's baseless argument that evidence is fake. See also *Aidini v. Costco Wholesale Corp.,* No. 215CV00505APGGWF, 2017 WL 10775082, at *1 (D. Nev. Apr. 12, 2017) ("Of course, counsel must have an evidentiary or legal basis for any statements to the jury. And if some specific statements square with the evidence but also pose a risk of unfairly undermining the jury's reason, I will balance those scales when the time comes.").

Another possible limitation on an unsupported argument of "deepfake" might be the rules of professional responsibility. Model Rule of Professional Conduct Rule 3.1 requires that attorneys must assert only those claims with a basis in law and fact so "that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law." Model Rule 3.3(a) states that a lawyer may not knowingly make a false statement of fact or law to a tribunal. *These provisions may not work to keep all deepfakes out of the court,* because a lawyer seeking to admit an item may not know that the client has made a deepfake. But the liar's dividend problem by definition is one in which the lawyer is arguing deepfake but without any support for that argument.[47]

So it would appear that there is enough in the law already to combat, and deter, lawyers from making baseless deepfake *arguments* at trial. But what about demonstrative *evidence* about the ease of deepfaking, with no factual basis to think it has occurred in the instant case? It turns out that case law prohibits offering such evidence in the absence of any foundation. The leading case is probably *United States v. Peterson*, 945 F.3d 144, 157 (4th Cir. 2019), a drug case, in which the defendant had made and received a number of incriminating texts. These were all properly authenticated; there was no basis to suspect that they were fake. But at trial, defense counsel sought to put on evidence that texts in general could be easily faked, by demonstrating how a text could be manufactured by using software available for free on the internet. [This would be the equivalent of a demonstration of how easy it is to make a deepfake audio or video, in the absence of any evidence that it occurred in the instant case.] The trial court prohibited the demonstration, citing Rule 403. It stated that in the absence of a foundation ---meaning here that there was some cause to believe that fakery had occurred in this case --- the demonstration had little probative value and raised a risk of confusion, distraction, and prejudice. The court of appeals affirmed, declaring that the trial court properly applied Rule 403. The attempted demonstration "had virtually no probative value" because counsel "offered no evidence to suggest that the screenshots submitted at trial were fabricated." The court declared that "Peterson's proposed demonstration was an attempt to prejudice the jury—an attempt to confuse it by throwing the veracity of text message screenshots

[47] Rebecca Delfino argues that the provisions in the Model Rules are too general to be much of a deterrent for a lawyer who is making an unsupported deepfake argument. See Delfino, *The Deepfake Defense: Exploring the Limits of the Law and Ethical Norms in Protecting Legal Proceedings from Lying Lawyers,* 84 Ohio St. L.J. 1057 (2024). It may be that the Model Rules' general proscriptions are not perfect deterrents. But it seems reasonable to think that most lawyers would give pause, and think about, ethical proscriptions when deciding whether or not to make a baseless argument.

writ large into doubt, *without any effort to identify a connection to Peterson's case*." (Emphasis added.)

A similar line of cases covers attempts to introduce evidence of an alternative perpetrator. Courts have applied Rule 403 to prohibit proof that "somebody else must have done it." Alternative perpetrator evidence is allowed only upon a foundation that there is a real connection between the perpetrator and the crime. *See, e.g., United States v. McVeigh,* 153 F.3d 1166 (10th Cir. 1998).

In sum, it would appear that there is sufficient authority in the case law and the rules of ethics to prevent lawyers from arguing that evidence in the case is fake, without an evidentiary basis. And it would appear that there is sufficient case law under Rule 403 to prohibit general demonstrations of fakery when there is no indication of fakery in the case.

This is not to say that a specific rule directed at the Liar's Dividend is unwarranted or would be unhelpful. But there are some reservations about a specific rule: 1) It seems appropriate to wait to see if such arguments and evidentiary proffers are being frequently used --- they are not today; 2) If the problem does arise with some frequency, it probably makes sense to see if the courts are able to handle it with the tools discussed above; and 3) A rule specifically dealing with the liar's dividend might be thought to be too narrow. Why single out a liar's dividend argument when lawyers, at least from time to time, make other prejudicial and unfounded arguments?

All that said, it might be useful to add a paragraph discussing the liar's dividend to a committee note that adds a new Rule 901(c) to deal with deepfakes. A Committee Note has the virtue of avoiding a new, probably too-narrow, rule that is in part about argument and not about evidence. And it might be a helpful addition to instruct courts and lawyers on where to find the authority for controlling evidence and argument that is intended to reap the liar's dividend.

The draft amendment adding a new Rule 901(c) contains proposed note language directed to the Liar's Dividend.

IX. Draft of a Deepfake Amendment

The Committee's draft of a new Rule 901(c), reviewed at the last meeting, is set forth below, with a few tweaks that will be discussed after the text and the Committee Note.

Rule 901(c). ***Potentially Fabricated Evidence Created By Generative Artificial Intelligence .***

If a party challenging the authenticity of an item of evidence ~~computer-generated or other electronic evidence~~ demonstrates to the court that a jury reasonably could find that the ~~evidence~~ item has been fabricated, in whole or in part, by generative artificial intelligence, the ~~evidence~~ item is admissible only if the proponent demonstrates to the court that it is more likely than not authentic.

This rule governs authentication under both Rule 901 and 902.

Reporter's explanation of changes:

1) Rule 901 refers to an "item of evidence" and not to "evidence." So it makes sense to carry that terminology over to a new subdivision. It is also a better description, to say that the "item" has been fabricated rather than the "evidence" has been fabricated.

2) There is no reason to limit the subdivision to "computer-generated or other electronic evidence." The subdivision should apply to any evidence that can be altered by generative AI. While that will probably be electronic evidence most of the time, who knows? Maybe someday we will be able to deepfake real evidence.[48]

There is no reason to qualify the kind of information that can be deepfaked. The question is, what happens *if it is deepfaked*, not what it was when it started out. Under the original draft, one could argue that a deepfaked photo that was taken by a regular camera was not covered by the rule, because the photo was not processed from a computer and was not electronic. There is no benefit in describing the kind of items that are subject to the rule.

3) The structure and requirements of the new provision must also apply to items offered as self-authenticating under Rule 902. See the North Dakota article in Part 1. To take the most obvious example, newspapers and periodicals, which are self-authenticating under Rule 902(7) can definitely be deepfaked.

[48] In the new movie "Mickey 17" the lead character is essentially deepfaked 17 times with a 3D printer. So you never know.

Draft Committee Note

This new subdivision is intended to set forth guidance and standards when the opponent alleges that an ~~audio or video~~ item is a "deepfake" --- i.e., that it has been altered by generative artificial intelligence so that it is not what the proponent says it is.

The term "artificial intelligence" can have several meanings, and it is not a static term. In this rule, "artificial intelligence" means software used to perform tasks or produce output previously thought to require human intelligence. "Generative Artificial Intelligence" is a type of artificial intelligence technology that can produce various types of content, including text, imagery, audio and synthetic data. While traditional AI is typically designed to perform a narrow range of tasks repetitively, Generative AI creates new content in response to a wide variety of user inputs.

The rule sets out a two-step process for regulating claims of deepfakes. First, the opponent must set forth enough information for a reasonable person to find that the item has been altered by the use of generative artificial intelligence. Thus, a broad claim of "deepfake" is not enough to put the court and the proponent to the time and expense of showing that the item has not been manipulated by generative artificial intelligence. Second, assuming that the opponent has shown enough to merit the enquiry, the proponent must show to the court that the item is more likely than not genuine. While that Rule 104(a) standard is higher than ordinarily required for a showing of authenticity, it is justified given that any member of the public has the capacity to make a deepfake, with little effort and expense, and deepfakes have become more difficult to detect by jurors. Moreover, it is anticipated that expert testimony may often be required to determine whether or not an item is a deepfake. As with experts evaluated under Rule 702, there is a concern that lay jurors may not be in a position to evaluate expert testimony regarding deepfakes. Accordingly, the same preponderance of the evidence standard should apply. It is therefore reasonable for the court to require a showing, by a preponderance of the evidence, that the item is not a deepfake, once the opponent has met its burden of going forward.

This amendment covers specific proffered items as to which the opponent has presented a sufficient foundation of fakery. It does not directly address another

possible consequence --- that because of the background risk of deepfakes, juries might be led to think that no evidence can be trusted. This phenomenon has been called the "liar's dividend." But rules are in place to combat claims that "you can't believe anything you see." To the extent evidence of such a broad point is proffered, it is certainly subject to Rule 403. And to the extent the point is expressed by lawyers in argument, it is subject to the court's inherent authority to regulate lawyer argument that is made without foundation in the evidence.

The requirements of the rule apply to authentication under either Rule 901 or 902. The risk of deepfakes extends to many of the items designated in Rule 902 as self-authenticating --- most obviously newspapers and publications.

Reporter's Comments on changes:

1) The deletion of "audio or video" is useful, again, because we don't know what can be deepfaked. Written material can be fabricated, so once again there is no reason to describe the items that can be subject to this rule.

2) A definition of generative AI is included.

3) Some language is added to clarify the explanation for applying the Rule 104(a) gatekeeper function once there is a credible showing of a deepfake.

4) The liar's dividend problem is addressed.

5) The explanation for the coverage of self-authenticated items is added as the last paragraph.

X. Drafts of a New Rule 707

As stated above, this amendment treats the problem that arises where machine data would be considered expert testimony if coming from a person, but it is entered into evidence either directly or by someone who is not familiar with the machine's process and cannot verify its reliability. This problem arises most often today with attempts to "improve" visual or aural data by use of software that is not validated. What follows is: 1. the draft reviewed by the Committee at the last meeting, with suggested changes that are explained in the comments; and 2) A second draft that refers directly to "machine learning."

Rule 707. Machine-generated Evidence

Where the output of a process or system would be subject to Rule 702 if testified to by a human witness, the court must find that the output satisfies the requirements of Rule 702 (a)-(d). This rule does not apply to the output of basic scientific instruments ~~or routinely relied upon commercial software~~.

Comments:

1) The reference in the last sentence to routinely relied upon commercial software creates too broad an exclusion. For example, it could cover output from ChatGPT, if not now, then soon, because it will be "routinely relied upon." It can be argued that "basic scientific instruments," along with the Committee Note, will be sufficient guidance for courts in determining the scope of the rule. It is unlikely that any court is going to hold a *Daubert* hearing over a digital thermometer, regardless of what this rule says.

It could be further argued that the sentence should simply be *struck*, leaving the discussion of the breadth of the rule to the Committee Note. Again, one would not expect this rule to actually require a *Daubert* hearing for an electronic scale. But on the other hand, opponents may seek to exploit the lack of a limit in text.

The actual risks of overapplication of this rule will probably be raised in public comment. As such, for the public comment period, it is probably useful to have language in text for people to take a crack at. "Basic scientific instruments" is probably a good start for the comment period.

2) Another way to attempt to limit the rule is to put some qualifications on the term "process or system." If the goal of regulation is machines that learn things like humans, then perhaps the rule should be set forth as follows:

Where the output of a process or system **of machine learning** would be subject to Rule 702 if testified to by a human witness, the court must find that the output satisfies the requirements of Rule 702 (a)-(d).

This could be backed up by definition of machine learning in the Committee Note:

"Machine learning is an application of artificial intelligence that is characterized by providing systems the ability to automatically learn and improve on the basis of data or experience, without being explicitly programmed."

There would seem to be no risk of applying the rule to a digital thermometer if the scope of the rule is specifically limited to machine learning systems.

I ran this option by Professor Andrea Roth, who has graciously provided extremely valuable input to the Committee on this subject. Here is her answer:

"I think the term 'machine learning' describes a particular subset of algorithms that are 'trained' on data and then engage in either supervised or unsupervised 'learning' in terms of how to classify that data (what is a "dog" versus "cat," or what is this person's handwriting versus that person's handwriting, etc.). Deep neural networks and LLMs are a subset of machine learning that are particularly complex (involving "deep learning").

But an algorithm need not involve machine learning to be the sort of process or system that produces a machine-generated result and that would raise the issues underlying a proposed 707-like rule. For example, blood-alcohol software ... or Fitbit sleep tracking, gas chromatograph software, other forensic tools..."

So by using the term "machine learning" in the text the rule runs the risk of being underinclusive. But by covering all machines that would reach an expert-like conclusion, with a qualifying sentence at the end, you run the risk of being overinclusive. On balance, the risk of overinclusiveness may be the lesser risk; sensible courts are not going to conduct expert hearings on simple instruments. The risks of underinclusiveness are possibly greater because the line between a machine-learning process and other algorithmic calculations can be fuzzy, and is likely to become more fuzzy in the future. The current draft draws the line between *expert-like conclusions and non-expert-like conclusions.* And courts should be pretty good at assessing what would be an expert conclusion if coming from a human witness.

Just to show you what it would look like, there is a draft below (after the Committee Note) that is a machine-learning version of the rule.

Draft Committee Note

Expert testimony in modern trials increasingly relies on software- or other machine-based conveyances of information, from software-driven blood-alcohol concentration results to probabilistic genotyping ~~software~~. Machine-generated evidence can involve the use of a computer-based process or system to make predictions or draw inferences from existing data. When a machine draws inferences and makes predictions, there are concerns about the reliability of that process, akin to the reliability concerns about expert witnesses. Problems include using the process for purposes that were not intended (function creep); analytical error or incompleteness; inaccuracy or bias built into the underlying data or formulas; and

lack of interpretability of the machine's process. Where ~~an~~ a testifying expert relies on such a method, ~~the~~ that method – and the expert's reliance on it – will be scrutinized ~~pursuant to~~ under Rule 702. But if machine or software output is presented without the accompaniment of a human expert (for example through a witness who applied the program but knows little or nothing about its reliability), Rule 702 is not obviously applicable. Yet it cannot be that a proponent can evade the reliability requirements of Rule 702 by offering machine output directly, where the output would be subject to Rule 702 if rendered as an opinion by a human expert. Therefore, new Rule 707 provides that if machine output is offered ~~directly~~, without the accompaniment of an expert, its admissibility is subject to the requirements of Rule 702 (a)-(d).

The rule applies when machine-generated evidence is entered directly, but also when it is accompanied by lay testimony. For example, the technician who enters a question and prints out the answer might have no expertise on the validity of the output. Rule 707 would require the proponent to make the same kind of showing of reliability as would be required when an expert testifies on the basis of machine-generated information.

The rule is not intended to encourage parties to opt for machine-generated evidence over live expert witnesses. Indeed the point of the rule is to provide reliability-based protections when a party chooses to proffer machine evidence instead of a live expert.

It is anticipated that a Rule 707 analysis will usually involve the following, among other things:

• Considering whether the inputs into the process are sufficient for purposes of ensuring the validity of the resulting output. For example, the court should consider whether the training data for a machine learning process is sufficiently representative to render an accurate output for the population involved in the case at hand.

• Considering whether the process has been validated in circumstances sufficiently similar to the case at hand. For example, if the case at hand involves a DNA mixture of several contributors, likely related to each other, and a low quantity

of DNA, the software should be shown to be valid in those circumstances before being admitted.

The final sentence of the rule is intended to give trial courts sufficient latitude to avoid unnecessary litigation over ~~machine output that is regularly relied upon in commercial contexts outside litigation and that, as a result, is not likely to render output that is invalid for the purpose it is offered~~ the output from simple scientific instruments that are relied upon in everyday life. Examples might include the results of a mercury-based thermometer, an electronic scale, or a battery-operated digital thermometer. ~~or automated averaging of data in a spreadsheet, in the absence of evidence of untrustworthiness~~.

The Rule 702(b) requirement of sufficient facts and data, as applied to machine-generated evidence, should focus on the information entered into the process or system that leads to the output offered into evidence.

Comments:

1) There are a few refinements throughout, and an attempt to sharpen the paragraph that describes the "simple scientific instrument" exception. More examples of such instruments that are excluded from coverage can be added --- maybe as the result of public comment.

2) The paragraph on the risk that parties will not call experts but just admit machine data is addressed in a new paragraph, in response to the concerns of Judge Bates, expressed at the last meeting.

Draft Alternative --- Machine-Learning

Rule 707. Output of a Process of Machine-Learning

Where the output of a process or system of machine-learning would be subject to Rule 702 if testified to by a human witness, the court must find that the output satisfies the requirements of Rule 702 (a)-(d).

Draft Committee Note

Machine learning is an application of artificial intelligence that is characterized by providing systems the ability to automatically learn and improve on the basis of data or experience, without being explicitly programmed. Machine learning involves artificial intelligence systems that are used to perform complex tasks in a way that is similar to how humans solve problems. Machine-learning systems can make predictions or draw inferences from existing data supplied by humans. When a machine draws inferences and makes predictions, there are concerns about the reliability of that process, akin to the reliability concerns about expert witnesses. Problems include using the process for purposes that were not intended (function creep); analytical error or incompleteness; inaccuracy or bias built into the underlying data or formulas; and lack of interpretability of the machine's process. Where a testifying expert relies on the output of machine learning, that output – and the expert's reliance on it – will be scrutinized under Rule 702. But if machine learning output is presented without the accompaniment of a human expert (for example through a witness who applied the program but knows little or nothing about its reliability), Rule 702 is not obviously applicable. Yet it cannot be that a proponent can evade the reliability requirements of Rule 702 by offering machine learning output directly, where the output would be subject to Rule 702 if rendered as an opinion by a human expert. Therefore, new Rule 707 provides that if machine learning output is offered without the accompaniment of an expert, its admissibility is subject to the requirements of Rule 702 (a)-(d).

The rule applies when machine learning evidence is entered directly, but also when it is accompanied by lay testimony. For example, the technician who enters a question and prints out the answer might have no expertise on the validity of the output. Rule 707 would require the proponent to make the same kind of showing of reliability as would be required when an expert testifies on the basis of machine learning output.

The rule is not intended to encourage parties to opt for machine learning output evidence over live expert witnesses. Indeed the point of the rule is to provide reliability-based protections when a party chooses to proffer machine learning evidence instead of a live expert.

It is anticipated that a Rule 707 analysis will usually involve the following, among other things:

• Considering whether the inputs into the process are sufficient for purposes of ensuring the validity of the resulting output. For example, the court should consider whether the training data for a machine learning process is sufficiently representative to render an accurate output for the population involved in the case at hand.

• Considering whether the process has been validated in circumstances sufficiently similar to the case at hand. For example, if the case at hand involves a DNA mixture of several contributors, likely related to each other, and a low quantity of DNA, the software should be shown to be valid in those circumstances before being admitted.

The Rule 702(b) requirement of sufficient facts and data, as applied to machine learning evidence, should focus on the information entered into the process or system that leads to the output offered into evidence.

TAB 4

TAB 4A

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Memorandum To: Advisory Committee on Evidence Rules
From: Daniel J. Capra, Reporter
Re: Possible Amendment to Rule 609(a)(1)
Date: April 1, 2025

The Committee has been considering the possibility of amending Rule 609 --- the rule governing impeachment of witnesses with prior convictions --- for the last three meetings.

Rule 609(a) currently provides as follows:

Rule 609. Impeachment by Evidence of a Criminal Conviction

(a)In General. The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction:

(1) for a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than one year, the evidence:

(A) must be admitted, subject to Rule 403, in a civil case or in a criminal case in which the witness is not a defendant; and

(B) must be admitted in a criminal case in which the witness is a defendant, if the probative value of the evidence outweighs its prejudicial effect to that defendant; and

(2) for any crime regardless of the punishment, the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving—or the witness's admitting—a dishonest act or false statement.

At its Fall, 2023 meeting, Professor Jeffrey Bellin made a presentation recommending the abrogation of Rule 609. The Committee was not in favor of a complete abrogation of Rule 609, because that would mean that convictions for perjury and other lying crimes could not be admitted, and members concluded that such lying-based convictions were very probative of a witness's character for untruthfulness. But the Committee resolved to consider the abrogation of Rule

609(a)(1), which allows impeachment with convictions that are not based on lying, subject to balancing tests. Discussion at that Committee meeting indicated that at least some members found convictions offered under Rule 609(a)(1) to be only minimally probative of the likelihood that the witness will lie on the stand --- and that admitting such convictions could be very prejudicial, especially when offered against criminal defendants (who might decide not to testify), and especially when they are similar to the crime with which the defendant was charged. But ultimately, two meetings ago, the Committee voted against abrogating Rule 609(a)(1). Some members determined that while there are undeniably abuses of the rule --- allowing highly prejudicial and not very probative convictions to be admitted against criminal defendants --- those abuses were misapplications by the courts of the balancing test set forth in Rule 609(a)(1)(B). After discussion, the Committee agreed to consider an amendment that would alter the balancing test in Rule 609(a)(1)(B) to make it less likely that courts will admit highly prejudicial and minimally probative convictions against criminal defendants. The proposed fix was to change the balancing test so that a conviction would not be admissible to impeach the defendant unless the probative value of the evidence *substantially* outweighs its prejudicial effect to that defendant. The Committee was closely divided on this amendment, and resolved to reconsider it at the Spring 2025 meeting.

This memorandum is in five parts. Much, but not all of it, is the same as the memo prepared for the last meeting. Part One discusses the existing rule and focuses on Rule 609(a)(1)(B). Part Two provides examples of court rulings allowing impeachment of criminal defendants with highly prejudicial and minimally probative evidence. Part Three discusses the arguments in favor of and against an amendment that would allow admission of a conviction under Rule 609(a)(1)(B) only when the probative value of the conviction *substantially* outweighs its prejudicial effect. Part Four is a new section that considers the possibility of an "add-on" amendment to Rule 609(b), to clarify how the timing requirement is calculated for old convictions covered under that Rule. Part Five sets out two alternatives for a draft amendment and Committee Note.

Attached to this memorandum is a case law digest analyzing district court opinions applying Rule 609(a)(1)(B).

The proposal for the amendment to Rule 609 is an action item for this meeting. The Committee will vote on whether to recommend to the Standing Committee that proposed amendments to Rule 609 be released for public comment.

I. Rule 609(a)(1)(B)[1]

Rule 609(a)(1)(B) provides that a recent conviction not involving dishonesty or false statement can be admitted to impeach a criminal defendant if its probative value outweighs its prejudicial effect. This is a rule of mild exclusion. It is a rule that is more protective against impeachment than the rule applied to all witnesses other than the criminal defendant. As to all other witnesses, the applicable Rule is 403 --- convictions are presumed to be admissible, and only excluded when their probative value is substantially outweighed by their prejudicial effect.

The legislative history of Rule 609 indicates that this relatively protective test, applicable only to criminal defendants, was generated by a concern about the "deterrent effect" of prior conviction impeachment "upon an accused who might wish to testify." H.R. Rep. No. 93-650, at 11 (1973). See also 4 Weinstein & Berger, § 609App.01[3], at 10 (recognizing that the House Judiciary Committee's changes to the rule were motivated by concern that the existing text applying Rule 403 did not "adequately protect[] an accused who wished to testify"). Thus there was a concern, right at the outset, that broad impeachment with prior convictions could deter criminal defendants from exercising their constitutional right to testify. The quite reasonable presumption that some criminal defendants would testify but for impeachment with convictions was the animating reason behind the protective balancing test.

Federal courts have used a multifactor test to determine whether a conviction should be admissible under Rule 609(a)(1)(B). The circuit-based tests vary at the margins, but they basically follow the five-factor framework established by the Seventh Circuit in *United States v. Mahone,* 537 F.2d 922, 929 (7th Cir. 1976). The *Mahone* factors require the court to consider:

> (1) The impeachment value of the prior crime. This factor recognizes that some crimes not involving false statement (such as theft) might be more probative of character for untruthfulness than others (such as assault or armed robbery).
>
> (2) The age of the conviction and the witness's subsequent history. This factor recognizes that older convictions are less probative than more recent ones, but that probative value of an old conviction may increase if there has been consistent wrongdoing. (Note that if the conviction is more than 10 years old in the measurement set forth in Rule 609(b), its admissibility is governed by an even more exclusionary balancing test --- the probative value must substantially outweigh the prejudice.)
>
> (3) The similarity between the past crime and the charged crime. This factor recognizes that if the conviction is for a crime similar to that charged, the prejudice is higher because the

[1] This section is substantially the same as was presented in the last memo to the Committee.

jury may draw the impermissible inference that the defendant has a propensity to commit the charged crime.

(4) The importance of the defendant's testimony. This factor recognizes that as the importance of the defendant's testimony to a proper resolution increases, the cost of admitting the conviction increases as well because *impeachment will deter* the defendant from exercising the constitutional right to testify.

(5) The importance of the defendant's credibility. This factor works in tension with factor 4, because whenever the defendant's testimony is important, his credibility is as well. The more central his credibility, the more the test leans toward admission of a conviction.[2]

In many cases, the final two factors are in fact *not* applied to cancel each other out. Most cases emphasize the importance of the witness's credibility; and in some cases that is in fact the *only* factor that the court relies on in allowing impeachment of the accused. *See, e.g., United States v. Cooper*, 990 F.3d 576 (8th Cir. 2021) (in a drug prosecution, a prior conviction for aggravated assault was properly admitted; the only factor relied upon by the court was that the defendant's credibility was important, because his testimony contradicted that of the government's witnesses --- when would that not be the case?); *United States Carroll,* 2024 WL 3924604 (E.D. Mo.) ("Mr. Carroll's credibility is likely to be important to the jury, so the probative value of his past conviction outweighs its prejudicial effect * * * "); *United States v. Tolliver*, 374 Fed. Appx. 655, 658 (7th Cir. 2010) (drug distribution case: "Here, Toliver's testimony and credibility were central to the case * * *. Thus, although the similarity of [Toliver's] two [drug distribution] crimes increased the risk of prejudice, the importance of Toliver's credibility weighed in favor of admissibility."); *United States v. Perkins,* 937 F.2d 1397, 1406 (9th Cir. 1991) ("In this case, defendant's credibility and testimony were central to the case, as Perkins took the stand and testified that he did not commit the [bank] robbery. We therefore conclude that the district court did not abuse its discretion in denying Perkins's motion to preclude the government from asking him about his recent prior conviction for bank robbery."); *United States v. German*, 2023 WL 1466609, at *1 (11th Cir. 2023) ("A criminal defendant who chooses to testify places his credibility in issue as does any witness; therefore, he is subject to impeachment through evidence of prior convictions.").

It is important to note what is *not* considered in the above factors: the need to focus on a conviction's *marginal* probative value in light of the fact that the defendant's credibility is already impaired by his obvious motive to falsify. When bias is not considered in determining whether a

[2] See *United States v. Caldwell,* 760 F.3d 267, 275, n.15 (acknowledging the "tension" between the fourth and fifth factors); Bellin, *Circumventing Congress: How the Federal Courts Opened the Door to Impeaching Criminal Defendants with Their Prior Convictions)* ("In essence, the factors cancel each other out. To the extent a defendant's testimony is 'important' * * * his credibility becomes 'central' in equal degree, leading to a curious equipoise).

conviction can be used for impeachment, it means by definition that many convictions currently admitted are being assigned more probative value than they actually have, leading to incorrect determinations under Rule 609(a)(1)(B).

II. Court Rulings Allowing Broad Impeachment Under Rule 609(a)(1)(B)

The balancing test of Rule 609(a)(1)(B) was intended to be protective. The compromise in Congress was that while there would be open admissibility of convictions involving false statements, there should be a strict control on all other convictions of criminal defendants--- given their diminished probative value and the high risk of prejudice. Of course, many courts have taken the Congressional intent to heart and exclude convictions under Rule 609(a)(1)(B).[3] But the sad fact is that many courts routinely admit these convictions --- even if they are for inflammatory acts, or are for crimes identical to that charged, and even admitting multiple convictions.[4]

Here are some of the many recent examples of admission of highly prejudicial convictions, even though the protective balancing test of Rule 609(a)(1)(B) was applicable:[5]

***United States v. Roper,* 2024 WL 4727633 (D.N. Mex.)** In a prosecution on three Hobbs Act robbery charges, the court held that the defendant's prior conviction for armed robbery was admissible to impeach him. The court quoted Rule 609(a)(1)(B) to state that a prior conviction "must be admitted in a criminal case in which the witness is a defendant." The judge ignored the fact that the sentence ends with a qualifier --- that the probative value must outweigh the prejudicial effect. The court found that the prior armed bank robbery was not similar to the crime charged because they are different kinds of robbery. The court also stated that convictions under Rule 609(a)(1)(B) are "presumptively admissible."

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[3] For just one example of a rigorous application (others can be found in the attached case digest), see *United States v. Gillard*, 2024 WL 247054 (E.D.Pa.)**:** A defendant charged with drug and firearms crimes sought to exclude firearms and drug convictions under Rule 609(a)(1). The court first observed that Rule 609 was a very "controversial" rule. It found the gun crimes inadmissible because they had "little to no bearing on his character for truthfulness." The court noted that drug crimes may vary in their probative value as to character for truthfulness, and without having any further information about the prior crime, chose to find it of limited probative value. The prejudice of both the gun and drug convictions was high because of the similarity to the charged crimes.

[4] See Bellin, supra at 334: "At both the trial and appellate level, the *Mahone* framework is now better understood as a means of justifying the admission of impeachment, rather than as a mechanism for determining whether that impeachment is proper in the first place. This is one of the more surprising aspects of the federal courts' failure to faithfully implement the congressional policy directive embodied in Rule 609."

[5] The first three cases are new.

***United States v. Barber,* 2024 WL 3740594 (E.D. Okla.):** The defendant was charged with the shooting death of his girlfriend. The court found that the defendant's 8-year-old conviction for domestic battery by strangulation was admissible. The court relied on the premises that all convictions are probative and that the defendant's testimony was important as he was the only eyewitness.

***United States v. Williams,* 2024 WL 3540519 (D.N.J.):** The defendant was charged with felon-firearm possession. The court allowed impeachment with three drug convictions, ranging from 5-7 years old. Considering remoteness, the court reasoned that the fact that they were less than 10 years old made them especially relevant (which is a kind of double-counting because otherwise they would not have been admissible under the rule at all). The court recognized that drugs and guns are associated but relied on extensive case law indicating that "drug convictions are admissible even when the defendant is charged with a drug offense."

***United States v. Otufale,* 2024 WL 3391094 (E.D.N.Y.):** The defendant was charged with wire fraud and identity theft. The court found that two identity theft convictions were admissible to impeach the defendant, even though the defendant was already going to be impeached with two fraud convictions under Rule 609(a)(2), and even though the convictions were for the same crime as that charged in the case. The court acknowledged the "aggregate prejudicial effect of allowing the Government to cross-examine Lazarre regarding four convictions" but held that the convictions are "highly probative of whether Lazarre would be truthful if called to testify," that the jury should know about all convictions and that "[a]ny aggregate prejudicial effect that results can be mitigated by" a limiting instruction.

***United States v. Hellard,* 2024 WL 2378931 (N.D. Okla.):** The defendant was charged with assault with a dangerous weapon, malicious mischief, and arson. The court held that a 9-year-old conviction for assault with a dangerous weapon was admissible for impeachment, even though it was identical to one of the charged counts. The court found that the fact that the conviction was less than 10 years old weighed heavily in favor of admissibility--- but that is only to say that the conviction fell within (a) rather than (b); it is double-counting to say that it is especially probative merely because it fits within the 10-year deadline. The court also found that the defendant's credibility was important as the case centered on eyewitness testimony. It did not give weight to the possibility that the defendant would be deterred from testifying.

***United States v. Jones*, 2024 WL 2302262 (M.D. Pa.):** The defendant was charged with drug trafficking. The court held that a 2004 conviction for drug trafficking was admissible for impeachment. (He was finally released from confinement on that conviction in 2020, so Rule 609(b) did not apply). The court found that the "importance of defendant's testimony" and "importance of defendant's credibility" crossed each other out; and the court concluded that drug

convictions are probative of credibility. The fact that the conviction was identical to the charge was apparently not enough to justify exclusion even under the more protective balancing test.

***United States v. Girty,* 2024 WL 1674508 (E.D. Okla.):** The defendant was charged with firearms offenses. The court held that a 2019 conviction for domestic assault and battery by strangulation was admissible for impeachment. While the impeachment value of the conviction was not high, the conviction was recent, and dissimilar from the crime charged. The court acknowledged that "the violent nature of Defendant's prior felony conviction—assault and battery by strangulation—is prejudicial, in that it may invoke an emotional response from jurors" and that admitting the conviction would likely "cause Defendant to abstain from testifying, thus damaging his right to a full defense." But the court held that the defendant's credibility was "central" and therefore the conviction was admissible.

***United States v. Walker,* 2024 WL 1822852 (N.D. Okla.):** In a prosecution for kidnapping, the court held that all three of the defendant's prior convictions --- one for firearms and two for drugs --- would be admissible for impeachment. The court stated that the convictions were not very probative, but the prejudice was diminished because they were not similar to the crime charged. The court relied mostly on the importance of the defendant's credibility.

***United States v. Briscoe,* 2023 WL 8237269 (D.N. Mex.):** In a carjacking and firearms prosecution the court held that two armed robbery convictions, nine years old, were admissible for impeachment. The court recognized that the probative value of violent crimes was limited, and prejudice was high given similarity to the charged crime. But the court essentially relied exclusively on the importance of the defendant's credibility were he to testify.

***United States v. Williams,* 2023 WL 5973993 (D.D.C.):** In a felon-firearm prosecution, the court held that a conviction for carrying a firearm without a license would be admissible. The court recognized that the conviction was not very relevant to the defendant's character for truthfulness. And it recognized that there was a high risk of prejudice because the firearm conviction was very similar to the crime charged. But the court declared that "district courts should be reluctant to exclude otherwise admissible evidence that would permit an accused to appear before a jury as a person whose character entitles him to complete credence when his criminal record stands as direct testimony to the contrary." In other words, the burden is on the defendant rather than where the rule places it --- on the government.

Note: ***If the statement of the court in Williams is correct, then why have a balancing test at all? Essentially there were no factors (other than the importance of the witness's credibility) that supported admission. The quote from the case indicates that the court is applying a presumption of admissibility to non-falsity convictions. But Rule 609(a)(1)(B) provides for a presumption of exclusion.***

The court in Williams also mentioned that prejudicial effect was minimized by the fact that it was a felon-firearm prosecution and the jury would in any event know that the defendant had a prior felony conviction. Maybe so, but that very fact also diminishes the probative value of the other conviction, given that the defendant is impeached by the prior conviction that is the status element of the charge. Thus, the felony element in the case washes out.

***United States v. Harper,* 2023 WL 396099 (W.D. Okla.):** The defendant was charged with a sexual assault, and the court found that he could be impeached with two convictions from 2016: use of a car without permission, and assault and attempt to escape. The court stated that "the Rules of Evidence begin from an assumption that prior felony convictions have impeachment value when a defendant takes the stand." It concluded that attempted escape from arrest or detention illustrates dishonesty. It found the convictions were not very prejudicial because they differed from the crime charged. It relied most heavily on the fact that "the central issue at trial is the identity of the individual who attacked E.F" and so the defendant's "testimony and credibility are important and central to the trial." The court did exclude older fraud and other convictions under Rule 609(b).

***United States v. Crittenden,* 2023 WL 2967891 (N.D. Okla.):** In a prosecution for kidnapping, the government sought to impeach the defendant with 13 prior convictions, falling into three separate categories: (1) possession of firearm offenses; (2) possession of controlled substances offenses; and (3) eluding a police officer. The court found all of the convictions to be fairly probative, noting that none of them were for violence. The prejudice was considered low, because none of the convictions were for crimes similar to the crime charged. The court found the importance of the defendant's testimony to be critical --- but not in the light of preserving the right to testify. Rather, importance of testimony and credibility were *both* weighed in favor of admission. The court concluded that all thirteen convictions would be admissible to impeach the defendant.

NOTE: It's hard to see how the probative value is sufficient for all thirteen convictions. The marginal value of a conviction goes down as more and more are admitted. That is not necessarily so for prejudice, as the jury is likely to think much worse of a defendant who was convicted two times rather than one, and so forth.

***United States v. Steward,* 2023 WL 8235817 (S.D.Ill.):** The defendant was charged with possession of contraband in prison. The court held that if he testified, *all* of the following convictions would be admissible against him for impeachment under Rule 609(a)(1)(B): (1) Carjacking; (2) Carrying, Using, and Brandishing a Firearm During and in Relation to a Crime of Violence; (3) Robbery in Indian Country; and (4) Carrying, Using, and Brandishing a Firearm During and in Relation to a Crime of Violence (so, two of them). The court concluded that

prejudice was minimal "because none of Steward's prior convictions were similar to his current offense and thus would not tend improperly to suggest to the jury any tendency on his part to commit the instant offense." Prejudice was thought to be further limited because the jury would know that he was in prison when he did the act charged. (Although that fact should limit the probative value of the convictions as well, as he is already impeached by the fact he is in prison.) Finally, the court stated that although it did not yet know the defendant's theory of the case, "there is a strong probability that his testimony will differ from, and potentially contradict, that of the corrections officer."

***United States v. Pafaite,* 2022 WL 837489 (M.D. Pa):** In a prosecution for distributing methamphetamine, the government sought to admit four separate theft-related convictions. The court held that all the convictions were admissible. The court found the convictions to be very probative of character for truthfulness because they were theft-related. The prejudicial effect of the convictions was found minimal because they were dissimilar to the drug charges. And the importance of testifying factor was crossed out by the importance of credibility factor. The court did not explain why all four convictions should be admitted. That is, the court did not consider whether the diminished probative value of the fourth conviction (at the very least) outweighed the prejudicial effect. (Arguably the prejudicial effect is diminished as well, but there are two answers to that: 1) the jury could well think that a 4-time felon was a more terrible person than a 3-time felon; and 2) assuming both the probative value and the prejudicial effect are equally marginal, then the evidence should be excluded under a balancing test that favors exclusion).

***United States v. Howard*, 2020 WL 2781607 (S.D. Ind.):** In a felon-firearm prosecution, the government sought to impeach the defendant with two armed robbery convictions and a battery conviction. The court held that all three convictions were admissible. The court found the convictions for *armed robbery* to be "crimes of dishonesty." The convictions were considered recent, and thus especially probative, simply because they were within the 10-year time limit of Rule 609(a). Finally, the court declared that "battery and armed robbery are not so similar to a felon in possession charge as to create an unacceptable risk that the jury will improperly consider the evidence of battery and armed robbery as evidence that Howard committed the felon in possession of a firearm charge."

Note: Given that this was a firearms prosecution, query whether a prior armed robbery conviction was "not so similar."

***United States v. Lewis,* 493 F.Supp.3d 858 (C.D. Cal. 2020)**: In a bank robbery prosecution, the court held that two prior bank robbery convictions would be admissible to impeach the defendant if he testified. The court found the impeachment value of a bank robbery was "high." The convictions were recent, and "the Court can mitigate any prejudice from the similarity of the

offenses through the limiting instruction it has asked the parties to provide." *The court made no mention of the fact that the convictions were identical to the crime charged.*

***United States v. Perry,* 2017 WL 2875946 (D. Minn. 2017):** The defendant was prosecuted for the unlawful possession and reckless discharge of a firearm. The district court found that all three of the defendant's prior felony convictions – a 2005 conviction for reckless discharge of a firearm, a 2008 conviction for terroristic threats, and a 2010 conviction for terroristic threats and domestic assault – were admissible to impeach him under Rule 609(a)(1)(B). The court did not address the similarity of the past offenses to the charged crimes (one conviction was *identical* to the charge) or analyze the specific Rule 609(a)(1) factors. Instead, the court summarily held that the probative value of all the convictions outweighed any unfair prejudice because the defendant "puts his character for truth in issue when he decides to take the stand."

> ***Reading this opinion literally, it means that Rule 609(a)(1)(B) convictions are automatically admissible.***

***United States v. Williams*, 2017 WL 4310712 (N.D. Cal. 2017):** Six of eleven charged defendants were heading to trial in a RICO prosecution arising out of gang-related activities involving guns, drugs, prostitution, and stolen property. Although the court deferred a final ruling on the admissibility of the defendants' many prior convictions under Rule 609 until trial, the court provided a table indicating tentative rulings for each defendant. As the court noted, the table showed that the court was inclined to admit all prior felonies that were less than ten years old and to exclude all older felonies. This would mean that many felonies involving firearms, drugs, robbery, burglary, and murder would be admissible to impeach the defendants' trial testimony.

***United States v. Ford*, 2016 WL 259640 (D.D.C. 2016**): Multiple defendants were charged with conspiracy to distribute PCP, possession of PCP with intent to distribute, carrying firearms in a connection with a drug crime, and with being felons in possession of firearms and ammunition. The court first allowed several of the defendants' prior PCP convictions to be admitted at trial through Rule 404(b), using a conclusory analysis. The court found that all prior convictions admitted under Rule 404(b) could also be used to impeach because no new prejudice would result from that use. (The court did not consider the fact that while the admitted evidence diminished the prejudicial effect when offered for impeachment, it also limited the probative value.) The government also sought to use additional PCP convictions, and other convictions of several defendants for carjacking, assault, firearm possession, unauthorized use of a vehicle, and destruction of property to impeach their trial testimony under Rule 609(a)(1)(B). The court found that all of the prior convictions showed a conscious disregard for the rights of others and said something about the credibility of the defendants, and so *all of them were admissible*.

***United States v. Thomas*, 214 F. Supp. 3d 187 (E.D.N.Y. 2016)**: The defendant was prosecuted for being a felon in possession of a firearm and the prosecution sought to impeach his trial testimony with five prior felony convictions for: 1) robbery; 2) assault; 3) reckless endangerment; 4) menacing; and 5) criminal contempt. The court refused to permit any of these prior convictions to be admitted under Rule 404(b), but then considered admissibility to impeach through Rule 609(a)(1)(B). The court found the probative value of the defendant's convictions was high, particularly because theft and robbery show dishonesty. The court noted that the crimes were recent and that the defendant had continued committing crimes. Although the court acknowledged similarity between the felon in possession charges and the prior violent crimes, the court stated that similarity does not automatically require exclusion. The court found the defendant's credibility important because he would attempt to contradict government witnesses. Finally, the court noted that the jury would be aware that the defendant was a "felon" due to the nature of the charged offense, such that knowing the particular felonies would not create significant additional prejudice. [not recognizing that the probative value of these convictions were diminished in the same measure] *The court found all prior felonies admissible to impeach.*

***United States v. Warren*, 2016 WL 931100 (M.D. Fla. 2016):** The defendant was charged with being a felon in possession of a firearm. The court found that the defendant's prior convictions for possession of drugs with intent to distribute and fleeing from an officer were admissible for impeachment. The court stated that the defendant's credibility would be at issue if he chose to testify and found that he had failed to establish sufficient prejudice from the use of his remaining felony convictions to exclude them *(thus incorrectly placing the burden on the defendant to show prejudice rather than on the prosecution to show probative value outweighing any potential prejudice)*.

***United States v. Boyajian*, 2016 WL 225724 (C.D. Cal. 2016):** The defendant was charged with a sex offense against a minor victim. The court found the defendant's prior sex offense conviction could be used to impeach the defendant's trial testimony under Rule 609(a)(1)(B) because the defendant's credibility was crucial and because the prior sex offense suggested dishonesty. No consideration was given to the inflammatory nature of the conviction or to its similarity to the crime charged.

***United States v. Sneed*, 2016 WL 4191683 (M.D Tenn. 2016):** One of the defendants was charged with the possession and distribution of cocaine and sought to exclude evidence of three prior felony convictions from trial: 1) a conviction for the sale of a controlled substance; 2) a conviction for the attempted possession of a controlled substance; and 3) a reckless aggravated assault conviction. The court summarily found that the defendant's credibility would be central to the case if he chose to testify and that, therefore, all prior felonies would be admissible to impeach him. The court did not discuss the probative value of the prior offenses for impeachment or note the similarity of the past drug offenses to the crimes charged.

***United States v. Hebert,* 2015 WL 5553662 (E.D. Okla. 2015):** The defendant was charged with being a felon in possession of explosives after a box of blasting caps was discovered in his home. Wishing to testify at trial that he had no knowledge of the blasting caps, the defendant moved to exclude evidence of three prior convictions for impeachment: 1) a 2008 conviction for possession of methamphetamine with intent to distribute; 2) a 2013 conviction for possession of a controlled substance; and 3) a 2014 conviction for burglary. The court stated that all the convictions were relevant and recent. The defendant argued that the association between drugs and guns could carry over to the "explosives" charged in the instant case and argued that the similarity between the past drug crimes and the current offense precluded use of his prior convictions. The court disagreed, finding possession of blasting caps too distinct from past drug offenses to create any risk of propensity use. The court emphasized that the defendant's testimony was important because he was the only witness who could deny the requisite knowledge of the blasting caps. For the same reason, the court found the defendant's credibility crucial. With four of five balancing factors weighing in favor of admission, the court found that probative value outweighed any unfair prejudice and ruled that *all* of the defendant's prior convictions were admissible.

***United States v. Verner,* 2015 WL 1528917 (N.D. Okla. 2015):** The defendant was charged with possession of methamphetamine with intent to distribute and sought to prevent the government from using the following prior convictions against him as impeachment: 1) a 2006 burglary conviction; 2) a 2007 conviction for possession of a controlled substance; and 3) a 2007 conviction for possession with intent to distribute marijuana and for unlawfully possessing a firearm. The court held that all of those convictions would be admissible to impeach the defendant's testimony under Rule 609(a)(1)(B). The court found that burglary is probative of veracity and stated that past drug convictions have impeaching value particularly when a defendant "denies involvement with illegal drugs." The court noted the recency of the defendant's past convictions and the importance of his credibility at trial. In response to the defendant's concerns about propensity use of his prior drug convictions, the court noted that it would give a limiting instruction, that it would not allow "details" of past convictions to be shared, and that a defendant places his credibility at issue when he decides to take the stand, so the jury needs information about past convictions to evaluate that credibility.

***United States v. Rembert,* 2015 WL 9592530 (N.D. Iowa 2015):** The defendant was charged with felon firearm possession and intent to distribute marijuana. The defendant sought to preclude the government from impeaching him with a marijuana conviction and a theft conviction. The court found, in conclusory fashion, that both convictions were probative and that the defendant's credibility was important. The court did not address the similarity of the past drug offense to the current charges. It held that both prior convictions were admissible to impeach.

***United States v. Sleugh,* 2015 WL 3866270 (N.D. Cal. 2015):** The defendant was charged with robbery, drug possession, and with unlawfully possessing and using a firearm after shooting someone during a drug deal. The defendant sought to exclude evidence of his 2008 armed robbery conviction. The court held the conviction admissible to impeach the defendant under Rule 609(a)(1), without analysis of the relevant factors.

***United States v. Walia,* 2014 WL 3734522 (E.D.N.Y. 2014):** In a prosecution for drug distribution, the court summarily held that the defendant's 2011 felony conviction for driving under the influence could be used to impeach his testimony under Rule 609(a)(1)(B) "because of its probative value, which is not unduly prejudicial."

***United States v. Drift,* 2014 WL 4662505 (D. Minn. 2014):** The defendant was charged with the sexual abuse of a child and sought to prevent the government from using two prior felony convictions to impeach his trial testimony: 1) a 2008 conviction for operating under the influence and 2) a 2008 conviction for terroristic threats. The defendant argued that the terroristic threats conviction, in particular, was not probative of his veracity and that its inflammatory nature might prejudice the jury against him. The court held that both convictions were admissible to impeach the defendant's testimony. The court emphasized that the defense would aim to undermine and contradict the testimony of the minor victim, making credibility of paramount importance. Without addressing the specific Rule 609(a)(1)(B) factors, the court found that the probative value of the prior convictions outweighed any modest prejudice (that could be alleviated through a limiting instruction).

***United States v. Gongora*, 2013 WL 12219169 (C.D. Cal. 2013):** One of the defendants was prosecuted for conspiracy, fraud, and failure to file tax returns. The government sought permission to impeach him with his 2004 felony conviction for grand theft. The court found the prior conviction more probative of credibility than prejudicial under Rule 609(a)(1)(B), with very little analysis.

***United States v. Sutton,* 2011 WL 2671355 (C.D. Ill. 2011):** The defendant was charged with possession of crack with intent to distribute and sought to prevent the government from using a nine year-old conviction for delivery of a controlled substance. The court stated that drug offenses possess some probative value with respect to veracity. Although the conviction was nine years old at the time of trial, the court found that the defendant did not have a clean record in the intervening years. Although the court noted the similarity of the prior conviction to the crime charged in passing, it concluded that a limiting instruction would reduce prejudice. Finally, the court found the defendant's credibility key given that his testimony would likely contradict that of several other witnesses, thus increasing the probative value of his prior felony. The court concluded that the government could impeach the defendant's trial testimony with his prior similar drug conviction.

***United States v. Martinez*, 2010 WL 11537701 (D. Alaska 2010):** The defendant was charged with narcotics offenses and sought to prevent the government from using his prior robbery conviction to impeach his trial testimony. The court examined the Rule 609(a)(1)(B) factors, finding that robbery is a crime that suggests dishonesty, particularly because the defendant hid the proceeds of the robbery and lied about its commission (though this is going behind the conviction itself in a way that is prohibited under Rule 609(a)(2)). The court also found probative value high because the prior crime was recent, occurring four years earlier. The court noted that there was no similarity between the prior robbery and the instant narcotics charges that might lead to an impermissible propensity inference. Finally, the court stated that the defendant's testimony would be key to the defense, and that the government would need impeaching evidence to help the jury weigh the defendant's credibility. The court based its ruling on the contention that criminal defendants are not entitled to take the stand with a false aura of veracity.

***United States v. Harper,* 2010 WL 1507869 (E.D. Wis. 2010):** In a prosecution for felon-firearm possession (involving a shooting and flight from the police) the defendant sought to exclude three convictions: a 2001 conviction for the manufacture and delivery of cocaine; a 2006 conviction for fleeing and eluding officers in a vehicle; and a 2006 conviction for drug possession. The court found all of the convictions to be admissible. Although the defendant argued that drug possession and flight did not suggest dishonesty, the court declared that all felonies are impeaching and that Rule 609(a)(1) felony convictions need not be for crimes of dishonesty in order to be admitted. The court noted the recency of the three felonies. The defendant argued that his 2006 conviction for fleeing in a vehicle would cause unfair propensity prejudice due to its similarity to the events of the instant case, but the court disagreed. The court noted that the defendant was charged only with firearm possession and that flight and firearms were not similar. The court also found the defendant's credibility crucial where his only defense would involve denying possession of the firearm found in the vehicle. The court acknowledged that admitting all three convictions could be considered prejudicial, but reasoned that prejudice was lessened because the jury would already know the defendant was a "felon" due to the current charge [*again missing the point that the felony they know about also diminishes the probative value of the other felonies in showing character for truthfulness]*. The court concluded that the defendant's credibility was sufficiently important to justify admission of all three prior convictions.

***United States Stolica*, 2010 WL 538233 (S.D. Ill. 2010):** The defendant was charged with illegal counterfeiting and with being a felon in possession of a firearm. The defendant moved to preclude the government from admitting two 1999 convictions for armed bank robbery to impeach his trial testimony. The court found one conviction outside the Rule 609 ten-year time period and one inside of that window. Nonetheless, the court held that both bank robbery convictions would be admissible for impeachment. The court reasoned that bank robbery was indicative of credibility even though it was not a crime of dishonesty. It also found that armed bank robbery presented little propensity risk due to its lack of similarity to the charged offenses --- even though one of the

offenses was possession of a firearm. Finally, the court emphasized that the defendant's credibility was very important because he would likely contradict government witnesses if he took the stand. In admitting both convictions, the court stated that they would only be admissible in the event that the defendant chose to testify --- thus they were not admissible under Rule 404(b).

***United States v. Campbell*, 2010 WL 1610583 (C.D. Ill. 2010):** A defendant facing cocaine distribution charges sought to prevent the government from using his prior conviction for the manufacture and delivery of a controlled substance to impeach his trial testimony. With no analysis regarding the prejudice caused by admission of a similar past conviction, the court stated that the prior felony had impeachment value and so was admissible.

***United States v. Lujan*, 2008 WL 11359114 (D.N.M. 2008):** Without explaining the current charges or performing analysis, the court ruled that the defendant's prior conviction for the possession of marijuana would be admissible against him if he testified. The court stated only that the defendant's credibility was important and that the prior conviction could demonstrate a motive for the instant offense (which would implicate Rule 404(b) rather than Rule 609, which the court was analyzing).

Circuit Court Decisions Allowing Broad Impeachment Under Rule 609(a)(1)[6]

There are a number of circuit court decisions indicating a lack of enforcement of the protective test for criminal defendants in Rule 609(a)(1)(B) that was granted by Congress. Here are just a few examples in which prior convictions have been found properly admitted against an accused under Rule 609(a)(1), even when the conviction is substantially similar to the crime charged, and sometimes when the conduct is especially inflammatory. *See, e.g.:*

• *United States v. Tracy,* 36 F.3d 187 (1st Cir. 1994) (in an armed robbery prosecution it was permissible to impeach the defendant with convictions for aggravated assault and stolen firearms, because the accused's credibility was important).

• *United States v. Shaw,* 701 F.3d 367 (5th Cir. 1983) (prior convictions for rape and assault were properly admitted to impeach a defendant in a murder prosecution).

United States v. Walli, 785 F.3d 1080 (6th Cir. 2015) (in a prosecution for injuring government property the defendants were properly impeached with prior convictions for injuring government property).

[6] This section is identical to that in the prior Reporter's memo.

• *United States v. Hernandez,* 106 F.3d 737, 740 (7th Cir. 1997) (acknowledging that the similarity of the prior conviction to the charged offense was "a factor that requires caution" but concluding that it was outweighed by "the importance of the credibility issue in this case").

• *United States v. Headbird,* 461 F.3d 1074 (8th Cir. 2006) (prior convictions for violent felonies were properly admitted to impeach a defendant in a felon-firearm prosecution: "One who has transgressed society's norms by committing a felony is less likely than most to be deterred from lying under oath.").

•*United States v. Givens,* 767 F.2d 574 (9th Cir. 1985) (no error to admit prior robbery convictions to impeach the defendant in a prosecution for armed robbery).

• *United States v. Alexander,* 48 F.3d 1477 (9th Cir. 1995) (prior robbery conviction properly admitted to impeach the defendant in a bank robbery prosecution).

• *United States v. Smith,* 10 F.3d 724 (10th Cir. 1993) (prior convictions for robbery and burglary were properly admitted to impeach the defendant in a bank robbery prosecution).

• *United States v. Harris,* 720 F.2d 1259 (11th Cir. 1983) (prior drug convictions properly admitted to impeach the defendant in a drug prosecution).

It should be noted that it is relatively rare for negative Rule 609 rulings in the trial court to be appealed by an accused. That is because the negative ruling ordinarily occurs *in limine*, and in order to preserve the claim of error the defendant must actually testify and be impeached with the conviction on cross-examination. *Luce v. United States,* 469 U.S. 38 (1984) (defendant who does not testify waives the right to complain about an *in limine* ruling holding prior convictions to be admissible); *Ohler v. United States,* 529 U.S. 753 (2000) (defendant who raises an objectionable prior conviction on direct examination waives the right to complain that its admission was error). It appears that in many cases, if the trial court rules *in limine* that a conviction will be admissible to impeach him should he testify, *the defendant decides not to testify*, and an appellate court never reviews the trial court's ruling. Some data on that point is set forth below.

III. Arguments About a Rule Allowing Admissibility Only When the Probative Value of the Conviction *Substantially* Outweighs Its Prejudicial Effect

A. Promoting the Intent of Congress

The basic argument in favor of an amendment to add "substantially" to the balancing test is that Congress itself recognized that impeachment with non-falsity convictions could be very

prejudicial to criminal defendants, and could discourage them from testifying.[7] That is a serious cost, especially considering that the convictions covered by Rule 609(a)(1)(B) are by definition of diminished probative value --- because they do not involve dishonesty or false statement. Considering all these factors, Congress concluded that a more protective test was required for criminal defendants. It stands to reason that this more protective test should be most effective when any one of three circumstances arise: 1) the conviction is similar to the crime charged; 2) the conviction is especially inflammatory; or 3) the defendant is well-impeached by other sources (thus making a conviction less probative). It should be elementary that exclusion is necessary where all three of these problematic factors arise in the same case.

And yet, the cases discussed above are replete with admission of convictions that are very similar and even identical to the crime charged. Crimes of domestic violence and sexual assaults, obviously highly inflammatory, have been admitted. And multiple convictions have been admitted, without consideration of the fact that each conviction to be admitted becomes less probative when one has already been admitted. Courts also give no consideration to the fact that a criminal defendant comes to the stand impeached with bias. And other defendants are impeachable with inconsistent statements and bad acts, which are not taken into account by many courts in evaluating the probative value of the conviction.

The argument for a change is basically that many courts have not fulfilled the promise of Congress's protective test. Some cases discussed above essentially place the burden on the defendant to show that the conviction should be excluded. Others automatically admit convictions because the defendant has decided to take the stand and therefore he puts his character for truthfulness at issue. But none of these virtually automatic rulings are justified under the protective balancing test. And even when the rulings are not automatic, the courts above give short shrift to prejudice and much weight to probative value.

The argument in favor of the amendment is that a slight change to the balancing test can be a signal to courts that they need to more carefully weigh prejudicial effect and probative value, and give defendants the protection that Congress intended.

Lack of Oversight

At the last meeting, a member made the argument that the problem was not the rule, but that trial courts are not incentivized to apply it correctly because there is no review over Rule 609 decisions to admit evidence. Under *Luce v. United States,* as discussed above, the defendant must

[7] H.R. Rep. No. 93-650, at 11 (1973), noting the "deterrent effect" of prior conviction impeachment "upon an accused who might wish to testify." See also 4 Weinstein & Berger, supra note 60, § 609App.01[3], at 10 (recognizing that House Judiciary Committee's changes to rule were motivated by concern that existing text did not "adequately protect[] an accused who wished to testify")

take the stand and be impeached in order to get review, and defendants are understandably reluctant to do that. Assuming that the problem with the rule is that there is no review, *one future possibility is to propose an amendment that would allow defendants to preserve error as to Rule 609 determinations without taking the stand* --- as is the practice in New York and in many other states. **Abrogating *Luce* is a possibility that will be explored at future meetings if the current proposal to amend Rule 609 is not approved.**

B. Does Prior Conviction Impeachment Actually Deter Defendants From Testifying?

Two meetings ago the argument was made that excluding convictions of criminal defendants is not important because defendants won't testify even if their convictions are excluded. Put another way, there are other reasons for a defendant's choosing not to testify, including fear of cross-examination, impeachment with prior inconsistent statements, and so forth. Accordingly, the argument goes, there is no reason to provide a rule that more aggressively excludes convictions of criminal defendants, because these convictions never actually get introduced at trial anyway.

One question for the Committee is whether it can be empirically shown that prior conviction impeachment keeps defendants off the stand. At the outset, it would appear to be impossible, within the confines of the rulemaking process, to provide scientifically validated statistics on this question. The decision making process in each criminal case is bound to be different. Multiple factors are in play.

That said, the data, common sense, and the sense of Congress leads to the conclusion that the threat of conviction will deter the testimony of some number of defendants.[8] Here are some of the data points:

1. Empirical Data

There is some empirical data from about 15 years ago indicating that the threat of impeachment deters defendants from testifying. Professors Theodore Eisenberg and Valerie Hans (two of the most distinguished empiricists on matters of litigation in the United States), report on their findings in *Taking a Stand On Taking the Stand: The Effect of a Prior Criminal Record On the Decision to Testify and On Trial Outcomes*, 94 Cornell L. Rev. 1353 (2009). They conducted a statistical analysis of 382 actual trials in four large counties around the U.S. in which prior crimes were found admissible for impeachment. They found a "statistically significant association"

[8] At the last meeting, the FJC offered to undertake a year-long survey of criminal defense counsel to determine their views on whether admission of prior convictions deters defendants from testifying. The Committee declined the offer, because any dispute within the Committee about that proposition would not be resolved by a survey of defense counsel.

between the existence of a criminal record and the decision not to testify at trial. They also found a correlation, in cases with weak evidence, between the jury's learning of a criminal record and conviction (from under 20% to over 50%).

Probably the most important finding on deterrence from broad impeachment was a study of exonerated defendants, who by definition were innocent and so would be the most likely candidates, generally speaking, to elect to testify. It turns out that, as of 2008, 39% of the exonerated defendants did not testify, and 91% of that non-testifying group had prior convictions that would probably have been admissible, or were ruled to be admissible, under broad impeachment rules like Rule 609(a). John Blume, *The Dilemma of the Criminal Defendant with a Prior Record--Lessons from the Wrongfully Convicted*, 5 J. Empirical Legal Stud. 477, 484-86 (2008) ("In almost all instances in which a defendant with a prior record did not testify, counsel for the wrongfully convicted defendant indicated that avoiding impeachment was the principal reason the defendant did not take the stand."). Another study of criminal cases throughout the country, conducted in the 1970's by Professor Myers, found that 62% of defendants without criminal records testified while 45% of those with criminal records testified. *See also* Gordon Van Kessel, *Adversary Excesses in the American Criminal Trial,* 67 Notre Dame L. Rev. 403, 482 (1992) (noting that "[t]he threat of felony conviction impeachment can be a powerful deterrent to taking the witness stand" and citing empirical evidence that "a defendant [i]s almost three times more likely to refuse to testify if he ha[s] a criminal record than if not").

2. Other Evidence

There is significant evidence that: a) a fair number of defendants actually do testify, especially if they are free from impeachment; and b) that for defendants with prior convictions, the possibility of impeachment does deter their testimony. Those points will be discussed in turn.

a) Defendants Testifying:

A review of federal court records indicates that about 25% of all criminal defendants tried by jury testified in cases terminated in 2023. There were in excess of 1500 criminal defendants terminated after jury trials that year. https://www.uscourts.gov/statistics/table/d-4/statistical-tables-federal-judiciary/2023/12/31, and, of these, hundreds testified. Those statistics are a far cry from a conclusion that defendants "never testify." At the same time, the statistics also suggest that the system is likely not at a saturation point where every defendant who would want to testify is already testifying.

For another data point: some of the famous recent criminal prosecutions involved defendants taking the stand to testify. See, e.g., the trials of Mike Lynch and Sam Bankman-Fried, both of whom were not subject to impeachment with prior convictions. Other testifiers have

included Elizabeth Holmes, Colony Capital Founder Tom Barrack, KPMG partner David Middendorf, Privinvest executive Jean Boustani, and Kyle Rittenhouse. See generally Tarm, *Are More Defendants Testifying at Trial?* APNews, Dec. 24, 2021 https://apnews.com/article/death-of-daunte-wright-ghislaine-maxwell-ahmaud-arbery-kyle-rittenhouse-kenosha-327ee5f8fdc3b9b20afd10e601fa92df (noting that there is an uptick in defendants testifying; concluding that "There's no recent data on percentages of defendants nationwide who have chosen to testify. That'll take years to compile.").

See also https://time.com/6129830/high-profile-defendants-testifying-ghislaine-maxwell-kim-potter/:

> There are many reasons why [a defendant] might choose to testify, including the nature of the criminal charge. In self-defense murder cases, for example, it's crucial for jurors to hear from the defendant about how he or she perceived danger, because nobody else can provide as powerful an account.
>
> "It's much more challenging to put the jury in the defendant's shoes without hearing from the defendant himself," says Jessica A. Roth, a professor at Cardozo School of Law and a former federal prosecutor. The approach helped convince the jury in the Rittenhouse case: he was acquitted of all charges after testifying that he feared for his life when he opened fire.

In sum, there is a good deal of recent evidence indicating that a fair percentage of defendants do testify.

b) Anecdotal Evidence on Deterrence:

The Federal Public Defender conducted a survey on of Defenders on whether defendants choose not to testify because of impeachment under Rule 609(a)(1). This survey was included in the agenda book for the last meeting. The survey, and the written comments to the survey, at the least provides substantial anecdotal evidence that Rule 609(a)(1) does work to prevent defendants from exercising their right to testify.

c) Data from Federal Cases where Impeachment was Allowed or Denied

I asked Dr. Timothy Lau of the FJC to help me look up whether the defendants in my digest of Rule 609(a)(1)(B) rulings (attached to this memorandum) testified or not. These are his findings:

Section of This Digest	**Total Number of Defendants Implicated**[9]	Pled guilty	Testified in Jury Trial	Did not Testify in Jury Trial	No information/ did not have to testify due to dismissal/ bench trial
The Court Excludes All of Defendant's Felony Convictions Under Rule 609(a)(1)(B) [*Holmes* through *Hoffman*]	25	11	6	6	2
The Court Admits Some, But Excludes Other Felony Convictions Under Rule 609(a)(1)(B) [*Barker* through *Baker*]	27	5	5	12	5
Court Rulings Allowing Broad Impeachment Under Rule 609(a)(1)(B) [*Barber* though *Jackson*]	41	20	3	13	5

Some trends can be identified:

[9] Some of the rulings implicate more than one defendant, so this is not a straight count of the cited rulings.

(1) For the defendants whose convictions were entirely excluded for purposes of impeachment, 6 (50%) out of the 12 defendants who were tried by juries testified, which is higher than the 25% figure that is found across all criminal defendants.
(2) For the defendants whose convictions were fully admissible for purposes of impeachment, *only three* (19%) *out of 16 defendants testified.* That is lower than the 25% average, and dramatically lower than the cases in which impeachment was barred.
(3) For the defendants whose convictions were partially admissible for purposes of impeachment, 5 (29%) out of 17 defendants testified. This is intermediate between the two categories described above.

In sum, the data supports the common sense intuition that, the more convictions the court excludes for purposes of impeachment, the more likely defendants will testify.

Skeptics can say that the data set in this comparison is small. But the data set is actually more than 90% of the reported cases in which Rule 609(a)(1)(B) was applied to either admit or exclude convictions, from 2010 to now. And it seems difficult from this data to conclude that admission of prior convictions had no effect on the decision to testify.

3. Most Importantly: Congressional Determination and Court recognition.

Any doubt in the proposition that prior convictions deter defendants from testifying is belied by Congress itself. The somewhat protective test of Rule 609(a)(1)(B) --- more protective than the test applied for any other witness --- is grounded in the Congressional assumption that impeachment under a less protective balancing test *will discourage criminal defendants from exercising the constitutional right to testify*. It is the sole reason set forth in the legislative history for having the more protective test.

Moreover, federal courts have clearly recognized that impeachment with non-falsity convictions will deter defendants from testifying. Indeed, that is why one of the factors in the five-factor test is to consider the importance of the defendant's testimony --- the more important, the greater the need for the defendant to be able to exercise the right to testify, and thus this factor counts against admissibility. And many courts, in their decision making, clearly recognize that impeachment with Rule 609(a)(1) convictions will deter defendants from testifying. See, e.g., *United States v. Girty*, 2024 WL 1674508 (E.D. Okla.) (recognizing that admitting the conviction would likely "cause Defendant to abstain from testifying, thus damaging his right to a full defense").

All the proposed amendment does is take that same fundamental assumption and tweak the test, because many courts have undervalued the Congressional concern about deterring the defendant from testifying.

4. State Determinations[10]

As with Congress, the states also work from the premise that broad impeachment with prior convictions will deter the defendant from testifying. Most states have provisions that track Rule 609(a)(1)(B) --- thereby recognizing, as did Congress, that broad use of convictions for impeachment would deter defendants from testifying. See, e.g., Iowa Rule 5.609 (applying the same balancing as Federal Rule 609(a)(1)(B); Arizona R.Evid. 609 (same).

In addition, several states are even more sensitive to the effect of prior convictions on the defendant's decision to testify:

Kansas Stat. Ann. § 60-421:

> Evidence of the conviction of a witness for a crime not involving dishonesty or false statement shall be inadmissible for the purpose of impairing his or her credibility. If the witness be the accused in a criminal proceeding, *no evidence of his or her conviction of a crime shall be admissible for the sole purpose of impairing his or her credibility unless the witness has first introduced evidence admissible solely for the purpose of supporting his or her credibility*

Michigan Rule of Evidence 609:

> **(a) General Rule.** For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall not be admitted unless the evidence has been elicited from the witness or established by public record during cross-examination, and
>
> (1) the crime contained an element of dishonesty or false statement, or
>
> (2) the crime contained an element of theft, and
>
> (A) the crime was punishable by imprisonment in excess of one year or death under the law under which the witness was convicted, and
>
> (B) the court determines that the evidence has significant probative value on the issue of credibility and, if the witness is the defendant in a criminal trial, the court further determines that the probative value of the evidence outweighs its prejudicial effect.
>
> *Thus, Michigan applies the same balancing test but only theft-related crimes are allowed under that balancing test. Less probative convictions are not admissible at all.*

West Virginia Rule 609(a)

> **(a) General Rule.**

[10] This section is the same as in the previous memo.

(1) *Criminal Defendants.* For the purpose of attacking the credibility of a witness accused in a criminal case, evidence that the accused has been convicted of a crime shall be admitted but only if the crime involved perjury or false swearing.

So in West Virginia, convictions are admissible against criminal defendants only if they involve dishonesty or false statement.

Moreover, there are a number of state cases throughout the country that recognize the connection between impeachment with prior convictions and the decision not to testify. In many states, if a prior conviction or bad act is wrongly found to be admissible, it can be found to be a harmful error justifying reversal, even when the defendant does not testify and the conviction/act is not actually admitted at trial. How can that be? It is because *the court assumes that the threat of admitting the conviction kept the defendant from testifying*.[11]

A notable recognition of this presumption of deterrence is the New York Court of Appeals decision in *People v. Harvey Weinstein,* 42 N.Y.3d 439, 223 N.Y.S.3d 531 (2024). Weinstein was charged with sexual assaults. The People obtained a ruling that it if Weinstein chose to testify, he could be asked about the following bad acts: directing a witness to lie to Weinstein's wife; filing an application for a passport using a friend's social security number; telling a woman he "could harm her professionally" but could also offer her a book publishing opportunity; using his entertainment company's budget for personal costs; withdrawing from a business deal and asking others to cease its funding; hiding a woman's clothes; insisting that members of his staff falsify a photo for a movie poster by photoshopping a female actor's head on another woman's nude body; telling a private intelligence firm to manipulate or lie to people; scheduling a business meeting in 2012 with a woman under false pretenses; inducing executives to lie on his behalf; making threats and committing acts of violence against people who worked for him; abandoning a colleague by the side of the road in a foreign country; physically attacking his brother; threatening to cut off a colleague's genitals with gardening shears; screaming and cursing at hotel restaurant staff after they told him the kitchen was closed; and throwing a table of food.

The Court of Appeals in *Weinstein* found that it was error to allow enquiry into the bad acts that were not based on dishonesty. It concluded that

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[11] This cannot happen in Federal Court because, as discussed above, under *Luce v. United States,* 469 U.S. 38 (1984) the defendant must actually take the stand and be impeached with the offensive conviction in order to preserve a claim of error.

It's notable that the number of appeals alleging Rule 609 error has plummeted since *Luce* was decided. In other words, defendants who are subject to negative Rule 609 rulings do not take the stand to preserve the error. This phenomenon itself is indicative of the fact that allowing convictions for impeachment against criminal defendants causes them to decide not to testify.

> the trial court abused its discretion when it ruled that defendant . . . could be cross-examined about prior . . . bad acts and despicable behavior which was immaterial to his in-court credibility, and which served no purpose other than to display for the jury defendant's loathsome character. ***The ruling necessarily and impermissibly impacted defendant's decision whether to take the stand in his defense and thus undermined the fact-finding process in this case, which turned on the credibility of the parties."***

The court found harmful error even though it conceded that some of the bad acts were admissible because they bore on dishonesty.

In sum, the argument that Rule 609(a)(1)(B) is not problematic because defendants don't testify anyway is undermined by federal and state law, as well as empirical evidence that many defendants do wish to testify and are deterred from doing so by the risk of impeachment with convictions that do not even involve dishonesty or false statement. The assumption that defendants are deterred by impeachment with convictions is the very basis of Rule 609(a)(1)(B). The proposed amendment would implement the assumption by fortifying the protection that Congress because many courts have denied the necessary protections.

Much of the argument about deterrence assumes that for the amendment to be supportable, there must be clear evidence that the threat of conviction is the *sole reason* for a defendant's decision not to testify. That is of course an impossible burden. The question is whether it is *one* of the reasons that impacts the decision. As discussed above, there are a number of indications --- beyond the fact that the principle is one of common sense --- to indicate that the risk of impeachment is likely to have a negative impact on the defendant's decision to testify.

C. Would the Amendment Result in Too Much Exclusion in Courts that Currently Apply the Rule Correctly?[12]

At the last meeting, some Committee members were concerned that if the balance was changed, the courts that currently apply the rule correctly will end up excluding convictions that ought to be admitted. This section addresses that concern.

The questions are, what cases would raise a concern about erroneous exclusion of a conviction under the new rule, and how many of them are there? First, the only case that raises a problem if

[12] This section is completely new.

the balance is changed is one in which 1) the conviction would be properly admitted because its probative value outweighs its prejudicial effect, but 2) the conviction would be excluded under the amendment because its probative value does not *substantially* outweigh its prejudicial effect.[13]

It is difficult to assess just which cases fall within that probably narrow band. Probative value and prejudicial effect are both judgment calls. It seems rather simple to determine when a court clearly errs in admitting a conviction under the current rule. The cases discussed above all involve convictions that are similar to the crime charged or are otherwise undisputably inflammatory; most of them also involve admissions of multiple convictions. And most of them involve analysis which relies on various incorrect assessments, such as: convictions are presumptively admissible; a defendant who chooses to testify basically opens the door to broad impeachment; and the conviction is admissible if the defendant's credibility is important in the case. All these incorrect assessments lead to virtually automatic admissibility, and are clearly wrong under the current rule. All such cases are subject to necessary improvement under the amendment.

Cases that don't involve wholesale admission of multiple convictions similar to the crime charged or otherwise inflammatory are harder to assess for accuracy under the current rule. Some analyst might be colored by the view that Rule 609(a)(1) is wrongheaded in the first place, because convictions that do not involve dishonesty, as a class, say little about the defendant's character for truthfulness, and are obviously prejudicial. In contrast an analyst might come from the view that the jury needs to know most everything about the defendant in order to assess credibility. An analyst from the former camp will conclude that there are very few cases that rightly apply the existing rule today, and so moving the balance to exclude more convictions does far more good than harm. An analyst from the latter camp sees that number of cases differently.

Just for a thought experiment let's try *United States v. Nace,* 2022 WL 686307 (E.D. Okla.), a murder prosecution, where the government sought to impeach the defendant with two convictions: escape and uttering a forged instrument. The court found both convictions admissible. It stated that neither was similar to the crime charged, and both were inherently dishonest and so probative of character for truthfulness. Analysts with an open view of impeachment would probably find both rulings to be a correct application of Rule 609(a)(1)(B) --- and posit that a court might unjustifiably exclude those convictions under the amendment. In my opinion, I would say the court is partially right and partially wrong. It's partially right because uttering a forged instrument is on the higher probative value side of non-dishonesty crimes, and it is completely dissimilar from the crime charged. The escape conviction is also dissimilar, but far lower on probative value, and it actually has high prejudice, because it provides proof of two convictions -

[13] There is obviously no problem with cases that have excluded convictions under Rule 609(a)(1)(B) as they would of course remain excludible under the amended rule.

-- the escape and the crime that put the defendant in custody (which the jury can only speculate about and as the charge in the case is murder, they might speculate that he was in on a very serious charge). Finally, the probative value of the conviction is especially low because he is already being impeached by the forged instrument conviction, and his credibility has also been diminished by the fact that he has a motive to falsify. So from my perspective, the change in the balancing test may well reach a better result in *Nace.*

For those with a more pro-prosecution view, it would probably be fair to conclude that the result in *Nace* might change in part under the new amendment. I think even a pro-prosecution person would pause at saying that the probative value of the escape conviction (considering the other impeachment) *substantially* outweighs the prejudicial effect. But they would probably conclude that the probative value of the forgery conviction substantially outweighs prejudicial effect, and so the amendment would not change the result as to that conviction. (If you think that most courts would in fact admit both convictions under the amended rule, then it is hard to complain about the amendment. Under that super pro-prosecution view, the effect of the amendment is likely to be only on the kinds of cases of clear abuse that are in the digest above).

If you do think that the result in *Nace* would change --- and that would be a bad thing --- then you would have to determine whether the benefits of the change outweigh the costs. The case digest from 2010 to date, attached to this memo, yields the following statistics:

46 cases where convictions that were similar to the crime charged or especially inflammatory were admitted.

26 cases where the court excluded all the proffered convictions.

14 cases where the convictions admitted were: not similar or especially inflammatory; not excessive in number; and toward the higher end of the probative value scale.

From that data, one could conclude that the amendment would have a salutary effect in the 46 cases; no effect in the 26 cases; and possible effect on the 14 --- although in most of those cases the analyses were strong and it would not be surprising that the court would find that the probative value of the conviction substantially outweighed the prejudicial effect. [14]

[14] For one example from the digest of a case admitting a conviction that would probably be decided the same under the amendment, see *United States v. Barker,* 2023 WL 2663241 (E.D. Okla.): In a murder prosecution, the government sought to impeach the defendant with two felony convictions for assault and battery, one felony conviction for preventing a witness from attending court, and one felony conviction for possession of a firearm. The court found that the two assault and battery convictions "do not involve characteristics that would go to Defendant's capacity for truthfulness. Crimes of violence, generally, have little impeachment value." Similarly, "the felon in possession of a firearm conviction does not have the impeachment value of a crime involving dishonesty." In contrast, the conviction for preventing a witness from attending court, while not automatically admissible because the elements do not require proof of a

It is obviously for each Committee member to weigh the costs and benefits of the proposed amendment.

D. Sanitizing Convictions as a Solution

Some courts have found that the way to deal with the prejudice of prior convictions is to admit them without letting the jury know what the crimes were. The jury would learn only that the defendant has been convicted of felonies and is left in the dark about what crime the defendant committed. There is a section for these cases in the attached digest. See, e.g., *United States v. Barber,* 2024 WL 3740594 (E.D. Okla.) (because prejudice was diminished by sanitizing the domestic battery conviction, its probative value outweighed the remaining prejudice).

With all respect to the many judges that sanitize convictions under Rule 609(a)(1)(B) --- often at the behest of the government --- sanitization is in tension with Rule 609 itself; it makes the convictions impossible to assess for probative value; and it probably does little to protect defendants from prejudice. As the court stated in *United States v. Gillard,* 2024 WL 247054 (E.D.Pa.), where the government proposed to avoid balancing under the rule by sanitizing the conviction:

> While this proposal may reduce possible prejudice, it does not increase the probative value of Mr. Gillard's prior felony convictions as to his character for truthfulness. Instead, the probative value of a prior felony conviction will be *diminished* where the jury is not provided information about the prior conviction that would help in evaluating the extent to which the offense reflects on the defendant's veracity as a trial witness.

There is nothing in the text of Rule 609, nor the legislative history, that *definitively* addresses whether a court can admit a conviction without telling the jury what the conviction is for. However, the rule does refer to "evidence" of a conviction --- and that sounds like the judgment of conviction, not just the fact that the witness was convicted. Moreover, Rule 608(b) provides that "extrinsic evidence" of a prior conviction is admissible under Rule 609 to prove "specific instances of a

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dishonest act or false statement, was nonetheless probative of character for truthfulness. As to prejudice, the prior convictions for felon in possession of a firearm and preventing a witness from attending court "are plainly dissimilar to the current charged crime of murder." The prior convictions for assault and battery "do, however, have some similarly to the charged crime because they both involve acts of violence" --- accordingly there was a greater risk of unfair prejudice as to those convictions. Putting everything together, the court held that the firearm conviction and the conviction for preventing a witness from testifying in court would be admissible for impeachment, but the assault and battery convictions would not. The most important factor to the court was, therefore, the similarity or dissimilarity of the conviction to the crime charged.

witness's conduct." That reference to extrinsic evidence surely contemplates the judgment of conviction, which will indicate the crime; the "witness's conduct" is not the conviction itself but the crime that resulted in the conviction. Thus, the leading treatise on the subject states that "the essential facts of a witness's convictions, including *the statutory name of each offense*, the date of conviction, and the sentence imposed, are included within the 'evidence' that is to be admitted for impeachment purposes." 4 Weinstein's Evidence § 609.20[2] at 609–57 (2d ed.2005).[15]

Besides the textual problem, sanitizing fails to provide the jury with the information that Rule 609 intends jurors to have. The fundamental principle of Rule 609 is that some convictions are more probative of character for untruthfulness than others. That principle animates the division of convictions between Rule 609(a)(2) and (a)(1). And as discussed in the cases above, one of the factors to balance under Rule 609(a)(1) is the probative value of the conviction --- recognizing that some convictions (such as for violent activity) are less probative than others (such as for theft). By stripping the conviction of its name, the jury is deprived of the opportunity to make this differentiation of probative value. Balancing probative value as the *court* sees the crime of which the defendant has been convicted makes no sense if the jury doesn't get the same information. Obviously "probative value" is ultimately to be assessed by the jury. For example, courts find theft-related convictions to be more probative than violent activity convictions. When that factor is applied in the Rule 609(a)(1)(B) balancing test to admit a conviction, it seems obvious that the jury needs to be told what the conviction is, because the whole point is that the jury, and not the judge, assesses credibility.

If the conviction is sanitized, it is extremely unlikely that the jury is going to correctly assess the probative value of the conviction. Jurors, operating blindly, are almost certain to give the conviction more or less probative value than the conviction warrants. It's like a probative value crapshoot. Mis-assessment is certainly likely where the court, when balancing, finds the conviction to be on the probative end of the Rule 609(a)(1) spectrum, then proceeds to strip the conviction of that higher probative value when it gets to the jury. *See, e.g., United States v. Durbin,* 2012 WL 894410 (D. Mont. 2012) (in a case apparently involving drug-related crimes, the court finds that drug-related convictions are especially probative of character for truthfulness, but admitted just the fact of the conviction and not the nature of the past offense.).

That kind of practice --- ruling on the probative value of a conviction based on the elements of the crime, but then not allowing the jury to know the crime, was rejected in 2006 in a related context. The 2006 amendment to Rule 609(a)(2) prohibits a court from going behind the crime to

[15] In contrast, the details of the conviction, such as where it was committed, the identity of the victims, the number of coconspirators, etc., are not admissible under Rule 609, because they are not set forth in the judgment of conviction; and the better rule, as discussed below, is that they are not admissible under Rule 608 either, because to admit them would undermine the special treatment of convictions in Rule 609. *See, e.g., United States v. Osazuwa,* 564 F.3d 1169 (9th Cir. 2009) (details of a prior conviction are not admissible under Rule 609, nor under Rule 608, because impeachment with prior convictions is within the exclusive purview of Rule 609).

find it more probative of veracity, because the jury will not be privy to the underlying facts --- the thinking was that probative value must be assessed in light of how the *jury* will evaluate credibility.

The court in *United States v. Estrada,* 430 F.3d 606 (2nd Cir. 2005), raises questions about using Rule 609 to allow admission of only the fact and not the nature of the conviction. The court declared as follows:

> Both Rule 609(a)(1) and (a)(2) contemplate admitting "evidence" of a witness's convictions for impeachment purposes. The language of both provisions is identical with respect to the generalized description of the "evidence" of a witness's convictions that is to be admitted. The presumption * * * is that the "essential facts" of a witness's convictions, including *the statutory name of each offense*, the date of conviction, and the sentence imposed, are included within the "evidence" that is to be admitted for impeachment purposes. * * *
>
> The overwhelming weight of authority supports this conclusion and suggests that, while it may be proper to limit, under Rule 609(a)(1), evidence of the underlying facts or details of a crime of which a witness was convicted, inquiry into the "essential facts" of the conviction, including the nature or statutory name of each offense, its date, and the sentence imposed is presumptively required by the Rule, subject to balancing * * * . See *United States v. Howell*, 285 F.3d 1263, 1267–68 (10th Cir.2002) (finding that evidence of the number and nature of felony offenses is ordinarily required under Rule 609(a)(1) because a witness's convictions bear to differing degrees on credibility depending on these characteristics); *United States v. Burston*, 159 F.3d 1328, 1335–36 (11th Cir.1998) (holding that the probative value of prior felony convictions varies with their nature and number); *Campbell v. Greer*, 831 F.2d 700, 707 (7th Cir.1987) (concluding in a civil case that the "crime must be named" because the jury cannot evaluate a witness's credibility "if all it is told is that the witness was convicted of a 'felony' "); 28 CHARLES ALAN WRIGHT & VICTOR JAMES GOLD, FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 6134, at 224 (1993) (stating that the "mere fact" approach, under which only the fact of a felony conviction is admitted, is difficult "to justify with the language and structure of Rule 609"); 4 WEINSTEIN & BERGER § 609.20[2] at 609–57 to 60 (stating that the impeaching party is usually limited to establishing the name of the offense, the date of conviction, and the sentence, and that it may be improper "to limit impeachment to the mere fact of a prior conviction, without allowing the impeaching party to specify the nature and number of offenses involved").
>
> This interpretation of Rule 609 is consistent with both the Rule's structure and the insight that different felonies, even those that do not constitute crimen falsi, bear on credibility to varying degrees. * * * In short, the balancing requirement incorporated into Rule 609(a)(1) presumes that some details of a witness's felony convictions will be considered. * * * [I]t is the jury's function to assess the probative value of a witness's specific conviction or convictions as part of its overall evaluation of the witness's credibility. * * * We believe that

felonies not involving dishonesty or false statement such as to fall within the scope of Rule 609(a)(2) nonetheless bear on credibility to varying degrees.

Estrada is not directly controlling on the question of whether a criminal defendant's convictions can *ever* be sanitized. The trial court in *Estrada* decided to strip the convictions without analyzing the loss of probative value from such a ruling, and the court found this failure to be error (i.e., if you are going to strip the conviction, you have to evaluate the probative value of the conviction as stripped). But *Estrada* does point out that stripping a conviction of its name is inconsistent with the fundamental premises that 1) it is the jury that ultimately assesses credibility, and 2) convictions falling within Rule 609(a)(1) have differing probative value. At the very least it shows that stripping the conviction of any content must be done carefully, after considering the probative value and prejudicial effect of the conviction *as sanitized*.

It might be contended that sanitization is a good thing because it *protects* defendants. But that is a debatable proposition. If sanitization were not permitted the court would have to face the music and might well find it necessary to exclude the conviction. By allowing a too-easy safety valve, the defendant may end up with the short end of the compromise. So it might well be that sanitization is not doing the defendant many favors. Though of course it could be (cynically?) argued that without the safety valve, a trial court would just exercise discretion to admit the unadulterated conviction by finding that its probative value outweighs the prejudicial effect.

There is another reason why sanitization is doing the defendant no favors. Because jurors don't know what the conviction is, they can make their own assumptions --- unsupported by anything other than what they think of the defendant and the other evidence presented. Assume a defendant charged with drug distribution, and the trial judge notes that a prior drug conviction would be highly prejudicial, and so sanitizes it. The jurors are told that the defendant was convicted of a felony five years ago. Of course the jurors will speculate on what the conviction was for. It seems quite probable that they will land on drug distribution. So it might mean, perversely, that a sanitized conviction ends up being extremely prejudicial, probably as prejudicial as the underlying conviction.

There is data to back up the argument that sanitizing convictions can end up prejudicing certain defendants. Professor James MacLeod, in *Evidence Law's Blind Spots,* 109 Iowa L.Rev. 189 (2023), shows the bad outcomes from sanitization of convictions, with supporting data. Mock trials were conducted and the conclusion reached was that "when mock jurors learned that the defendant had a prior felony conviction, but did not learn its nature, a significant race-based disparity emerged: mock jurors rated the Black defendant significantly more likely to be guilty than the white defendant."

A final problem with sanitization is that the court often considers probative value of the conviction --- *but not the conviction as sanitized.* Then it says that the prejudice is limited when the jury only hears about the conviction and not what the crime was. This was the error in

Estrada.[16] If the sanitization is to be done right, the court has to figure out the probative value of a stripped-down conviction and balance that against the prejudicial effect of that conviction as sanitized. It seems likely that if the court actually did that, it would have difficulty figuring out the probative value of the sanitized conviction. How probative is a sanitized felony as proof of a defendant's character for truthfulness? The same difficulty would occur with prejudice: what's the prejudicial effect of a conviction without a name?

It seems clear that sanitizing a conviction is a procedure fraught with difficulty and unfairness, and contrary to the underlying principles of Rule 609. So is there anything for the Committee to address with regard to sanitization? There are several possibilities to consider. While it might be argued that sanitization is so problematic that it might warrant an amendment on its own, the current question is whether it should be treated as part of the proposed amendment on the Committee's agenda. Some possibilities for treatment include:

1. Prohibiting admission of a sanitized conviction: There are reasons to prohibit the practice, but given its widespread use an absolute ban might be an overstep on judicial discretion. *See, e.g., United States v. Hursh,* 217 F.3d 761 (9th Cir. 2000) (approving lower court's admission of a conviction similar to the crime charged, noting with approval that the trial court sanitized the conviction). It is at least possible that in some cases a criminal defendant might benefit from sanitization. A total ban seems like overkill.

2. Providing specific guidelines on when sanitization can be used: This could be in the text, or more preferably in the Committee Note, given the difficulty of handling the complex problem in the text of an already complex rule.

The complex route would provide that sanitization is permitted only if the court makes two specific findings: 1) that the probative value of the conviction in natural form does not outweigh the prejudicial effect; and 2) that the probative value of the conviction in sanitized form *does* outweigh the prejudicial effect. In this way, sanitizing would only apply if the jury could not hear what the crime was in the first place, because the conviction with the name of the crime would be inadmissible. But the downsides of this two-step approach are: a) It is complex and sounds like micromanaging; and 2) A court might find that the unsanitized conviction's probative value outweighs prejudicial effect and *still* decide to admit only the fact of conviction because that fact is still sufficiently probative and substantially diminishes the prejudice of the unadulterated conviction. Presumably a court should be allowed to reach that result if it is beneficial to the defendant. (Indeed the defendant should be able to argue for such a result.)

[16] See also, *United States v. Briscoe*, 2023 WL 8237269 (D.N.M.) (finding that violence-based convictions were not very probative, but prejudice was limited by sanitizing the convictions, and impeachment was necessary because "the jury must be well-informed" about the defendant's credibility); *United States v. Blakeney*, 2021 WL 1723224 (E.D. Pa.) (finding that burglary and drug convictions were particularly relevant for impeachment, but then sanitizing the conviction); *United States v. Jackson*, 2020 WL 7063566 (E.D.N.Y.) (finding that narcotics convictions were highly probative of credibility, and that prejudice could be handled by sanitizing the convictions).

3. Providing simply that sanitizing must be preceded by balancing and must satisfy the balancing test. The text or Note might provide that when a court is considering whether to admit only the fact of conviction, it must determine that the probative value of the fact of conviction *as sanitized* outweighs its prejudicial effect as sanitized. And the Note might caution that the sanitization procedure requires careful balancing and should not be used as an automatic safety valve. It could also say that it might be very difficult to accurately assess the probative value and prejudicial effect of the mere fact of a conviction. These guidelines might be helpful in bringing some regulation to a process that seems inconsistently and sometimes fuzzily applied. And it might discourage the practice. *This alternative is set forth in the draft Committee Note, below.*

4. Do nothing. The final alternative is to say nothing about sanitization. If the balancing test is changed and the probative value must substantially outweigh the prejudicial effect, a possible outcome could be that sanitization will be less frequent. And that is because the conviction, even sanitized, is prejudicial, and the probative value of a naked conviction, to the extent it can be assessed at all, is surely on the low side.

E. Notice Requirement?

One question the Committee might consider is whether a notice requirement should be added to Rule 609(a). Some judges appear to include orders requiring pretrial notice of criminal convictions offered for impeachment in their standard pretrial orders. For example, Judge Larimer has the following order:

> Both the Government and the defendant must file notice if they intend to impeach any witness, including the defendant, should he/she choose to testify, by evidence of his/ her character or specific instances of conduct, under Fed. R. Evid. 608, or by evidence of prior conviction, under Fed. R. Evid. 609.
>
> The notice should include the specific nature of the proposed impeachment evidence, including the dates of the prior acts or convictions, and citation to relevant case law that may assist the Court in determining admissibility. Copies of any relevant exhibits sought to be introduced should be attached to the notice.

While such an order is certainly appropriate, it does not follow that a notice requirement should be added to Rule 609(a). Generally speaking, the defendant knows what convictions the government knows about, and can rationally predict that the government will be trying to admit all of them for impeachment. Indeed many Rule 609 determinations are made pretrial after the *defendant* moves *in limine* to exclude them. It is true that notice is required for admission of old convictions under Rule 609(b), but that might be justified by the fact that the parties may have forgotten about, or the adversary not uncovered, an old conviction; and it also might be justified

because the defendant might think that the government would not try to admit old convictions and should know in advance of the government's intent to do so.

In the end, it is clear that there is no call to amend Rule 609(a) *solely* to add a notice requirement. Whether one should be added to an amendment that changes the balancing test of Rule 609(a)(1) is a question for the Committee.

F. The Impact on Rule 608(b)

Assume a defendant-witness has a five-year-old conviction for carjacking, and is charged with carjacking. If Rule 609(a)(1)(B) were tightened up, an accused could not be impeached with that conviction. The probative value is very unlikely to substantially outweigh the prejudicial effect. But what if the defendant takes the stand and the prosecutor asks: "Isn't it true that you previously highjacked a car?" The prosecutor argues that she can ask that question because she is not asking whether the defendant was convicted. She is asking about whether the defendant committed a bad act under Rule 608(b).

Rule 608(b) allows a cross-examiner to inquire into bad acts of a witness, in order to attack the witness's character for truthfulness, *subject to Rule 403*. Thus, questioning about a bad act is allowed unless the probative value of the bad act in showing the witness's character for untruthfulness is substantially outweighed by the risk of unfair prejudice suffered by the party whose testimony the witness favors. Both the original Advisory Committee Note and the Committee Note to the 2003 amendment specify that impeachment with bad acts is regulated under Rule 403. *See United States v. Abair,* 746 F.2d 260, 263 (7th Cir. 2014) (cross-examination with bad acts to attack a witness's character for truthfulness "remains subject to the overriding protection of Rule 403").[17]

If the balancing test of Rule 609(a)(1)(B) were amended, the result is that admissibility of a bad act and admissibility of a conviction for that act would be determined by opposite balancing tests. (There is a conflict already today under the current balancing test for 609(a)(1)(B), but it would be aggravated by the amendment.) It obviously makes no sense to prohibit admissibility of a conviction but then allow the underlying acts to be inquired into. The clear intent of Congress is that impeachment with a conviction is to be governed solely by Rule 609. Rule 608(b) itself directs the reader to Rule 609 when a conviction is involved:

> "*Except for a criminal conviction under Rule 609,* . . . the court may on cross-examination allow [specific acts] to be inquired into . . ."

[17] While a bad act that passes through Rule 403 can be raised while examining the witness, extrinsic evidence is not admissible to prove the act. Rule 608(b).

There are a couple of decisions that have allowed Rule 608(b) to be used as an end-run of another important limitation currently established by courts under Rule 609: that when a conviction is admitted, the jury does not get to hear the details of the underlying acts, only the crime of which the witness was convicted and the date of the conviction. Two cases, with little analysis, allowed a cross-examiner to raise the details of these acts simply by citing Rule 608(b). *See, e.g., Elcock v. Kmart Corp.,* 233 F.3d 734 (3rd Cir. 2000); *United States v. Barnhart,* 599 F.3d 737 (7th Cir. 2010). But most courts rightly disagree, concluding that the limitations imposed on the details of the conviction would be impermissibly evaded if the cross-examiner could simply ask about the underlying acts under Rule 608(b). *See, e.g., United States v. Osazuwa,* 564 F.3d 1169 (9th Cir. 2009) (impeachment with prior convictions is within the exclusive purview of Rule 609; the court recognizes "the unfairness that would result if evidence relating to a conviction is prohibited by Rule 609 but admitted through the 'back door' of Rule 608"; the court cites case law from four circuits in support).

If Rule 609(a)(1)(B) is to be amended, it might be a good opportunity to include language in the Committee Note that if a conviction is inadmissible under the Rule, the government cannot raise the underlying facts under Rule 608. The proposed Committee Note, below, addresses this problem. Textual language seems unnecessary, because a proper reading of Rule 608(b) is that it cedes the field to Rule 609 if there is a conviction involved.

IV. Possible Change to Rule 609(b)

If an amendment to Rule 609(a) *is* proposed, the Committee might also consider an amendment that would improve the clarity of one aspect of Rule 609(b). Rule 609(b) provides for an exclusionary balancing test for convictions that are more than ten years old. The House was of the view that "after ten years following a person's release from confinement (or from the date of his conviction) the probative value of the conviction with respect to that person's credibility *diminished to a point where it should no longer be admissible."* The Senate took the more flexible position that convictions over ten years old "generally do not have much probative value" but "there may be exceptional circumstances under which the conviction substantially bears on the credibility of the witness." Eventually the Senate view prevailed, and an old conviction can be admissible, but only if its probative value "supported by specific facts and circumstances, substantially outweighs its prejudicial effect." And a notice requirement was added. So Rule 609 (b) currently reads as follows:

> **(b) Limit on Using the Evidence After 10 Years.** This subdivision (b) applies if more than 10 years have passed since the witness's conviction or release from confinement for it~~,~~ whichever is later. Evidence of the conviction is admissible only if:

(1) the probative value, supported by specific facts and circumstances,[18] substantially outweighs its prejudicial effect; and

(2) the proponent gives an adverse party reasonable written notice of the intent to use it so that the party has a fair opportunity to contest its use.

The problem left by Rule 609(b) is how to determine whether the ten-year period has been passed. The starting point for the measurement is clear enough: the date of "the witness's conviction or release from confinement for it, whichever is later."[19] But *no* date is given for the endpoint.

A circuit split has developed over the appropriate endpoint.[20] As one district court lamented, "[T]here appears to be little uniformity . . . which squarely addresses the appropriate time for a court to conclude the ten[-]year time period."[21]

Four candidates have emerged from the case law for the end date: 1) the date that the offense being litigated occurred; 2) the date the current trial started; 3) the date of indictment (or

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[18] The "specific facts and circumstances" language imposes an additional admissibility requirement for old convictions. Courts have consistently held that, in reviewing the admissibility of stale convictions under Rule 609(b), the court is required to "make an on-the-record finding based on specific facts and circumstances that the probative value of the evidence substantially outweighs the danger of unfair prejudice." *Jones v. New York City Health & Hosps. Corp.*, 102 F. App'x 223, 226 (2d Cir. 2004) (quoting *United States v. Maher*, 579 F.2d 730, 734 (2d Cir. 1978). For example, in *United States v. Cavender*, 578 F.2d 528, 530 (4th Cir. 1978), the court rejected the government's argument that a court may simply deny a motion to exclude a conviction under 609(b). It stated that the court must articulate specific findings on the record as to the particular facts and circumstances that support the probative value that weighs toward the admissibility of the stale conviction. Similarly in *United States v. Pettiford*, 238 F.R.D. 33, 43 (D.D.C. 2006), the court excluded a stale conviction offered by the government, noting "the lack of specific circumstances indicating why the Court should overlook the remoteness of the conviction." Courts applying Rule 609(b) emphasize both "[t]he qualitative requirement for 'specific facts and circumstances' and the quantitative requirement that probative value be shown 'substantially' to outweigh prejudicial effect" which "combine to make the barrier to admissibility of stale convictions under Rule 609(b) much higher than the barrier for the admissibility of recent convictions under Rule 609(a)." *United States v. Nguyen*, 542 F.3d 275, 280 (1st Cir. 2008).

[19] Courts have held that the time period begins once *physical* confinement is over. Periods of supervised release do not toll the beginning of the ten-year period. *United States v. Stoltz,* 683 F.3d 934 (8th Cir. 2012).

[20] *See, e.g.*, *Rodriguez v. United States*, 286 F.3d 972, 983 (7th Cir. 2002) (using the date of the "present offense" as the endpoint); *United States v. Thompson*, 806 F.2d 1332, 1339 (7th Cir. 1986) (using the date "[t]he trial in the present case began" as the endpoint*); United States v. Cathey*, 591 F.2d 268, 274 (5th Cir. 1979) (noting the defendant "was released from military confinement June 31, 1961, and called to testify in October 1977").

[21] *Trindle v. Sonat Marine, Inc.,* 697 F. Supp. 879, 880–81 (E.D. Pa. 1988) (emphasis omitted).

presumably in a civil case, the day the complaint is filed); or 4) the date the witness subject to the conviction begins to testify.[22]

The timing problem will of course arise only rarely—it will be an unusual situation where the conviction is so close to hitting the 10-year mark that an earlier endpoint will render the conviction easier to admit, while the later endpoint will subject it to Rule 609(b). For this reason, it is unlikely that this problem is serious enough to warrant amending Rule 609 on its own. But the Committee's policy has always been that if a rule is going to be amended, there might be improvements that can --- and should --- be made even though those improvements are not enough to justify an amendment standing alone. The reason for this policy is that constantly tinkering with a rule on unimportant matters is upsetting to courts and litigants. But if the Committee is going to amend a rule, that is a good time to make it the best it can be.[23]

What is the best solution for an endpoint? Probably the least appealing option is the date on which the offense being litigated was committed.[24] The theory for this approach is that the new offense "negates the inference that the witness is in the process of rehabilitation."[25] Obviously, this rationale applies only if the witness is the criminal defendant, and only if the defendant is guilty of the new crime.[26] It is completely irrelevant to the character for truthfulness of a witness that the *defendant* committed the crime on a particular day.[27] Therefore, this endpoint does not provide a sound basis for rulemaking because, among other things, it is too focused on just one sort of witness: the criminal defendant. And even as to the defendant, the relevant point for his character for truthfulness is sometime around the time he would be *testifying* --- and that might be fairly long after the date of the crime charged. Finally, assessing the conviction from the date of the crime assumes that the defendant actually committed that crime.

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[22] See Bobby Levine, *The Missing Endpoint of Rule 609(b),* 2024 Harv. J.L. & Pub. Pol'y Per Curiam 9 (setting out the various cases and positions).

[23] An example is the 2019 amendment to Rule 404(b). The major purpose for the amendment was to improve the notice requirement so that it was more effective and protective. But the amendment also clarified a minor confusion that was left by the restyling.

[24] *Foley*, 683 F.2d at 277 n.5 ("computing the amount of time that has elapsed between offenses"); *Rodriguez*, 286 F.3d at 983 (using the date of the "present offense" as the endpoint).

[25] 28 WRIGHT & MILLER, *supra* note 33, § 6136.

[26] *Id.* Moreover, this date may introduce uncertainty if the offense involves a continuing crime, such as a conspiracy.

[27] *United States v. Thomas,* 815 F. App'x 671, 677 n.2 (3d Cir. 2020) ("Rule 609(b)'s focus is impeachment of a witness's credibility when testifying, not at the time of the offense or indictment. Further, the Rule applies to any trial witness, not exclusively criminal defendants, and is therefore relevant in cases where there is no [subsequent] offense or indictment date.").

Another possibility is to place the end date at the date of indictment, or the date of the complaint in a civil case.[28] A recent article suggests this point because it is early enough in the matter that it "carries a very minimal risk of gamesmanship."[29] Maybe so but surely the risk of strategic activity (manipulating the date so that the 10-year period will run out, or be extended) cannot be the sole basis for setting an endpoint, especially because the problem arises so infrequently. Setting the endpoint at indictment or complaint has nothing to do with the witness's character for truthfulness --- why is the witness's character at the point of indictment important to the factfinder assessing the witness's character at the time of trial? Moreover, there may well be cases where there are many years between the indictment (or complaint) and the testimony --- or where there will be many years between indictment/complaint and a retrial in which the testimony is provided. The date of indictment is about as random and arbitrary as the date of the offense.

Most courts have held that the date the trial begins is the appropriate endpoint for a Rule 609(b) calculation.[30] This solution is appealing, in part, because the date is easy to ascertain and the trial is the point in time when the factfinder at least begins to assess credibility of witnesses. The Seventh Circuit, for example, concluded that a criminal defendant's tax fraud conviction was less than 10 years old because the defendant's last day of confinement was February 22, 1976, and "[t]he trial in the present case began on September 30, 1985."[31] Some have argued that the start of trial is an undesirable date because the parties may strategically set a date in order to allow the ten-year period to run out, and thus protect an important witness from impeachment (or to accelerate the date to allow for impeachment).[32] The possible answer to this concern is that this problem

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[28] See *United States v. Lorenzo*, 43 F.3d 1303, 1308 (9th Cir. 1995) (setting the date of indictment as the endpoint for assessing the ten-year period).

[29] *The Missing Endpoint of Rule 609(b)* at 13.

[30] *United States v. Thompson,* 806 F.2d 1332, 1339 (7th Cir. 1986) (using the date "[t]he trial in the present case began" as the endpoint); *United States v. Hans,* 738 F.2d 88, 93 (3d Cir. 1984) ("Normally such evidence is admissible only if either the conviction or the witness' release from prison occurred within 10 years of the trial."); *United States v. Portillo,* 633 F.2d 1313, 1323 n.6 (9th Cir. 1980) (noting the age of the defendant's prior felony convictions "[a]t the time of trial"); *United States v. Cobb,* 588 F.2d 607, 612 n.5 (8th Cir. 1978) ("Cobb's 1966 conviction appears to fall within the ten-year limitation, because his period of confinement apparently ended less than ten years prior to the date of his trial here in June 1978."); *United States v. Mahler,* 579 F.2d 730, 734 (2d Cir. 1978) (using the age of the conviction "at the time of the second trial").

[31] *Thompson*, 806 F.2d at 1339.

[32] See "*The Missing Endpoint of Federal Rule 609(b)*", supra (contending that the trial date "is far enough along a case's lifecycle to incentivize dilatory tactics. Once it is clear that a trial will take place, litigants will have more confidence in their need to manipulate the litigation schedule to ensure impeachment using a prior conviction will be permitted or to attempt to avoid such impeachment."). See also *United States v. Nguyen*, 542 F.3d 275, 281 (1st Cir. 2008) (applying the date of trial and noting that

arises so infrequently that it is not necessary to worry very much about strategic activity; moreover, experienced courts, with opposing counsel's assistance, are likely to sniff out such attempts.

A more nuanced version of the use-trial-as-the-endpoint position fixes the endpoint not at the time the *trial begins*, but instead on the day the particular witness *begins testifying* --- because the factfinder's evaluation of that witness's credibility starts at that moment.[33] In *United States v. Cathey*, the Fifth Circuit articulated the policy supporting this position: "since the concern is the [witness's] credibility when he testifies, the correct point from which to measure backwards in time may be the date when he testifies rather than the date when the trial commences, which in a protracted trial might be considerably earlier."[34]

Using the date of the witness's testimony best comports with the policy underlying Rule 609(b) because it is at that moment—when that witness begins to testify—that the factfinder must assess that witness's credibility.[35] It is also at that moment that any unfair prejudice of the conviction may influence the factfinder.[36]

One complicating factor with using the time of testimony as an endpoint is that when the judge rules on a motion to admit or exclude the conviction, that is ordinarily not occurring on the

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the government had made no strategic attempts to fiddle with that date in order to protect one of their witnesses).

[33] See *United States v. Cathey*, 591 F.2d 268, 274 (5th Cir. 1979) (noting the defendant "was released from military confinement June 31, 1961, and called to testify in October 1977"); *see also United States v. Peatross*, 377 F. App'x 477, 492 (6th Cir. 2010) ("[M]ail fraud sentence ended less than ten years prior to the day on which she testified."). Some district courts are in accord; *e.g.*, *United States v. Pettiford*, 238 F.R.D. 33, 37 (D.D.C. 2006) ("[F]or the purposes of determining whether a conviction is more than ten years old, the question is whether ten years has expired at the time the witness testifies at trial."); *Kiniun v. Minn. Life Ins. Co.,* No. 3:10cv399/MCR/CJK, 2013 WL 12146384, at *4 n.10 (N.D. Fla. Jan. 14, 2013) (agreeing with the plaintiff that the ten-year period "ends as of the date of the witness's testimony"); *United States v. Brown*, 409 F. Supp. 890, 894 (W.D.N.Y. 1976) (describing the "ten-year period ending at the time of the defendant-witness's testimony").

[34] *Cathey*, 591 F.2d at 274 n.13; *see also Trindle v. Sonat Marine Inc.,* 697 F. Supp. 879, 882 (E.D. Pa. 1988) ("Because it is the jury which must evaluate the witness's credibility, the most appropriate time to conclude the ten-year period is the date the jury actually hears the witness testify that he had been convicted of a crime.").

[35] 28 WRIGHT & MILLER § 6136 ("This is the only approach that makes sense from a policy standpoint. Since the conviction evidence is offered to impeach, the relevant ten-year period must be that immediately preceding the date the witness's credibility becomes an issue." (citation omitted)).

[36] *Whiteside v. State,* 853 N.E.2d 1021, 1028 (Ind. Ct. App. 2006) ("The moment that the jury learns that a witness was previously convicted is the first moment that the unfair prejudice, if any, has the potential to influence the jury.").

day of the testimony. The usual practice would be an *in limine* ruling before trial. But in the end, this is not a big problem. At the time of the ruling, everyone would be aware of a possible timing question, i.e., the witness has a conviction that hits the ten-year point sometime around the trial. For close cases like that, a judge can either reserve judgment, or reevaluate at the time of trial, or make a conditional ruling that if Rule 609(b) is applicable at the time of testimony, the conviction will be excluded. All that said, it means that the date of testimony is not as stable as the date of the trial.

In sum, the only two justifiable dates for ending the ten-year time period are 1) date of testimony, and 2) date of trial. The former is more justifiable in terms of the policy of the rule, while the latter is a little more predictable and a little less subject to manipulation. The drafting alternatives below provide an amendment for each option.

V. Drafting Alternatives

What follows are two alternative drafts. Both are identical as to Rule 609(a). The variation is in (b), where the endpoint of the first alternative is the date of testimony, and the endpoint of the second alternative is the date of trial. The Committee Notes differ accordingly.

It must be emphasized that the Rule 609(a) part of the Committee Note has been edited to take out some of the guidelines for the courts that were included in the earlier Committee Note. The Department of Justice representative complained that these guidelines amounted to judicial micromanagement. The Note below is shortened, and light on instructions. It does, however, continue to provide significant commentary on the problems of sanitizing convictions.

The draft alternatives start on the next page.

A. Alternative 1 --- 609(b) Endpoint Date of Testimony.

Rule 609. Impeachment by Evidence of a Criminal Conviction

(a) In General. The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction:

(1) for a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than one year, the evidence:

(A) must be admitted, subject to Rule 403, in a civil case or in a criminal case in which the witness is not a defendant; and

(B) must be admitted in a criminal case in which the witness is a defendant, if the probative value of the evidence substantially outweighs its prejudicial effect to that defendant; and

(2) for any crime regardless of the punishment, the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving—or the witness's admitting—a dishonest act or false statement.

(b) Limit on Using the Evidence After 10 Years. This subdivision (b) applies if more than 10 years have passed ~~since~~ between the witness's conviction or release from confinement for it~~,~~ (whichever is later) and the date that the witness testifies. Evidence of the conviction is admissible only if:

(1) the probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect; and

(2) the proponent gives an adverse party reasonable written notice of the intent to use it so that the party has a fair opportunity to contest its use.

* * *

Committee Note

Rule 609(a)(1)(B) has been amended to provide a more exclusionary balancing test for convictions that do not involve dishonesty or false statement, when they are offered to impeach the character for truthfulness of a testifying defendant in a criminal case. Congress allowed such impeachment with non-falsity-based convictions under Rule 609(a)(1), but imposed important limitations when the witness was the accused, in order to assure that the accused's constitutional right to testify would not be improperly discouraged. Experience has shown that the congressional intent to limit admissibility of such convictions has often not been realized. Some courts have not recognized that 1) the probative value of convictions not involving falsity is often minimal when they are offered as a prediction that the witness will lie on the stand; and 2) the unfair prejudicial effect of such convictions may well result in deterring a defendant in a criminal case from testifying at all.

The Committee has determined that a non-falsity-based conviction should not be admissible to impeach a criminal defendant unless its probative value *substantially* outweighs the risk of unfair prejudice to the defendant. The Rule retains automatic admissibility for those convictions that are the most probative, i.e., those that required proof that the witness engaged in a dishonest act or false statement.

The strict balancing test contemplates that it is generally improper to allow impeachment of an accused with a conviction that is similar to the crime charged, given the obvious prejudicial effect that the defendant will suffer from such a conviction. Moreover, the fact that the defendant takes the stand already impeached for having a motive to falsify means that the additional probative value of a non-falsity conviction is less likely to substantially outweigh the prejudicial effect.

If a conviction is inadmissible under this rule, it is inappropriate to allow a party, under Rule 608(b), to inquire into the bad acts underlying the conviction. Rule 608 permits impeachment only by specific acts that have not resulted in a criminal conviction. Evidence relating to impeachment by way of criminal conviction is treated exclusively under Rule 609.

Nothing in this rule prohibits the use of convictions to impeach by way of contradiction. Such impeachment is governed by Rule 403. So for example, if the witness affirmatively testifies that he has never had anything to do with illegal drugs, a prior drug conviction may be admissible for purposes of contradiction even if not admissible under Rule 609. See United States v. Castillo, 181 F.3d 1129 (9th Cir. 1999) (unequivocal denial of involvement with drugs on direct examination warranted admission of the witness's drug activity under Rule 403).

A number of courts have, in a kind of compromise, admitted only the fact of a conviction to impeach a defendant in a criminal case. Thus the jury hears only that the defendant was convicted of a felony, not what the crime was. That solution is problematic, because convictions falling within Rule 609(a)(1) have varying probative value, and admitting only the fact of conviction deprives the jury of the opportunity to properly weigh the conviction's effect on the witness's character of truthfulness. It might be thought that admitting only the fact of a conviction would limit its prejudicial effect, but in fact a juror might draw very negative inferences in the absence of information about the nature of the conviction. At any rate, admitting only the fact of conviction is not an automatic safety valve or a means to a rough compromise. The court must find that the probative value of the mere fact of conviction substantially outweighs the prejudicial effect of the conviction as sanitized. Assessing the probative value and prejudicial effect of the mere fact of conviction is hardly an easy task. But it is not enough to weigh the crime's probative value and prejudicial effect and then simply rule that the fact of conviction is admissible as a compromise.

In addition, Rule 609(b) has been amended to set an endpoint by which the rule's 10-year period is to be measured. The lack of such an endpoint in the original rule has led courts to apply various endpoints, including the date of the charged offense, the date of indictment, the date of trial, and the date the witness testifies. Because the goal of the rule is to regulate the factfinder's assessment of the witness's character for truthfulness, it follows that the endpoint should be the date that the witness testifies. It is at that point that the witness's character for truthfulness becomes pertinent. Therefore, the rule provides that the endpoint is the day that the witness testifies.

B. Alternative 2 --- Date of Trial as Rule 609(b) Endpoint

Rule 609. Impeachment by Evidence of a Criminal Conviction

(a) In General. The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction:

(1) for a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than one year, the evidence:

(A) must be admitted, subject to Rule 403, in a civil case or in a criminal case in which the witness is not a defendant; and

(B) must be admitted in a criminal case in which the witness is a defendant, if the probative value of the evidence substantially outweighs its prejudicial effect to that defendant; and

(2) for any crime regardless of the punishment, the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving—or the witness's admitting—a dishonest act or false statement.

(b) Limit on Using the Evidence After 10 Years. This subdivision (b) applies if more than 10 years have passed ~~since~~ between the witness's conviction or release from confinement for it~~,~~ (whichever is later) and the date of trial. Evidence of the conviction is admissible only if:

(1) the probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect; and

(2) the proponent gives an adverse party reasonable written notice of the intent to use it so that the party has a fair opportunity to contest its use.

* * *

Committee Note

Rule 609(a)(1)(B) has been amended to provide a more exclusionary balancing test for convictions that do not involve dishonesty or false statement, when they are offered to impeach the character for truthfulness of a testifying defendant in a criminal case. Congress allowed such impeachment with non-falsity-based convictions under Rule 609(a)(1), but imposed important limitations when the witness was the accused, in order to assure that the accused's constitutional right to testify would not be improperly discouraged. Experience has shown that the congressional intent to limit admissibility of such convictions has often not been realized. Some courts have not recognized that 1) the probative value of convictions not involving falsity is often minimal when they are offered as a prediction that the witness will lie on the stand; and 2) the unfair prejudicial effect of such convictions may well result in deterring a defendant in a criminal case from testifying at all.

The Committee has determined that a non-falsity-based conviction should not be admissible to impeach a criminal defendant unless its probative value *substantially* outweighs the risk of unfair prejudice to the defendant. The Rule retains automatic admissibility for those convictions that are the most probative, i.e., those that required proof that the witness engaged in a dishonest act or false statement.

The strict balancing test contemplates that it is generally improper to allow impeachment of an accused with a conviction that is similar to the crime charged, given the obvious prejudicial effect that the defendant will suffer from such a conviction. Moreover, the fact that the defendant takes the stand already impeached for having a motive to falsify means that the

additional probative value of a non-falsity conviction is less likely to substantially outweigh the prejudicial effect.

If a conviction is inadmissible under this rule, it is inappropriate to allow a party, under Rule 608(b), to inquire into the bad acts underlying the conviction. Rule 608 permits impeachment only by specific acts that have not resulted in a criminal conviction. Evidence relating to impeachment by way of criminal conviction is treated exclusively under Rule 609.

Nothing in this rule prohibits the use of convictions to impeach by way of contradiction. Such impeachment is governed by Rule 403. So for example, if the witness affirmatively testifies that he has never had anything to do with illegal drugs, a prior drug conviction may be admissible for purposes of contradiction even if not admissible under Rule 609. See United States v. Castillo, 181 F.3d 1129 (9th Cir. 1999) (unequivocal denial of involvement with drugs on direct examination warranted admission of the witness's drug activity under Rule 403).

A number of courts have, in a kind of compromise, admitted only the fact of a conviction to impeach a defendant in a criminal case. Thus the jury hears only that the defendant was convicted of a felony, not what the crime was. That solution is problematic, because convictions falling within Rule 609(a)(1) have varying probative value, and admitting only the fact of conviction deprives the jury of the opportunity to properly weigh the conviction's effect on the witness's character of truthfulness. It might be thought that admitting only the fact of a conviction would limit its prejudicial effect, but in fact a juror might draw very negative inferences in the absence of information about the nature of the conviction. At any rate, admitting only the fact of conviction is not an automatic safety valve or a means to a rough compromise. The court must find that the probative value of the mere fact of conviction substantially outweighs the prejudicial effect of the conviction as sanitized. Assessing the probative value and prejudicial effect of the mere fact of conviction is hardly an easy task. But it is not enough to weigh the crime's probative value and prejudicial effect and then simply rule that the fact of conviction is admissible as a compromise.

In addition, Rule 609(b) has been amended to set an endpoint by which the rule's 10-year period is to be measured. The lack of such an endpoint in the original rule has led courts to apply various endpoints, including the date of the charged offense, the date of indictment, the date of trial, and the date the witness testifies. The rule provides for the date of trial as the endpoint, as that is a clear and objective date and it is the time at which the factfinder begins to analyze the truthfulness of witnesses.

TAB 4B

District Court Rulings on Rule 609(a)(1)(B) Impeachment --- 2009-present

Case Digest by Professor Liesa Richter, updated by the Reporter

April 1, 2025

A review of recent district court cases analyzing the admissibility of prior felony convictions against criminal defendants for impeachment purposes reveals a variety of approaches to such evidence. Many courts freely admit prior felony convictions for impeachment purposes under Rule 609(a)(1)(B), even those that are very similar to the charged offense. Other courts attempt to protect the defendant from unfair prejudice by sanitizing references to the past felony convictions they admit for impeachment purposes. On the other hand, some courts exclude the only prior felony convictions potentially eligible to impeach a criminal defendant under Rule 609(a)(1)(B), particularly when those convictions are similar to the charged offenses. Finally, some courts compromise by admitting some of a criminal defendant's prior felony convictions for impeachment, while excluding other eligible convictions.

Reporter's Note: The references in the cases below to the balancing of Rule 609(a)(1) factors usually refers to the following factors used by most of the lower courts:

> (1) the kind of crime involved (including its probative value as to witness-truthfulness and its similarity to the charged crime); (2) when the conviction occurred; (3) the importance of the defendant's testimony to the case; and (4) the importance of the credibility of the defendant.

United States v. Caldwell, 760 F.3d 267 (3rd Cir. 2014). *See also United States v. Mahone,* 537 F.2d 922 (7th Cir. 1976) (using the same factors but splitting up the first factor into two --- probative value as to credibility and similarity of the crime --- and thus applying five factors).

Reporter's Note: The commentary to the case law is by the Reporter.

I. The Court Admits All of Defendant's Felony Convictions Under Rule 609(a)(1)(B)

Many courts admit all of a criminal defendant's prior felony convictions eligible for impeachment use under Rule 609(a)(1)(B), often including prior convictions similar to the charged offense. Some courts support the admissibility of these prior felonies by placing great emphasis on the government's need for impeachment and on the defendant's choice to put his or her credibility in issue by testifying (which are essentially automatic factors). Others order the admission of prior felony convictions more summarily with less analysis.

- ***United States v. Roper,* 2024 WL 4727633 (D.N. Mex.)** In a prosecution on three Hobbs Act robbery charges, the court held that the defendant's prior conviction for armed robbery was admissible to impeach him. The court quoted Rule 609(a)(1)(B) to state that a prior conviction "must be admitted in a criminal case in which the witness is a defendant." The judge ignored the fact that the sentence ends with a qualifier --- that the probative value must outweigh the prejudicial effect. The court found that the prior armed bank robbery was not similar to the crime charged

because they are different kinds of robbery. The court also stated that convictions under Rule 609(a)(1)(B) are "presumptively admissible."

- **United States v. Walker, 2024 WL 182285 (N.D. Okla.):** In a prosecution for kidnapping, the court found that the following convictions would be admissible to impeach the defendant: October 2009 criminal felony conviction for felon in possession of a firearm; March 2017 criminal felony conviction for possession of a controlled dangerous substance; and August 2018 criminal felony conviction for possession of controlled dangerous substance without tax stamp, possession of controlled dangerous substance with intent to distribute, and possession of controlled dangerous substance. The court conceded that the convictions "do not involve characteristics that go to Defendant Walker's capacity for truthfulness." However, the convictions were timely --- two were a couple of years old, and the age of the firearm conviction was mediated by the fact that there were intervening convictions, indicating that his character was unchanged. The court heavily relied on the fact that the convictions were dissimilar to the kidnapping charge. This affected the next factor, which is the importance of allowing the defendant to testify. The court found that the defendant would not be deterred from testifying because the convictions were dissimilar from the crime charged. Under this analysis, importance of the defendant testifying loses its independence as a factor, because it is directly determined by the similarity or dissimilarity of the convictions. Finally, the court found that credibility was important because the video and other evidence in the case was disputable. The court concluded that "the only factor that weighs against admissibility is factor one: impeachment value. Because all other factors weigh in favor of admissibility, the Court will allow the Government to introduce evidence of Defendants' prior convictions for purposes of impeachment under Fed. R. Evid. 609."

So the only factor that weighed in favor of exclusion was that the convictions were at best minimally probative of the defendant's character for truthfulness. Shouldn't that be enough to exclude the convictions. And why are three convictions necessary?

- **United States v. Harper, 2023 WL 396099 (W.D.Okla.):** The defendant was charged with a sexual assault, and the government sought to impeach him with two recent convictions: 1. Unauthorized use of a motor vehicle with sentencing in September 2016; 2. First degree burglary and attempted escape from arrest or detention in 2016. The court stated that "the Rules of Evidence begin from an assumption that prior felony convictions have impeachment value when a defendant takes the stand." It concluded that attempted escape from arrest or detention illustrates dishonesty. It reasoned that "the dissimilarity of the vehicular, burglary, and escape convictions from the physical and sexual assault charges does not weigh against admission—just the opposite, rather." It concluded that "the central issue at trial is the identity of the individual who attacked E.F. Defendant has consistently denied that he attacked E.F., thus, his testimony and credibility are important and central to the trial." The court found both convictions admissible; but it did exclude older fraud and other convictions under Rule 609(b).

● **United States v. Romero, 2023 WL 2413812 (D.N.Mex.):** In a prosecution for illegal narcotics sales, the defendant moved in limine to exclude his prior conviction for felony shoplifting, if offered to impeach him under Rule 609(a)(1). The court held that the conviction was admissible. It stated that "[t]he implicit assumption of Rule 609 is that prior felony convictions have probative value." The conviction was near in time, and was not very prejudicial, given the fact that "shoplifting is not of an inflammatory nature and is unlikely to provoke an emotional response" against the defendant and "is sufficiently different from the charged conduct that a jury is unlikely to confuse his past conduct with his current charges." The court concluded that the defendant's "credibility would be a central issue for the jury. He was the sole occupant in the vehicle containing the backpack with the narcotics and firearm. The case could turn on whether the jury chooses to believe his testimony concerning his knowledge of the contents of the backpack."

• **United States v. Crittenden, 2023 WL 2967891 (N.D. Okla.):** In a prosecution for kidnapping, the government sought to impeach the defendant with 13 prior convictions, falling into three separate categories: (1) possession of firearm offenses; (2) possession of controlled substances offenses; and (3) eluding a police officer. The court found all of the convictions to be fairly probative, noting that none of them were for violence. The prejudice was considered low, because none of the convictions were for crimes similar to kidnapping, and thus none were similar to the crime charged. The court found importance of the defendant's testimony to be critical --- but not in the light of preserving the right to testify. Rather, importance of testimony and credibility were both weighed in favor of admission. The court concluded that all thirteen convictions would be admissible to impeach the defendant.

It's hard to see how the probative value is sufficient for all thirteen convictions. The marginal value of a conviction goes down as more and more are admitted.

● **United States v. Steward, 2023 WL 8235817 (S.D.Ill.):** The defendant was charged with possession of contraband in prison. The court held that if he testified, *all* of the following convictions would be admissible against him for impeachment under Rule 609(a)(1): (1) Carjacking; (2) Carrying, Using, and Brandishing a Firearm During and in Relation to a Crime of Violence; (3) Robbery in Indian Country; and (4) Carrying, Using, and Brandishing a Firearm During and in Relation to a Crime of Violence (so, two of them). The court concluded that prejudice was minimal "because none of Steward's prior convictions were similar to his current offense and thus would not tend improperly to suggest to the jury any tendency on his part to commit the instant offense." Prejudice was further limited because the jury would know that he was in a prison when he did the act charged. (Although that fact should limit the probative value of the convictions as well. Finally, the court stated that although it did not yet know the defendant's theory of the case, "there is a strong probability that his testimony will differ from, and potentially contradict, that of the corrections officer."

● **United States v. Pafaite, 2022 WL 837489 (M.D. Pa):** In a prosecution for distributing methamphetamine, the government sought to admit the following convictions to impeach the defendant: 2012, Conspiracy to commit Criminal Trespass; 2014, Theft by Unlawful Taking; 2019, Theft by Unlawful Taking [Movable Property]; 2021, Receiving Stolen Property. The court found that all the convictions were admissible. The court found the convictions to be very probative

of character for truthfulness because they were theft-related. The prejudice of the convictions was found minimal because they were dissimilar to the drug charges. And the importance of testifying factor was crossed out by the importance of credibility factor.

- **United States v. Nace, 2022 WL 686307 (E.D. Okla.):** In a murder prosecution, the government sought to impeach the defendant with two convictions: escape and uttering a forged instrument. The court found both convictions admissible. Neither was similar to the crime charged, and both were inherently dishonest and so probative of character for truthfulness. The court did exclude an old burglary conviction under Rule 609(b).

- **United States v. Matthews, 2022 WL 1198218 (E.D. Okla.):** In a prosecution for aggravated assault, the court held that a nine-year old conviction for escape was admissible to impeach the defendant under Rule 609(a)(1). First, "the conviction tends to show Defendant's dishonesty or deceit, which provides impeachment value." Second, "the conviction is within the ten-year cut-off, and, thus, this factor weighs in favor of admitting the conviction." [Of course that would be true with any conviction offered under Rule 609(a)(1).] Third, "the past crime (escape from a penal institution) is dissimilar from the charged crime (assault). This factor weighs against admitting the prior conviction for impeachment if the crimes are similar because the jury may improperly infer criminal propensity." Fourth, "Defendant has indicated he will testify and state he was acting in self-defense. His testimony is, thus, important to his defense. This factor weighs against admitting the conviction." Finally, "Defendant's credibility will be central at trial" and "this factor weighs in favor of admitting the conviction." In sum, "the probative value of the 2013 conviction for escape from a penal institution outweighs any prejudicial effect to Defendant. Therefore, it may be introduced if Defendant testifies."

- **United States v. Davis, 2022 WL 2115846 (D. Minn.):** In a trial for drug distribution and firearm possession, the court held that the defendant's 8-year-old conviction for burglary was admissible to impeach him under Rule 609(a)(1). The court stated that the defendant's credibility would be "directly in issue" and that while a burglary conviction "does not implicate his character for truthfulness as directly as a conviction of fraud, for example, the existence of prior felony convictions is, nonetheless, inherently probative of credibility." The court did exclude assault and burglary convictions that were older than 10 years.

- **United States v. Jefferson, 2021 WL 6196988 (D.D.C.):** The defendant was charged with being a felon in possession of a firearm and ammunition. The government moved in limine to allow impeachment with three convictions if the defendant chose to testify: 1) unlawfully possessing a firearm in 2020; 2) robbery in 2016; and 3) grand larceny in 2015. The court found that all of the convictions would be admissible against the defendant if he testified. The court stated that the robbery and grand larceny convictions both involved theft and that theft is "a serious crime that shows conscious disregard for the rights of others," so it is more relevant to credibility "than, say, crimes of impulse or simple narcotics and weapons possession." The prejudice as to the robbery and theft convictions was found minimal because they were not similar to the crime charged. The firearm conviction *was* similar, but the prejudice was in fact limited because that conviction had already been found to be admissible under Rule 404(b). The court also found that "Jefferson's credibility will likely be of central importance at trial."

- **United States v. Vaughn, 2021 WL 1561914 (S.D. Ind.): [SIMILAR CONVICTION ADMITTED]** This opinion is quick enough to include in its entirety. There is no indication of the crime charged or the convictions that are going to be admitted.

> The government has filed a motion in limine, seeking a ruling that Mr. Vaughn's prior convictions will be admissible for impeachment under Federal Rule of Evidence 609 if he testifies at trial. Mr. Vaughn has not responded.
>
> If Mr. Vaughn testifies, evidence of his prior convictions "must be admitted" for impeachment "if the probative value of the evidence outweighs its prejudicial effect." Fed. R. Evid. 609(a)(1)(B). Some of the factors that should be considered in weighing the probative value and prejudicial effect are: "(1) the impeachment value of the prior crime; (2) the point in time of the conviction and the defendant's subsequent history; (3) the similarity between the past crime and the charged crime; (4) the importance of the defendant's testimony; and (5) the centrality of the credibility issue." *Rodriguez v. United States*, 286 F.3d 972, 983 (7th Cir. 2002).
>
> Here, for the first factor, Mr. Vaughn's prior convictions have impeachment value. *See United States v. Rein*, 848 F.2d 777, 783 (7th Cir. 1988) ("[T]he fact that the defendant has been convicted of a prior offense may legitimately imply that he is more likely to give false testimony than other witnesses."). Second, all of the convictions raised in the motion are recent enough that they do not fall under Rule 609(b)'s additional limits on using evidence "if more than 10 years have based since the witness's conviction or release from confinement." Third, there may be some similarity between the current charges and prior convictions, but that is not dispositive when credibility is a key issue. *See Rodriguez*, 286 F.3d at 984. Fourth, the government has explained that if Mr. Vaughn testifies, that testimony will be central to his defense. And fifth, credibility is central when the defendant's testimony is likely to contradict important eyewitness testimony, as would likely be the case here. *See Rein*, 848 F.2d at 782–83.
>
> Moreover, as addressed at the final pretrial conference, the Court will instruct the jury on the appropriate use of Mr. Vaughn's prior convictions, including that they may not be used as propensity evidence. *See United States v. Nururdin*, 8 F.3d 1187, 1192 (7th Cir. 1993) ("[T]he record demonstrates that any prejudicial effect that the instruction of the prior felony convictions could have had was overcome by the court's limiting jury instruction, which directed that this evidence could not be used to demonstrate a propensity to commit crime.").

- **United States v. Howard, 2020 WL 2781607 (S.D. Ind.): [SIMILAR CONVICTION ADMITTED]** In a felon-firearm prosecution, the government sought to impeach the defendant with two armed robbery convictions and a battery conviction. The court held that all convictions were admissible. The court found the convictions for robbery to be "crimes of dishonesty." The convictions were considered recent *because* they were within the 10-year time limit of Rule 609(a). Finally, the court declared that "battery and armed robbery are not so similar to a felon in possession charge as to create an unacceptable risk that the jury will improperly consider the

evidence of battery and armed robbery as evidence that Howard committed the felon in possession of a firearm charge."

● **United States v. Lewis, 493 F.Supp.3d 858 (C.D. Cal. 2020): [IDENTICAL CONVICTION ADMITTED]** In a bank robbery prosecution, the court held that two prior bank robbery convictions would be admissible to impeach the defendant if he testified. The court found the impeachment value of a bank robbery was "high." The convictions were recent, and "the Court can mitigate any prejudice from the similarity of the offenses through the limiting instruction it has asked the parties to provide." The court made no mention of the fact that the convictions were identical to the crime charged.

• **United States v. Perry, 2017 WL 2875946 (D. Minn. 2017): [IDENTICAL CONVICTION ADMITTED]** The defendant was prosecuted for the unlawful possession and reckless discharge of a firearm. The district court found that all three of the defendant's prior felony convictions – a 2005 conviction for reckless discharge of a firearm, a 2008 conviction for terroristic threats, and a 2010 conviction for terroristic threats and domestic assault – were admissible to impeach him under Rule 609(a)(1)(B). The court did not address the similarity of the past offenses to the charged crimes or analyze the specific Rule 609(a)(1) factors. Instead, the court summarily held that the probative value of all the convictions outweighed any unfair prejudice because the defendant "puts his character for truth in issue when he decides to take the stand."

Reading this opinion literally, it means that Rule 609(a)(1) convictions are automatically admissible.

• **United States v. Williams, 2017 WL 4310712 (N.D. Cal. 2017): [IDENTICAL CONVICTION ADMITTED]** Six of eleven charged defendants were heading to trial in a RICO prosecution arising out of gang-related activities involving guns, drugs, prostitution, and stolen property. Although the court deferred a final ruling on the admissibility of the defendants' many prior convictions under Rule 609 until trial, the court provided a table indicating tentative rulings for each defendant. As the court noted, the table showed that the court was inclined to admit all prior felonies that were less than ten years old and to exclude all older felonies. This would mean that many felonies involving firearms, drugs, robbery, burglary, and murder would be admissible to impeach the defendants' trial testimony. The court did not give an analysis for each prior felony, but simply provided a tentative ruling for each.

• **United States v. Ford, 2016 WL 259640 (D.D.C. 2016): [IDENTICAL CONVICTION ADMITTED]** Multiple defendants were charged with conspiracy to distribute PCP, possession of PCP with intent to distribute, carrying firearms in a connection with a drug crime, and with being felons in possession of firearms and ammunition. The court first allowed several of the defendants' prior PCP convictions to be admitted at trial through Rule 404(b) using a conclusory analysis. The court found that all prior convictions admitted under Rule 404(b) could also be used to impeach because no new prejudice would result from that use. The government also sought to use additional PCP convictions, and other convictions of several defendants for carjacking, assault, firearm possession, unauthorized use of a vehicle, and destruction of property to impeach their trial testimony under Rule 609(a)(1)(B). The court found that all of the prior convictions showed

a conscious disregard for the rights of others and said something about the credibility of the defendants.

- **United States v. Thomas, 214 F. Supp. 3d 187 (E.D.N.Y. 2016): [SIMILAR CONVICTION ADMITTED]** The defendant was prosecuted for being a felon in possession of a firearm and the prosecution sought to impeach his trial testimony with five prior felony convictions for: 1) robbery; 2) assault; 3) reckless endangerment; 4) menacing; and 5) criminal contempt. The court refused to permit any of these prior convictions to be admitted under Rule 404(b), but then considered admissibility to impeach through Rule 609(a)(1)(B). The court found the probative value of the defendant's convictions high, particularly because theft and robbery show dishonesty. The court noted that the crimes were recent and that the defendant had continued committing crimes. Although the court acknowledged some similarity between the felon in possession charges and the prior violent crimes, the court stated that similarity does not automatically require exclusion. The court found the defendant's credibility important because he would attempt to contradict government witnesses. Finally, the court noted that the jury would be aware that the defendant was a "felon" due to the nature of the charged offense, such that knowing the particular felonies would not create significant additional prejudice. Thus, the court found all prior felonies admissible to impeach with a limiting instruction confining them to impeachment use.

- **United States v. Warren, 2016 WL 931100 (M.D. Fla. 2016):** The defendant was charged with being a felon in possession of a firearm after officers found guns under a passenger seat in a vehicle in which he was sitting. The defendant had five prior convictions between 2006 and 2008 for: 1) carrying a concealed firearm; 2) unlawfully possessing a firearm; 3) possession of drugs with intent to distribute; 4) fleeing from an officer; and 5) driving with a suspended license. The central issue in the case was the defendant's knowing possession of the guns under his seat and the court admitted both of his prior firearms convictions through Rule 404(b) to prove his knowledge and intent. The government sought permission to use the remaining convictions to impeach the defendant's trial testimony. The court stated that the defendant's credibility would be at issue if he chose to testify and found that he had failed to establish sufficient prejudice from the use of his remaining felony convictions to exclude them (thus incorrectly placing the burden on the defendant to show prejudice rather than on the prosecution to show probative value outweighing any potential prejudice). Although the court noted that its pretrial ruling could be revisited at trial, the court indicated that it was inclined to allow the government to use all of the defendant's recent felony convictions to impeach him.

- **United States v. Boyajian, 2016 WL 225724 (C.D. Cal. 2016): [SIMILAR SEX OFFENSE ADMITTED]** The defendant was charged with a sex offense against a minor victim. The court found the defendant's prior sex offense conviction could be used to impeach the defendant's trial testimony under Rule 609(a)(1) because the defendant's credibility was crucial and because the prior sex offense suggested dishonesty.

- **United States v. Sneed, 2016 WL 4191683 (M.D Tenn. 2016):[SIMILAR OFFENSE ADMITTED]** The defendant was charged with the possession and distribution of cocaine and sought to exclude evidence of three prior felony convictions from trial: 1) a conviction for the sale of a controlled substance; 2) a conviction for the attempted possession of a controlled substance; and 3) a reckless aggravated assault conviction. Although the court did not specify the dates of conviction or release, it analyzed admissibility under Rule 609(a)(1)(B). The court summarily found that the defendant's credibility would be central to the case if he chose to testify and that, therefore, all prior felonies would be admissible to impeach him. The court did not discuss the probative value of the prior offenses for impeachment or discuss the similarity of the past drug offenses to the instant case.

- **United States v. Hebert, 2015 WL 5553662 (E.D. Ok. 2015):** The defendant was charged with being a felon in possession of explosives after a box of blasting caps was discovered in his home. Wishing to testify at trial that he had no knowledge of the blasting caps, the defendant moved to exclude evidence of three prior convictions for impeachment purposes: 1) a 2008 conviction for possession of methamphetamine with intent to distribute; 2) a 2013 conviction for possession of a controlled substance; and 3) a 2014 conviction for burglary. The court analyzed the Rule 609(a)(1)(B) factors one at a time, noting that none of the defendant's convictions were for crimes involving an element of dishonesty, but that all of them called his veracity into question. The court found all three convictions recent, particularly the two in the prior two years, thus increasing their probative value. The defendant argued that the association between drugs and guns could carry over to the "explosives" charged in the instant case and argued that the similarity between the past drug crimes and the current offense precluded use of his prior convictions. The court disagreed, finding possession of blasting caps too distinct from past drug offenses to create any risk of propensity use. The court emphasized that the defendant's testimony was important because he was the only witness who could deny the requisite knowledge of the blasting caps. For the same reason, the court found the defendant's credibility crucial. With four of five balancing factors weighing in favor of admission, the court found that probative value outweighed any unfair prejudice and ruled that all of the defendant's prior convictions could be used to impeach his trial testimony under Rule 609(a)(1)(B).

- **United States v. Verner, 2015 WL 1528917 (N.D. Ok. 2015): [SIMILAR OFFENSE ADMITTED]** The defendant was charged with possession of methamphetamine with intent to distribute and sought to prevent the government from using the following prior convictions against him as impeachment: 1) a 2006 burglary conviction; 2) a 2007 conviction for possession of a controlled substance; and 3) a 2007 conviction for possession with intent to distribute marijuana and for unlawfully possessing a firearm. The court found that those convictions would be admissible to impeach the defendant's testimony under Rule 609(a)(1)(B). The court found that burglary is probative of veracity and stated that past drug convictions have impeaching value particularly when a defendant "denies involvement with illegal drugs." The court noted the recency of the defendant's past convictions and the importance of his credibility at trial. In response to the defendant's concerns about propensity use of his prior drug convictions, the court noted that it would give a limiting instruction, that it would not allow "details" of past convictions

to be shared, and that a defendant places his credibility at issue when he decides to take the stand and that the jury needs information about past convictions to evaluate that credibility.

- **United States v. Rembert, 2015 WL 9592530 (N.D. Iowa 2015): [SIMILAR OFFENSE ADMITTED]** The defendant was charged with being a felon in possession of a firearm and with possession of marijuana with intent to distribute. The defendant sought to preclude the government from impeaching him with marijuana conviction and a theft conviction. The court found, in conclusory fashion, that both convictions were probative and that the defendant's credibility was important. The court did not address the similarity of the past drug offense to the current charges. It found both prior convictions admissible to impeach.

- **United States v. Sleugh, 2015 WL 3866270 (N.D. Cal. 2015): [SIMILAR OFFENSE ADMITTED]** The defendant was charged with robbery, drug possession, and with unlawfully possessing and using a firearm after shooting someone during a drug deal. The defendant sought to exclude evidence of his 2008 armed robbery conviction at trial. The court excluded the conviction during the prosecution's case-in-chief under Rule 404(b) after a careful analysis, but then held the conviction admissible to impeach the defendant under Rule 609(a)(1), without analysis of the relevant factors.

- **United States v. Walia, 2014 WL 3734522 (E.D.N.Y. 2014):** A defendant was charged with the importation of drugs and with possession with intent to distribute them. The court summarily held that the defendant's 2011 felony conviction for driving under the influence could be used to impeach his testimony under Rule 609(a)(1)(B) "because of its probative value, which is not unduly prejudicial."

- **United States v. Drift, 2014 WL 4662505 (D. Minn. 2014):** The defendant was charged with the sexual abuse of a child and sought to prevent the government from using two prior felony convictions to impeach his trial testimony: 1) a 2008 conviction for operating under the influence and 2) a 2008 conviction for terroristic threats. The defendant argued that the terroristic threats conviction, in particular, was not probative of his veracity and that its inflammatory nature might prejudice the jury against him. The court rejected the defendant's arguments and found both convictions admissible to impeach the defendant's testimony. The court emphasized that the defense would aim to undermine and contradict the testimony of the minor victim, making credibility of paramount importance. Without addressing the specific Rule 609(a)(1)(B) factors, the court found that the probative value of the prior convictions outweighed any modest prejudice (that could be alleviated through a limiting instruction).

- **United States v. Gongora, 2013 WL 12219169 (C.D. Cal. 2013):** The defendant was prosecuted for conspiracy, fraud, and failure to file tax returns. The government sought permission to impeach him with his 2004 felony conviction for grand theft. The court found the prior conviction more probative of credibility than prejudicial under Rule 609(a)(1)(B) with very little analysis.

- **United States v. Sutton, 2011 WL 2671355 (C.D. Ill. 2011): [SIMILAR OFFENSE ADMITTED]** The defendant was charged with possession of crack with intent to distribute and sought to prevent the government from using a nine year-old conviction for delivery of a controlled substance, to impeach his testimony. The court found that drug offenses possess some probative value with respect to veracity. Although the conviction was nine years old at the time of trial, the court found that the defendant did not have a clean record in the intervening years. Although the court noted the similarity of the prior conviction in passing, it found that a limiting instruction would limit prejudice. Finally, the court found the defendant's credibility key given that his testimony would likely contradict that of several other witnesses, thus increasing the probative value of his prior felony. The court concluded that the government could impeach the defendant's trial testimony with his prior similar drug conviction.

- **United States v. Martinez, 2010 WL 11537701 (D. Alaska 2010):** The defendant was charged with narcotics offenses and sought to prevent the government from using his prior robbery conviction to impeach his trial testimony. The court examined the Rule 609(a)(1)(B) factors, finding that robbery is a crime that suggests dishonesty, particularly because the defendant hid the proceeds of the robbery and lied about its commission (though this is going behind the conviction itself in a way that is prohibited under Rule 609(a)(2)). The court also found probative value high because the prior crime was recent, occurring four years earlier. The court noted that there was no similarity between the prior robbery and the instant narcotics charges that might lead to an impermissible propensity inference. Finally, the court acknowledged that the defendant's testimony would be key to the defense, and that the government would need impeaching evidence to help the jury weigh the defendant's credibility. The court found that probative value outweighed any unfair prejudice and allowed the defendant's robbery conviction to be used to impeach him, explaining that criminal defendants are not entitled to take the stand with a false aura of veracity.

- **United States v. Harper, 2010 WL 1507869 (E.D. Wis. 2010):** The defendant was charged with being a felon in possession of a firearm after allegedly shooting a gun out of the window of a vehicle in which he was a passenger. The vehicle allegedly fled from officers shortly after the shots were fired. The government sought to impeach the defendant with four prior felony convictions: 1) a 1995 conviction for battery; 2) a 2001 conviction for the manufacture and delivery of cocaine; 3) a 2006 conviction for fleeing and eluding officers in a vehicle; and 4) a 2006 conviction for drug possession. Because the 1995 conviction fell outside the ten-year window due to a continuance of the trial date, the court found it inadmissible under Rule 609(b). The court found the other three felony convictions admissible to impeach the defendant's trial testimony. Although the defendant argued that drug possession and flight did not suggest dishonesty, the court declared that all felonies are impeaching and that Rule 609(a)(1) felony convictions need not be for crimes of dishonesty in order to be admitted. The court noted the recency of the three felonies. The defendant argued that his 2006 conviction for fleeing in a vehicle would cause unfair propensity prejudice due to its similarity to the events of the instant case, but the court disagreed. The court noted that the defendant was charged only with firearm possession and that flight and firearms were not similar. The court also found the defendant's credibility crucial where his only defense would involve denying possession of the firearm found in the vehicle. The court acknowledged that admitting all three convictions could be considered

prejudicial, but found that prejudice was lessened because the jury would already know the defendant was a "felon" due to the current charge. Therefore, the court found that the defendant's credibility was sufficiently important to justify admission of all three prior convictions.

- **United States Stolica, 2010 WL 538233 (S.D. Ill. 2010):** The defendant was charged with illegal counterfeiting and with being a felon in possession of a firearm. The defendant moved to preclude the government from admitting two 1999 convictions for bank robbery to impeach his trial testimony. The court found one conviction outside the Rule 609 ten-year time period and one inside of that window. Nonetheless, the court held that both bank robbery convictions would be admissible to impeach the defendant's testimony at trial. The court found that bank robbery was indicative of credibility even though it was not a crime of dishonesty. The court also found that bank robbery presented little propensity risk due to its lack of similarity to the charged offenses of counterfeiting and illegal possession of a firearm. Finally, the court found that the defendant's credibility was very important because he would likely contradict government witnesses if he took the stand. In admitting both convictions, the court emphasized that they would only be admissible in the event that the defendant chose to testify --- thus they were not admissible under Rule 404(b).

- **United States v. Campbell, 2010 WL 1610583 (C.D. Ill. 2010): [SIMILAR OFFENSE ADMITTED]** A defendant facing cocaine distribution charges sought to prevent the government from using his prior conviction for the manufacture and delivery of a controlled substance to impeach his trial testimony. With no analysis regarding the prejudice caused by admission of a similar past conviction, the court found that the prior felony had impeachment value and should be permitted if the defendant chose to testify. The court held that the crime charged, the date, and the disposition would be allowed.

- **United States v. Lujan, 2008 WL 11359114 (D.N.M. 2008):** Without explaining the current charges or performing analysis, the court ruled that the defendant's prior conviction for the possession of marijuana would be admissible against him if he testified. The court stated only that the defendant's credibility was important and that the prior conviction could demonstrate a motive for the instant offense (which would implicate Rule 404(b) rather than Rule 609 which the court was analyzing).

- **United States v. Alfonso, 1995 WL 276198 (S.D. N.Y. 1995): [SIMILAR OFFENSE ADMITTED]** A defendant charged with conspiracy to distribute cocaine sought to prevent the prosecution from impeaching his trial testimony with his prior conviction for attempted criminal possession of cocaine. The court found the conviction admissible to impeach because drug trafficking was considered dishonest in the Second Circuit. With no analysis of unfair prejudice, the court found the prior conviction admissible to impeach the defendant if he testified.

- **United States v. Jackson, 1995 WL 337067 (N.D. Ill. 1995):** A defendant was charged with operating a fraudulent telemarketing scheme and sought to prevent the government from impeaching his trial testimony with two prior drug convictions. The court found that the defendant's commission of prior felonies reflected on his credibility and noted that the past crimes bore no resemblance to the charged fraud, thus minimizing unfair prejudice. Although the defendant argued that his trial testimony was crucial and could determine the outcome of the case

(and so he should not be prevented from testifying for fear of impeachment) the court found that this elevated the importance of his credibility and the probative value of the impeaching convictions.

II. The Court Sanitizes Defendant's Felony Convictions Admitted Under Rule 609(a)(1)(B)

Many courts that are inclined to allow use of a criminal defendant's felony record for impeachment under Rule 609(a)(1)(B) compromise by sanitizing the government's references to the defendant's past misdeeds. This typically means that the government may cross-examine a defendant about a generic "felony" or "felonies" committed on a specified date. Courts utilize this technique most frequently when faced with prior felony convictions that are similar to the charged offense. Sometimes, the prosecution proposes, or at least agrees to such sanitized references. In other courts, this practice is prohibited, on the ground that jurors cannot properly assess the probative value of the conviction on the defendant's character for truthfulness unless they know what the conviction was for.

- **United States v. Cruz, 2024 WL 621321 (D.N. Mex.):** In a prosecution for drugs and firearms violations, the government sought to impeach the defendant with his prior convictions for felony terroristic threats and possession of narcotics on school property, and aggravated burglary. The court held that neither of the convictions satisfied the Rule 609(a)(1)(B) balancing test. Neither was very probative of a character for truthfulness, and the narcotics crime was especially prejudicial due to its similarity with the crime charged. So it appeared that the court was going to exclude all evidence of the convictions. But the court noted that the defendant had stipulated to the facts of the convictions, so the court ruled that if the defendant testified, the jury would be informed that he had committed two prior felonies.

- **United States v. Briscoe, 2023 WL 8237269 (D.N.M.):** In a prosecution for attempted carjacking and illegal use of firearms, the government sought to impeach the defendant with prior convictions for armed robbery. The court found that the probative value of the convictions was limited because armed robbery is a crime of violence, and the probative value was further limited because the crimes were nine years old. Most importantly to the court, the similarity to the crimes charged raised a high risk of prejudicial effect. Finally, the court opined that the "importance of the testimony" and "importance of credibility" factors essentially crossed each other out. One would think that this analysis would lead to exclusion of the convictions. But the court stated that "the jury must be well-informed in order to weigh the testimony of Mr. Briscoe against the testimony of Jane Doe 1, Jane Doe 2, and Jane Doe 3." The court therefore compromised and allowed the jury to hear that the defendant had been convicted of the two felonies, but would not be told what the crimes were.

Note: This is a case where it is pretty clear that if sanitization were not an option, the court would have excluded the convictions. Also, it is odd to say that the jury "must be well-informed" and yet then give them barebones information which is actually impossible to assess for probative value.

● **United States v. Johnson, 2022 WL 2835955 (M.D. Pa.):** In a narcotics prosecution, the court held that the defendant's two prior narcotics convictions were admissible for impeachment. It reviewed extensive authority in which courts allowed impeachment with prior drug convictions in drug prosecutions. It concluded as follows:

> No doubt that courts have allowed the government to refer to the nature of the defendant's prior felony convictions once they determined that the convictions were admissible for impeachment purposes under Rule 609(b)(1). However, as an additional safeguard in this particular case, the court will only allow the government to refer to the fact that Johnson was convicted of prior felonies without specifying the nature of his drug convictions. . . . [T]his court finds that the admission of Johnson's two stated prior drug offenses is too similar to the instant charges he faces, and that it is appropriate in this case for the government to sanitize the offenses by only referring to them as prior felony convictions. Thus, in light of the drug charges Johnson faces in the instant case, the court will not allow the government to impeach him with specific facts of his prior drug felonies or by referring to the nature of these offenses. Rather, the government must only indicate that Johnson had previously been convicted of other unspecified felonies.
>
> **This was a case in which the court appeared to think it was bound by precedent to admit the convictions, and then decided to have mercy by sanitizing the convictions. But there is no precedent that *mandates* admissibility of drug convictions for impeachment of defendants in drug prosecutions. So the sanitization was more of an easy way out, an alternative to rejecting some of the case law head on.**

• **United States v. Barela, 2021 WL 5114406 (D.N.M.):** The defendant was charged with robbing a grocery store, and the government sought to impeach him with prior convictions for aggravated battery and trafficking in a controlled substance. In what appears to be a lawyer's error, defense counsel conceded that the convictions were admissible under Rule 609(a)(1), and sought only that the impeachment would be limited to the fact of the felonies, and the jury would not hear the names of the crimes. The government argued, correctly, that sanitization would rob the convictions of their probative value for impeachment. The court found that the convictions were not very probative and would be unduly prejudicial --- the same arguments that would be made to exclude the convictions entirely. But because defense counsel did not ask for that, the court ruled that it would "allow the Government, if Defendant testifies, to cross-examine Defendant about his two prior felony convictions for the limited purpose of impeaching Defendant's character and testimony. However, the Court will permit the United States to introduce only that Defendant has two prior felony convictions and the dates of these convictions."

● **United States v. Blakeney, 2021 WL 1723224 (E.D. Pa.):** In a felon-firearm prosecution, the government sought to impeach the defendant with two convictions: one for intent to distribute a controlled substance and the other for conspiracy to commit burglary. The court stated that most of the factors favored admission:

> Three out of the four *Bedford* factors weigh in favor of admitting this evidence here. The kind of crimes involved— possession with intent to distribute and conspiracy to

commit burglary—are both probative as to Mr. Blakeney's character for truthfulness. The timing of the convictions do not suggest a lengthy passage of time to allow for a changed character. Mr. Blakeney had just been released from confinement for unlawfully possessing a firearm, and was on probation when the events underlying this indictment occurred. Third, if he testifies Mr. Blakeney's credibility will be important. As both parties concede, Mr. Blakeney's defense will chiefly center on his explanation for the presence of a gun in his car. Conversely, the fourth factor weighs against admitting the evidence because Mr. Blakeney's testimony will be highly important given that the parties identify no other source of evidence that he could use to make the same argument. . . . In the event Mr. Blakeney chooses to testify, he will be placing his credibility directly at issue. Should that occur, the jury may consider evidence of the fact of his prior convictions.

After all that, though, the court dropped a footnote to state that "[t]he Government will be limited to presenting the fact of convictions without embellishment as to the details underlying them." No explanation was provided for this limitation.

• **United States v. Barnes, 2021 WL 5051367 (D.N.M.):** The defendant was charged with felon-firearm possession. The government sought to impeach him with his prior convictions for larceny, conspiracy to commit larceny, unlawful taking of a motor vehicle (two convictions), tampering with evidence, attempt to commit a felony forgery, and robbery. The court found the forgery conviction automatically admissible. As to the other convictions, the parties agreed that they would be sanitized. The court then evaluated those convictions, and found prior convictions for larceny, conspiracy to commit larceny, unlawful taking of a motor vehicle, and robbery "are sufficiently similar to the charged offenses that a jury could convict Defendant Barnes on the basis of propensity reasoning." The result of that ruling was that the jury would only hear that there were felonies, but not what crimes were committed. In contrast, the tampering with evidence conviction was not so similar to the crimes as to be unduly prejudicial. But the result of that ruling was *exactly the same,* given the parties' agreement. The jury could hear about the conviction but not what it was for.

Note: This case shows the problem of sanitizing. The court considered the probative value and prejudicial effect of the convictions for the actual crime. But that analysis is irrelevant because the jury is never told what the crimes are.

● **United States v. Jackson, 2020 WL 7063566 (E.D.N.Y.):** In a felon-firearm prosecution, the government sought to impeach the defendant with two prior narcotics convictions. The court found that the narcotics convictions were highly probative of credibility. While the convictions did not appear similar to the firearms charge, the court noted the connection between guns and drugs. But it said that the risk of prejudice "can be eliminated by prohibiting the government from inquiring into the nature or statutory name of the offense, while still allowing it to inquire into the other essential facts, namely the fact of the felony conviction, the date, and the length of the sentence.

It makes no sense to spend time talking about how narcotics convictions have high impeachment value (which is wrong anyway) and then to give the conviction to the jury without any indication that it is a narcotics conviction.

● **United States v. Johnson, 2020 WL 406370 (D.N.Mex.):** In a felon-firearm prosecution, the government sought to impeach the defendant with two convictions for drug trafficking. The court found the convictions admissible on the grounds that they were probative of credibility (relying on the presumption in 609(a)(1) that all convictions are probative), and the prejudicial effect was minimized because the convictions were not similar to the crime charged. The court noted that the parties had agreed that the jury would only hear about the fact of the felonies; the court found that "this concession by the parties is proper."

● **United States v. Young, 2019 WL 133268 (D.Mex.):** In a felon-firearm prosecution, the government sought to impeach the defendant with seven felony convictions: robbery with a weapon, attempted robbery with a weapon, attempted robbery with a firearm, aggravated battery with a deadly weapon, assault and battery with a deadly weapon, and obstructing an officer. The court first noted that none of the crimes "can 'readily ... be determined' on the record before the Court to involve 'dishonesty or false statement.'" Thus they were not admissible under Rule 609(a)(2). The court stated that the prior convictions "are not highly probative of Young's character for truthfulness" and that their prejudicial effect was "significant" because they involved violent offenses committed with deadly weapons: "The prior conviction evidence tends to portray Young as a dangerous criminal perhaps always armed with a firearm. The risk that the jury would convict Young, not on the merits of this case but on the merits of his past cases, is substantial." After all this, the court nonetheless allowed the government to introduce the fact that the defendant had been convicted of seven felonies (even though the jury was already made aware of the fact of the predicate felony).

> **The opinion shows the court spending a lot of time on balancing and then allowing admissions of the fact of conviction without any ruling that the probative value of the bare convictions outweighed the prejudicial effect. It could be argued that the probative value of a sanitized conviction *never* outweighs the prejudicial effect. The probative value is near zero, because the mere fact of a generic "felony" says very little about the likelihood that the defendant will lie under oath. And the prejudicial effect of a sanitized conviction is disturbingly high for two reasons: 1) The jury will still draw an inference, "once a criminal, always a criminal"; and 2) The jury will speculate about the nature of the conviction and is likely to assume the worst. See McLeod, *Evidence Law's Blind Spots,* 109 Iowa L.Rev. 189 (2023) (reporting on studies indicating that jurors assume the worst when a conviction is sanitized, especially where the defendant is a person of color.**

● **United States v. Mayo, 2019 WL 5868262 (W.D.La):** The defendant was charged with possession of ammunition by a felon. The government sought to impeach him with three drug convictions. The government argued that they were admissible because the defendant's credibility was going to be an important issue. But the court held that the balancing test would have no utility if the importance of the defendant's credibility was dispositive. The court found the convictions

insufficiently probative, but then compromised by allowing the government to refer to the fact of the convictions, with the jury being in the dark about how to assess "felonies" for credibility.

• **United States v. Casarez, 2018 WL 3340871 (D. Nev.):** In a prosecution for carjacking with a firearm, the government sought to impeach the defendant with prior convictions for possession of a stolen vehicle, assault with a deadly weapon, felon in possession of a firearm, and robbery. The court concluded that "the prior convictions are substantially similar to the current charges" and that when that is so, "there is a substantial risk that all exculpatory evidence will be overwhelmed by a jury's fixation on the human tendency to draw a conclusion which is impermissible in law: because he did it before, he must have done it again." Nor were the violence-based convictions very probative of character for truthfulness. But instead of excluding the convictions, the court sanitized them and the jury was made aware only that the defendant had been convicted of "felonies."

● **United States v. Washington, 2017 WL 3642112 (N.D. Ill. 2017):** The defendant was charged with being a felon in possession of a firearm after officers allegedly saw him throw a firearm over a fence. The defendant had two prior convictions with which the government sought to impeach his trial testimony: 1) a 2009 conviction for the manufacture and delivery of marijuana and 2) a 2012 burglary conviction. The defendant asked the court to sanitize the convictions by precluding mention of the names of his prior offenses, while the government argued for full use of the convictions to impeach. In weighing the Rule 609(a)(1)(B) factors, the court noted that marijuana offenses and burglary possessed only modest probative value in connection with truthful testimony. The court noted that the marijuana conviction was somewhat old, but that the defendant had not stayed out of trouble since that time, enhancing probative value. Further, the court found that neither prior offense was identical to the charged offense, reducing unfair prejudice. Still, the court found that defendant's testimony was extremely important because his own version of events constituted his sole defense. Thus, the court decided to allow both felonies to be used to impeach, but required them to be sanitized such that their names and the sentences received could not be mentioned. The court acknowledged that the names of prior offenses could be admitted in usual circumstances but also noted that courts in the Northern District of Illinois "regularly sanitize" impeaching convictions.

• **United States v. Waggy, 2017 WL 3299085 (E.D. Wash. 2017):** The defendant was prosecuted for making telephone calls designed to harass, intimidate, and threaten using obscene and lascivious language and acts. The defendant had three prior convictions potentially available for impeachment: 1) a 2008 harassment conviction; 2) a 2005 harassment/threat to kill conviction; and 3) a 2000 child rape. Acknowledging the inflammatory nature of the 2000 conviction, the government sought to impeach only with the 2008 and 2005 convictions. The court analyzed admissibility using the Rule 609(a)(1)(B) factors, noting that a "close call" should result in exclusion. The court found unfair prejudice too high for the 2008 and 2005 convictions due to their similarity to the charged offense and their salacious nature. *The court ruled that the government could not question the defendant about any of his specific convictions, but could only ask whether he had been convicted of "a felony."*

- **United States v. Dumire, 2016 WL 4507390 (W.D. Va. 2016):** A defendant was charged with being a felon in possession of a firearm, as well as with obstruction of justice arising out of witness intimidation and retaliation resulting in the death of the witness. The defendant had one prior conviction for malicious wounding with a firearm that the government sought to use for impeachment. The court found the prior conviction too similar to the instant offense and found that it would be unduly prejudicial if the jury learned that both incidents involved shooting someone. *The court ruled that it could be used only if the government referred to it as a prior "felony involving a firearm." Thus, the court allowed the conviction to impeach if partially sanitized.*

  It appears from the analysis that if not for the "compromise" the court would actually have excluded the conviction.

- **United States v. Marquez, 2016 WL 10720983 (D.N.M. 2016):** In a prosecution for methamphetamine distribution, the government sought to use a prior felony conviction for felon-firearm-possession to impeach the defendant's testimony. The court found that telling jurors that the defendant had a felony conviction would put them on notice that he may not be credible. Although the prior conviction was not similar to the charged drug offenses, the court found prejudice in the fact that a prior conviction for being a "felon in possession of a firearm" would actually reveal two prior felonies to the jury (the 2008 conviction and the predicate felony). The court found that defendant's credibility was important because his testimony would necessarily contradict other evidence. *After balancing the court allowed sanitized evidence of the 2008 "felony" without the name of the offense to be used to impeach the defendant's testimony.*

- **United States v. Castelluzzo, 2015 WL 3448208 (D.N.J. 2015):** In a drug distribution conspiracy prosecution, and the government moved for permission to use the defendant's prior felony convictions to impeach his trial testimony. The defendant had a 2008 theft by deception conviction, a 2008 drug possession with intent conviction, and a 2006 drug possession with intent and felon-in-possession of a firearm conviction. The court found the theft conviction automatically admissible pursuant to Rule 609(a)(2) (which most courts would not do because theft crimes do not contain an element of false statement) and carefully balanced the Rule 609(a)(1)(B) factors with respect to the other convictions. The court noted that the similarity of the prior drug convictions presented significant propensity risk. The court found that the age of the convictions did not diminish their probative value, however, because the defendant remained on probation for the crimes during the current charged conspiracy. Because the defendant's testimony constituted his only possible defense, his testimony was important and this weighed against admission. Still the court found that the defendant's credibility would be critical and impeachment important. (So the importance of the defendant's testimony crossed itself out --- it is important to limit impeachment in order to allow the defendant to testify, but equally important to impeach him). *The court decided to admit the prior drug convictions if the government would agree to characterize them only as "two non-violent felonies."* The court found that sanitizing the convictions would ameliorate any unfair prejudice --- but the court did not address the problem that sanitizing the conviction renders their probative value inscrutable.

- **United States v. Elder, 2015 WL 13035104 (S.D. Ind. 2015):** A defendant was charged with conspiracy to distribute methamphetamine. He sought to prevent the government from impeaching his trial testimony with two prior felony convictions: 1) a 1997 conviction for operation of a drug enterprise (for which he was released in 2005) and 2) a 2009 conviction for distribution of methamphetamine, arguing that their similarity to his charged offense would cause significant unfair propensity prejudice. The court carefully weighed the Rule 609 factors, finding that drug offenses were not highly probative of veracity, but that the recency of the offenses suggested their relevance to the defendant's current credibility. The court agreed with the defense that the similarity of the prior convictions to the charged offense was highly prejudicial, but found that the importance of the defendant's testimony and credibility weighed in favor of admission. The court found the Rule 609 balancing to be a "close call" due to the jury's need for impeaching information and the potential prejudice to the defendant. The court ultimately found both convictions admissible to impeach *with only the fact of a "felony" conviction and the date revealed* to protect the defendant from a propensity inference (though the jury could still draw a "once a criminal always a criminal" propensity inference).

- **United States v. Thomas, 2015 WL 2341320 (W.D Wis. 2015):** The defendant was apparently charged with a drug offense, although the nature of the indictment was not described. The prosecution sought leave to impeach the defendant with three prior drug felony convictions pursuant to Rule 609(a)(1)(B) if he chose to testify. The court immediately noted the similarity of the prior convictions to the charged offense, opining that a limiting instruction would likely be ineffective in protecting the defendant from an impermissible propensity inference. Therefore, the court held that the government could use all three felony convictions to impeach, *but only in a sanitized form that did not reveal the nature of the prior convictions to the jury.*

- **United States v. Clayton, 2014 WL 508523 (N.D. Iowa 2014):** The defendant was charged with bank robbery. He had two prior felony theft convictions that the government sought to use for impeachment. The court found that both convictions were probative of the defendant's honesty under Rule 609(a)(1)(B) only because they were "felonies" and not because of their specific nature, suggesting that their similarity to the current robbery charges could cause propensity prejudice. *Therefore, the court held that the prosecution could cross-examine the defendant only as to whether he had been convicted of "two felonies" without revealing their nature.*

- **United States v. Perez, 2014 WL 3362240 (E.D. Cal. 2014):** The defendant was charged with being a felon in possession of a firearm and ammunition and with the possession of an unregistered firearm after allegedly shooting his son. The defendant sought to preclude the government's use of his five prior felony convictions for heroin possession, resisting an officer, and assault with a deadly weapon as impeachment evidence under Rule 609(a)(1). *Without analysis of the Rule 609(a)(1) factors, the court held that all five could be used to impeach in a sanitized form that revealed only that the defendant had been convicted of "five felonies."*

- **United States v. Saquil-Orozco, 2012 WL 2576678 (N.D. Iowa 2012):** The defendant was charged with possession of a firearm by a convicted felon and with being an undocumented

person present in the United States after being removed from the country. The defendant sought to prevent the government from impeaching him with a 2007 conviction involving the possession of cocaine with intent to distribute. Although the government expressed an intent to ask him about his prior felony on cross-examination, the government agreed that it would not reveal the nature of the prior conviction. The court analyzed the admissibility of the prior drug conviction under Rule 609(a)(1)(B) and found that, *in its sanitized form,* its probative value outweighed any unfair prejudice and allowed the cross-examination as suggested by the government.

- **United States v. Swint, 2012 WL 3962704 (D. Ariz. 2012):** The defendant was charged with assaulting a federal officer and claimed self-defense. The government sought permission to use the defendant's 2003 assault conviction under Rule 609 to impeach his veracity if he testified at trial. The defendant opposed the request, arguing that his past assault was not indicative of veracity and that its similarity to the charged offense would create an unfair propensity inference about his violent tendencies. The defendant sought exclusion of the conviction or, at least, sanitized reference to it. *The court held that the government could ask the defendant about the fact of a 2003 "felony" conviction without reference to the nature of the prior crime.*

- **United States v. Durbin, 2012 WL 894410 (D. Mont. 2012):** Although the opinion never specifies the charged offense, it appears that the defendant was prosecuted for drug-related crimes. The defendant moved to exclude his 2008 felony conviction for the delivery of marijuana under Rule 609(a) should he choose to testify. The court analyzed the Rule 609(a) factors, noting that drug crimes are considered to be probative of veracity in the Ninth Circuit. The court found that the recency of the 2008 conviction increased its impeaching value. The court noted that the similarity of the prior conviction to the charged crime created a risk of unfair propensity use that weighed against admission. Finally, the court found that the defendant's testimony and credibility would be crucial if he testified at trial. The court held that the government could use the 2008 conviction to impeach the defendant, but prohibited the prosecution from revealing the nature of the past offense.

> **Comment: Note the inconsistency of emphasizing that drug crimes are probative of veracity, and admitting the conviction partly on that basis, but then depriving the jury (whose role it is to assess credibility) of the information that it was a drug crime. (This is similar to the inconsistency (rectified in 2006) where a court would hold a conviction automatically admissible under Rule 609(a)(2) if it found that the witness lied while committing a non-falsity crime --- a fact that the jury would never know).**

- **United States v. Gomez, 772 F. Supp. 2d 1185 (C.D. Cal. 2011):** The defendant was charged with the possession of methamphetamine with intent to distribute and the government moved for permission to impeach his trial testimony with two prior felony convictions: 1) a 1997 conviction for conspiracy to possess with intent to distribute methamphetamine; and 2) a 2006 felony conviction for false personation. The court first found the 1997 felony within the ten-year time period required by Rule 609 due to the defendant's release from custody in 2004. The court found the impeaching value of the 1997 conviction diminished by the existence of the more recent 2006 felony that could be used to impeach the defendant. Further, the court noted that the similarity between the 1997 methamphetamine

conviction and the instant charges would create a risk of unfair propensity use. Because the defendant's credibility would be crucial if he chose to testify, however, the court held that the government could impeach with the 1997 felony conviction, but further ordered that "to mitigate the risk of prejudice to defendant, the court will 'sanitize' the conviction and not allow the government to introduce evidence regarding the nature of the felony for which defendant was convicted." Because the 2006 felony conviction for false personation required proof that the defendant purposely and falsely impersonated another for financial gain, the court found this conviction automatically admissible to impeach the defendant's trial testimony under Rule 609(a)(2).

Comment: Query the necessity of admitting the older conviction after admitting a falsity-based, more recent conviction. It may be that "sanitizing" a conviction is just a way to avoid confronting the fact that its probative value is minimal, but at least the damage is limited.

- **United States v. Chaco, 801 F. Supp. 2d 1217 (D.N.M. 2011):** The defendant was charged with aggravated sexual abuse of his daughter and sought to prevent the use of four prior felony convictions to impeach his trial testimony: 1) a 2004 robbery conviction; 2) a 2004 breaking and entering conviction; 3) a 2004 false imprisonment conviction; and 4) a 2004 conviction for an attempt to disarm an officer. At a pretrial hearing in which the court suggested its inclination to exclude all of the defendant's prior felonies, the government offered to sanitize the convictions to prevent the jury from learning the names of the prior offenses and agreed to an instruction explaining that none of the past offenses were for sexual assault. In its ultimate ruling on the issue, the court traced the history of felony impeachment, expressed disapproval of the policy permitting such impeachment, but found that some impeachment with prior felonies was clearly consistent with congressional intent. In weighing the Rule 609(a) factors, the court noted that the case amounted to a true credibility contest between the victim and the defendant, thus making the importance of impeachment greater. Despite the defendant's concerns that the jury would perceive him as a "bad person" if he were impeached with his prior felony convictions, the court emphasized that none of the prior convictions were for similar offenses, thereby reducing the risk of unfair prejudice. Because credibility was so crucial, the court determined that it would allow impeachment with "four prior felony convictions," thus sanitizing the convictions consistent with the government's previous offer to do so. The court did not explain why sanitizing the dissimilar convictions was necessary.

Note that the court was going to exclude, whereupon the government offered the sanitization "compromise."

- **United States v. O'Neil, 839 F. Supp. 2d 1030 (S.D. Iowa 2011):** The defendant was charged with conspiracy to distribute cocaine and sought to prevent the government from using two prior felony convictions under Rule 609: 1) a 1997 conviction for cocaine distribution; and 2) a 2000 conviction for the delivery of a controlled substance. The court found that all felonies have some impeaching value pursuant to Rule 609, but stated that the nature of the 2000 drug offense did not add to that impeaching value because the prior drug crime did not suggest dishonesty. The court emphasized the likely propensity prejudice from impeaching with the prior

similar drug conviction. The court held that the government could impeach the defendant with the fact of a 2000 "felony conviction" without revealing the nature of that conviction. The court excluded the 1997 conviction as old and similar to the charged offense under Rule 609(b).

Comment: Here is a case where, if sanitization was not an option, the trial court might have found that the conviction wasn't admissible at all. Sanitization may or may not on balance be beneficial to the defendant.

- **United States v. Bruguier, 2011 WL 4708853 (D.S.D. 2011), *rev'd in part on other grounds* 735 F.3d 754 (8th Cir. 2013):** The defendant was charged in connection with alleged sexual assaults on minors and incapacitated persons. After his conviction, he moved for acquittal and for a new trial based upon alleged trial errors, including the district court's decision to allow his impeachment with a prior vandalism felony. In an interesting twist, the defendant claimed that the court's decision to sanitize the felony caused him prejudice because the jury should have been told that his prior conviction *was not* for sexual assault. The court rejected this contention, finding that the defendant had been free to reveal the nature of his prior conviction to the jury himself during his testimony and that his strategic decision not to do so was not grounds for a new trial.

- **United States v. Harriman, 2010 WL 5477752 (N.D. Iowa 2010):** The defendant was prosecuted for being a felon in possession of a firearm and sought to preclude the government from admitting his 1997 convictions for kidnapping and burglary to impeach his trial testimony. The court found that fewer than ten years had passed since the defendant's release from custody and that the prior felony convictions were probative of veracity. The court noted that special caution was required for the use of a criminal defendant's prior convictions and expressed concern about propensity inferences the jury might draw from the nature of the defendant's past crimes. Therefore, the court allowed the government to impeach the defendant *only with the fact and date of his prior convictions, without revealing their nature to the jury*.

Comment: The tone of the opinion indicates that if the trial court had not had the sanitization safety valve, it would have excluded the conviction entirely.

- **United States v. Brown, 606 F. Supp.2d 306 (E.D.N.Y. 2009):** The defendant was charged with conspiracy and with distribution of crack cocaine, as well as a firearms offense. He moved to preclude the government from impeaching his trial testimony with two prior convictions: 1) a 1997 conviction for unlawful possession of a firearm and 2) a 1999 conviction for criminal contempt arising out of the defendant's attack on a person protected by a court order with an ice pick. The court found that the 1997 conviction was more than ten years old and subject to the stringent balancing test in Rule 609(b). Finding low probative value for the gun offense and high prejudice due to the presence of a gun charge in the instant case, the court excluded Brown's 1997 felony conviction under Rule 609(b). The court found the 1999 criminal contempt conviction subject to Rule 609(a)(1)(B) and performed a careful analysis of the applicable factors. First, the court found low probative value of the criminal contempt conviction for impeachment purposes. The court noted that violation of a court order was not necessarily dishonest and that impulsive violence did not suggest a lack of veracity. The court found that the age of the prior conviction

further lessened its probative value. The court found significant prejudice as well, noting that both the prior conviction and current charges involved weapons and that an attack with an ice pick is highly inflammatory. Still, the court found that it would be unfair to allow the defendant to take the stand and contradict government witnesses without impeachment, especially because the defense was planning to impeach government witnesses with their prior felony convictions. The court held that a sanitized version of the 1999 conviction that revealed only the fact of a felony conviction, the date, and sentence would be permitted. **Comment: This case is in tension with Second Circuit case law, which questions a court allowing impeachment with convictions where the jury doesn't know what the conviction is for. *United States v. Estrada,* 430 F.3d 606 (2nd Cir. 2005). It's also notable that disclosure of the conviction was allowed basically because the defendant was going to impeach prosecution witnesses with prior convictions. That would not be a concern if Rule 609(a)(1) is eliminated.**

III. The Court Excludes All of Defendant's Felony Convictions Under Rule 609(a)(1)(B)

Some courts have refused to allow the prosecution to impeach a criminal defendant with any of his or her eligible prior felony convictions under Rule 609(a)(1)(B). This occurs most often in cases where available felony convictions are for offenses that are particularly inflammatory or identical to the charged offense.

- **United States v. Clanton, 2024 WL 5007419 (E.D.N.Y.):** The defendant was charged with Hobbs Act violations arising from a home invasion. The government sought to impeach him with an eight-year-old conviction for assault with a weapon. The court held that the conviction was not be admissible because assault-related convictions are not very probative of veracity, and the conviction was for conduct "strikingly similar" to the conduct at issue.

  Note: The court noted that impeachment *would* be allowed if the defendant took the stand and testified that he had never been convicted. If that happened, then the conviction would not be admitted under Rule 609. Rather, it would be admitted for purposes of contradiction. The proposed Committee Note emphasizes that the amendment has no effect on impeachment by contradiction.

- **United States v. Holmes, 2024 WL 411727 (E.D.P.A):** The defendant was charged with Hobbs Act Robbery and firearms offenses. The government sought to impeach him with identical convictions. The court excluded the convictions. The court first noted that the government relied on case law stating that there is a presumption of admissibility of convictions when offered against the defendant under Rule 609(a)(1). Of course that is not true under the terms of the rule. At any rate, the court observed that the case law cited was from outside the Third Circuit. The court noted that in citing those cases, the government "ignored an important decision from the Third Circuit which describes this portion of the Rule as "a heightened balancing test and a reversal of the standard for admission under Rule 403," creating "a predisposition toward exclusion." *United States v. Caldwell*, 760 F.3d 267, 286 (3d Cir. 2014). The court found that "there is no inherently strong or logical connection between Holmes' prior convictions—robbery

and a firearms offense—and his veracity as a witness. Indeed, it is possible to commit these crimes brazenly, with no deception, despite the seriousness of the offenses." In contrast, because the crimes were virtually identical to those charged, "[a]llowing such evidence creates a great risk that a jury will draw the impermissible inference that Holmes has a propensity to commit robberies and firearms offenses, rather than considering it as evidence only relevant to his credibility as a witness." The court found that the factors of importance of the defendant's testimony and importance of his credibility canceled each other out.

Notably, the court also excluded theft convictions of a government witness under Rule 609(b).

- **United States v. Gillard, 2024 WL 247054 (E.D.Pa.):** A defendant charged with drug and firearms crimes sought to exclude firearms and drug convictions under Rule 609(a)(1). The court first observed that Rule 609 was a very "controversial" rule. It found the gun crimes inadmissible because they had "little to no bearing on his character for truthfulness." The court noted that drug crimes may vary in their probative value as to character for truthfulness, and without having any further information about the prior crime, chose to find it of limited probative value. The prejudice of both the gun and drug convictions was high because of the similarity to the charged crimes. The government offered to sanitize the convictions, but the court rejected this offer, explaining as follows:

> While this proposal may reduce possible prejudice, it does not increase the probative value of Mr. Gillard's prior felony convictions as to his character for truthfulness. Instead, the probative value of a prior felony conviction will be *diminished* where the jury is not provided information about the prior conviction that would help in evaluating the extent to which the offense reflects on the defendant's veracity as a trial witness.

Exactly right.

- **United States v. Austin, 641 F.Supp.3d 1193 (D. Utah 2023):** The defendant was charged with involuntary manslaughter in Indian Country. The government sought to impeach him with his prior convictions for drug distribution and money laundering. The court stated that "the fact that Mr. Austin was involved in methamphetamine trafficking is not particularly relevant to his character for truthfulness as a witness" and that "a methamphetamine-related conviction is highly damaging and likely to be very prejudicial." The court further recognized that "allowing Mr. Austin to be impeached by this prior conviction will chill his testimony, which is likely to be important as to his mental state" which was an important issue in the case. The court also noted that while the defendant's testimony will be important, he planned to call an expert, and so the case is "unlikely to be a swearing contest between witnesses where the centrality of a defendant's credibility and the probative value of his past conviction is heightened." The court therefore concluded that "the probative value of this evidence does not outweigh its prejudicial effect to Mr. Austin."

- **United States v. Bennett, 2023 WL 6810439 (W.D.Pa):** The defendant was charged with distributing Fentanyl, and the government sought to impeach her with two Fentanyl convictions. The court applied the four factor test applicable in the third circuit, i.e.,

"(1) the kind of crime involved; (2) when the conviction occurred; (3) the importance of the defendant's testimony to the case; and (4) the importance of the credibility of the defendant." The first factor counted in favor of the defendant, because the convictions were identical to the crime charged, and "these non-violent crimes are not crimes of dishonesty or deceit, and therefore have low impeachment value." The second factor favored the government "since these convictions occurred within the ten year period in Rule 609(a)." [But then wouldn't that factor always favor the government?] The third factor favored the defendant because her testimony would be important in the case. The fourth factor favored the government, because her credibility would be important and so impeachment would be critical. (So the importance factor and the credibility factor crossed each other out.) The court concluded that because the factors were even at two apiece, and "the Government has the burden of proof, it has therefore failed to show that the probative value of the prior convictions outweighs their prejudicial effect."

Comment: This is clearly the right result, because the convictions are not very probative of character for truthfulness, and they are identical to the crime charged. But getting to that conclusion with the four factor test (a 2-2 tie), and treating those factors as all of equal weight, just has to be wrong. The second factor and the fourth factor, as applied by the court, are automatically on the government's side of the ledger. And these factors clearly should not be of equal weight to actually evaluating the probative value and prejudicial effect of the conviction.

- **United States v. Elias, 2022 WL 715486 (E.D.N.Y.):** Two defendants were charged with Hobbs Act robbery and use of a weapon to commit the robbery. The government sought to impeach each of them with a conviction. Thompson had a 2016 conviction for possessing a shank while incarcerated on Rikers Island. The court found that conviction inadmissible because it had nothing to do with dishonesty, and was essentially a crime of self-defense, given the situation at Rikers. The conviction was found especially prejudicial because it "inherently reveals an earlier conviction." The court specifically found that the "importance of testimony" and "importance of credibility" factors worked at cross-purposes. The court concluded that "these factors are not meant to be simply totted up, with points given to each side. The factors must be considered together in light of Rule 609(a)(1)'s overall purpose to provide "strong protection for criminal defendants" by adopting a standard that "favors excluding rather than admitting." [quoting Mueller & Kirkpatrick, supra, § 6.31].

Elias's conviction was for attempted robbery in 2010. The court concluded that the conviction was remote, and very prejudicial because it was similar to the charged crime. The court also declared that the fact that the conviction resulted from a guilty plea rather than a verdict "weighed strongly" against admission.

- **United States v. Bailey, 2022 WL 2290586 (D.V.I.):** In a drug prosecution, the government sought to impeach the defendant with his prior conviction for unlawfully mailing a firearm. The court found the conviction inadmissible under Rule 609(a)(1). It declared that "[t]he Government has not pointed to any reason why Defendant's prior conviction is particularly probative of his credibility. The Government's reliance on the fact that the statute

of conviction involves the *unlawful* mailing of a firearm and that it is a felony does little to advance its cause. Thus, this aspect of the first factor weighs in favor of exclusion because of the minimal probative value of Defendant's prior conviction." The court considered the age of the conviction. After significant discussion of the proper starting and ending points, it measured from the release from confinement on the prior conviction (analogizing to Rule 609(b)), with the endpoint being the date of trial (which makes sense because the defendant's character for truthfulness at the time of trial is what is being assessed). Under that measurement, the conviction was six years old. The court stated that "[s]ix years is roughly within the middle of the ten-year period of relevant convictions, making it somewhat probative, but the probative value is diminished." The court stated that the defendant's credibility was important, and essentially weighed that factor twice (importance of testifying and contrary importance of exploring credibility) and the factors crossed each other out. The court concluded as follows:

> Ultimately, the Court concludes that the four factors—taken together—weigh in favor of exclusion. Under Rule 609(a)(1)(B)'s "heightened balancing test," the Government has the burden to show that the balance tilts towards inclusion of the prior conviction. Here, the Government has not shown that the evidence makes a tangible contribution to the evaluation of credibility and that the usual high risk of unfair prejudice is not present.

- **United States v. Freeman, 2021 WL 2222735 (N.D. Okla.):** In a murder prosecution, the government sought to impeach the defendant with three convictions: child endangerment by driving under the influence; assault and battery with a dangerous weapon; and child abuse by injury. The court excluded all the convictions. It found that the assault and battery conviction was highly prejudicial because it is "highly similar to the crime" alleged in this case; thus it was "highly likely that the jury will use defendant's assault and battery with a dangerous weapon conviction to infer criminal propensity for inflicting violence by means of a dangerous weapon." In contrast the probative value of the conviction was low because it said very little about the defendant's character for truthfulness. As to the child abuse convictions, while not similar to the crime charged, the court found that they were "highly likely to inflame the jury, creating a substantial prejudicial effect. Further, they are likely to have minimal to no probative value because the elements of those crimes also do not go to defendant's truthfulness."

- **United States v. Ahaisse, 2021 WL 2290574 (N.D. Okla.):** In a prosecution on murder and firearms charges, the government sought to impeach the defendant with a prior conviction for being an accessory after the fact to a different murder. The court found that the conviction had some probative value, because the statute required a showing of active concealment. The court also noted that the conviction was dissimilar from the murder charge, as aiding and abetting did not involve violence. Nonetheless, the court found that admitting the conviction would be highly prejudicial because of the tie to murder. This had an impact on the "importance of defendant testifying" factor, as the court explained:

> Next, the Court must assess the likelihood this testimony will be chilled by allowing plaintiff to impeach defendant by prior conviction. Defendant's prior conviction for accessory after the fact to murder second degree is not inherently prejudicial (here,

> meaning that it is not particularly heinous on its face); however, the Court notes that the prior conviction, like one of the charged crimes, does involve a murder. Because those crimes are evocative of one another, defendant will likely waive his right to testify to avoid the high likelihood that the jury will associate him with a prior murder unrelated to the one with which he is charged. As a result, this factor weighs against admission of the prior conviction, as it is likely to prejudice the defendant by associating him with an unrelated murder.

The court ruled that the conviction was excluded, concluding as follows:

> Fundamentally, associating defendant with a prior murder while on trial for an entirely unrelated murder would be wholly inappropriate in this instance, especially in light of the fact that no other factors indicate there would be strong probative value in the admission.

- **United States v. Bernard, 2021 WL 3077556 (E.D. Pa.):** In a prosecution for felon firearm possession, the government sought to impeach the defendant with 2017 convictions for narcotics and resisting arrest. The court excluded both convictions. The court stated that "while a felony conviction has some inherent impeachment value, the connection between [the] drug conviction and Bernard's likelihood of testifying truthfully is attenuated. The same goes for Bernard's conviction for resisting arrest. Nothing about that conviction calls into question Bernard's tendency to testify truthfully. And although the Government conclusorily says Bernard's conviction is probative of his credibility, it provides no specific argument as to why." The court also noted that the defendant's only evidence would be his testimony, so it was important to not discourage him from testifying. It concluded that the government had failed to meet its burden under Rule 609(a)(1)(B).

- **United States v. Wilkins, 538 F.Supp.3d 49 (D.D.C. 2021):** In a prosecution for sex trafficking, the government sought to impeach the defendant with three prior convictions, one for assault and battery, one for possession of marijuana, and one for possession with intent to distribute cocaine. The court excluded all three convictions. The court noted that "certain types of felony offenses, that do not involve any false statement by the perpetrator, have been found to not be particularly probative of a witness's credibility." The court cited case law holding that drug crimes and violent crimes were of little probative value. "As a result, the probative value of Mr. Wilkins's past convictions with regard to truthfulness appears to be minimal." The court addressed the prejudice from the convictions as follows:

> > Balanced against this negligible probative value is the significant risk of a prejudicial effect on the jury stemming from the introduction of these past convictions. As has been repeatedly noted, there is a very real risk that a jury will "generaliz[e] a defendant's earlier bad act into bad character and tak[e] that as raising the odds that he did the later bad act now charged." *Old Chief*, 519 U.S. at 180, 117 S.Ct. 644. This risk is also heightened where, as here, the impeached witness is also the defendant. Nor can this risk of prejudice be appropriately limited by a limiting instruction, as the Government suggests. As this Court has previously recognized, "[w]hen '[t]he jury is told to consider the defendant's prior conviction

> only on the issue of credibility and not on the overall issue of guilt ... the jury [is required] to perform a mental gymnastic which is beyond, not only their powers, but anybody else's.'" *Holland*, 41 F. Supp. 3d at 95 (quoting *Lipscomb*, 702 F.2d at 1069). Considering the limited probative value and very real risk of significant prejudice, the Court concludes that the probative value of Mr. Wilkins's convictions for past drug possession, drug possession with intent to distribute, and assault do not outweigh the prejudicial effect of the introduction of this evidence. Consequently, this evidence is inadmissible for the purposes of impeachment.

- **United States v. Pierson, 2021 WL 1341562 (S.D. Ind.):** In a prosecution for illegal possession of a firearm, the government sought to impeach the defendant with a firearm and a resisting arrest conviction. The court excluded both convictions. The court stated that the convictions had "limited probative value" and expressed concern about "the danger of unfair prejudice arising from the similarity between his prior convictions and the current charge." The court concluded that "the government has not shown that the probative value of the prior convictions outweighs the danger of unfair prejudice."

- **United States v. Church, 2017 WL 2180284 (E.D. Pa. 2017):** Two defendants were prosecuted for cocaine distribution offenses. Both had prior felony convictions the government sought to use for impeachment. One defendant had a 2004 conviction for cocaine distribution and the other had a 2011 felony conviction arising from the distribution of cocaine and marijuana. The district court performed a thorough analysis of the Rule 609(a)(1)(B) factors and found the probative value of both drug convictions minimal in demonstrating a character for untruthfulness. The court emphasized that the most important factor was the similarity between the prior convictions and the instant charges. The court excluded both convictions, but noted that the issue could be revisited if either defendant testified in a manner that opened the door to contradiction with the convictions.

- **United States v. Anderson, 174 F. Supp. 3d 1041 (D.D.C. 2016):** The defendant was charged with being a felon in possession of a firearm and ammunition. The government sought permission to impeach the defendant with two prior felony convictions: (1) a 2010 possession of a firearm involving a machine gun and (2) a 2005 attempted possession of cocaine with intent to distribute. Both fell within Rule 609's ten-year time period and the court analyzed their admissibility pursuant to the Rue 609(a)(1)(B) factors. The court first noted that different convictions possess varying degrees of probative value for impeachment and found that both of the defendant's prior crimes were crimes of impulse rather than acts reflecting on credibility, making their probative value limited. The court also emphasized the importance of the similarity of the prior convictions and the heightened propensity prejudice suffered by a defendant impeached with a similar past offense. The court found the prior firearm possession highly prejudicial for that reason. The court also noted that, although the prior drug conviction was within the ten-year period required by Rule 609, it was on the cusp and almost stale, thus reducing its probative value. Therefore, the court found that the government had "failed to meet its burden" of demonstrating that probative value was greater than unfair prejudice and excluded both prior convictions.

- **United States v. Washington, 2015 WL 1403887 (N.D. Ill. 2015):** The defendant was charged with possession with intent to distribute, heroin, crack, and marijuana. He was also charged with being a felon in possession of a firearm and ammunition, as well as with using a firearm in connection with drug trafficking. Prior to trial, the government sought permission to impeach the defendant's trial testimony with his 2007 felony conviction for the attempted aggravated discharge of a firearm. The court weighed the requisite Rule 609(a)(1)(B) factors, finding that the prior firearms offense was not a dishonesty crime, but had some slight probative value for impeachment. Because the defendant was released from custody only three years prior to the instant offense, the court found the prior conviction recent and probative for that reason. The court emphasized that the similarity of the prior offense to the firearms counts in the current case weighed heavily against admission due to the risk of propensity use. Finally, the court noted the importance of the defendant's testimony to his defense and found that he would be deterred from testifying if the prior conviction were admitted due to the similarity of the offense and the likely ineffectiveness of a limiting instruction. The court, therefore, found that the probative value of the past firearm offense for impeachment did not outweigh its likely unfair prejudice and ordered the prior conviction excluded.

  Note: This is a case in which the importance of the witness's testimony was evaluated only in light of the interest of allowing the defendant to testify, and not to the countervailing interest in assessing his credibility. So those factors did not end up crossing each other out.

- **United States v. Valueland Auto Sales, Inc., 2015 WL 300469 (S.D. Ohio 2015):** A company and two individual defendants were charged with federal crimes arising out of the fraudulent reporting of cash deposits on behalf of the company. One of the two individual defendants sought to prevent the prosecution from using a prior conviction for money laundering to impeach his trial testimony. The court weighed the Rule 609(a)(1)(B) factors, finding that the probative value of money laundering was high for purposes of impeachment because it tended to suggest deception. All other factors weighed against admission, however. Because the offense was committed 14 years earlier and the defendant had been released from custody 6 years earlier, the court found the probative value diminished. Due to the similarity between the past conviction for money laundering and the instant reporting charges, the court expressed concern that the prior conviction would be used by the jury to suggest a propensity for improperly handling funds. Finally, the court afforded great weight to the defendant's right to testify in his defense and concluded that any probative value was significantly outweighed by the risk of prejudice. Thus, the court excluded the only conviction the government sought to use to impeach. (Again no cross-out factor seems to be material to the court's determination to exclude the evidence).

- **United States v. Holland, 41 F. Supp. 3d 82 (D.D.C. 2014):** The defendant was charged with conspiracy to distribute and with distribution of cocaine and heroin. The government sought to use two prior felony convictions to impeach the defendant's testimony, an assault conviction and a theft conviction, both of which arose out of a single mugging. The court found that crimes of violence are not probative of veracity and that the government produced no information suggesting that the assault involved any falsehood. Although the court acknowledged that theft

involves disregard of the rights of others and may have more probative value with respect to a testifying defendant's veracity, the court found the probative value of the defendant's theft conviction "minimal" where it arose out of the same mugging as the assault and involved no falsehood. The court found that limiting instructions designed to confine the evidence to impeachment required "mental gymnastics" a jury cannot perform.

- **United States v. Willis, 2014 WL 2589475 (N.D. Ok. 2014):** The defendant was charged with Social Security fraud after representing that he lived alone, while allegedly living with his wife. Prior to trial, the defendant sought to preclude the prosecution from introducing his two prior felony convictions to impeach his important trial testimony that he did, in fact, live alone at the relevant time: 1) a 2002 conviction for cocaine distribution (with a 2010 release from prison) and 2) a 1987 conviction for forgery. The court excluded both convictions after carefully evaluating the Rule 609 factors. The court found that cocaine distribution was not particularly probative of veracity and that the offense was old. Although the court noted that drug distribution was not similar to Social Security fraud and created little propensity prejudice, the court found the defendant's testimony important to his defense. The court also emphasized that the government would call numerous witnesses who would contradict the defendant's testimony about his residence, reducing the need to impeach the defendant with his prior drug conviction. The court explained that the forgery conviction would be automatically admissible but for its age and weighed probative value against unfair prejudice under Rule 609(b). Notwithstanding the impeaching value of a forgery conviction, the court found that its age and similarity to the current offense weighed heavily against admission and excluded it as well.

- **United States v. Douglas, 2012 WL 361694 (D. Minn. 2012):** The defendant was charged with possession of a firearm by a convicted felon and sought to preclude the use of multiple prior convictions for assault, aggravated robbery, and burglary as impeachment evidence. The court rather summarily found that none of his many priors were indicative of a lack of veracity and found significant propensity prejudice because many of the prior crimes involved the defendant's use of force and the instant charges involved the possession of a firearm. Thus, without analyzing them one by one, the district court excluded all of the defendant's prior convictions under Rule 609.

- **United States v. Sparks, 2012 WL 5878094 (S.D. Ind. 2012):** The defendant was prosecuted for being a felon in possession of a firearm. The prosecution sought permission to impeach the defendant with two prior felonies: 1) a 1995 conviction for being a felon in possession of a firearm and for unlawful possession of a sawed-off shotgun and 2) a 1986 perjury conviction. Due to the date of release, the court analyzed the 1995 conviction under Rule 609(a)(1)(B) and found that the prior similar conviction posed a grave risk of prejudice to the defendant. Although the government argued that the defendant's credibility would be important and that it needed some impeachment information, the court stated that it could not imagine the jury using this prior conviction for anything but propensity. The court also noted that the jury would be aware that the testifying defendant was "a felon" due to the nature of the instant prosecution. Therefore, the court excluded the prior felon-in-possession conviction. The court analyzed the 1986 perjury conviction under Rule 609(b) due to its age, finding the probative value of the twenty-six year-old conviction

insufficient to overcome the more stringent balancing test in that provision. Thus, both of the defendant's prior felonies were excluded under Rule 609.

- **United States v. Cunningham, 2012 WL 12865641 (W.D. Mich. 2012):** The defendant was charged with assault of a federal officer, arising out of a U.S. Marshall's attempt to arrest the defendant as a parole absconder. The government sought to use the defendant's 2004 felony conviction for prison escape to impeach his testimony at trial under Rule 609(a)(1)(B). The court further found that the prior escape was not very probative of veracity. It noted that the defendant had six previous dishonesty crimes that would be automatically admissible to impeach him under Rule 609(a)(2) and that the existence of these impeaching offenses further lowered the probative value of the escape felony. Although the escape offense was only seven years old, it remained less probative of veracity than the more recent dishonesty offenses. The similarity of the prior felony to the charged offense weighed strongly against admission and, although impeachment of the defendant would be important, the dishonesty offenses would provide the government with an adequate opportunity. Thus, defendant's motion *in limine* to exclude his 2004 escape conviction under Rule 609(a)(1)(B) was granted.

  Comment: This is just a case in which the government was greedy. They were already going to impeach the defendant with six automatically admissible convictions. And yet they wanted to also impeach with a conviction that was similar to the crime charged. In these circumstances, the argument that the conviction is necessary for, and will be limited to, impeachment, seems disingenuous.

- **United States v. Vasquez, 840 F. Supp. 2d 564 (E.D.N.Y. 2011):** A defendant was charged with being a felon in possession of a firearm. The government sought to use three prior felony convictions for the attempted sale of controlled substances in 1999, 2003, and 2005 to impeach the defendant's trial testimony. The court carefully analyzed the Rule 609(a)(1)(B) factors, noting that some drug crimes may be indicative of dishonesty. Although the defendant's street sales of drugs were more probative of veracity than mere possession offenses, they were far less probative than drug trafficking crimes. Thus, the court found probative value "moderately low." The court found the 1999 and 2003 convictions less probative due to their age. The court found unfair prejudice high for all three prior convictions because the jury might decide that the defendant was guilty of the charged gun offense because he was a drug dealer, due to the common association between guns and drugs. Although the court acknowledged that the defendant would contradict the government's witnesses and that his credibility was important, the court noted that the jury would already know that the defendant was a "felon" due to the felon-in-possession charge and the stipulation to that effect. Therefore, the court found that probative value for impeachment could not outweigh unfair prejudice and excluded all three felonies for impeachment.

- **United States v. Alexander, 2011 WL 6181434 (E.D. Mich. 2011):** The defendant was prosecuted on drugs and weapons charges. After learning that the defendant intended to testify to a "mere presence" defense, the government sought to use his 2007 conviction for marijuana delivery to impeach under Rule 609(a). Due to the similarity of the past conviction to the charged

offense, the court excluded the prior drug conviction under Rule 609(a)(1), stating that the government could not impeach with it unless the defendant somehow opened the door by denying past connections with drugs during his direct testimony.

- **United States v. Hoffman, 2010 WL 1416869 (S.D. W. Va. 2010):** The defendant was charged with a criminal violation of the Restoration, Conservation & Recovery Act (RCRA) arising out of the unlawful storage of hazardous materials in connection with an electroplating business. The government sought permission to use the defendant's 1999 conviction for violation of the Clean Water Act by unlawfully disposing hazardous materials in connection with a similar business enterprise. The court rejected the government's efforts to admit the 1999 conviction for impeachment purposes, stating that it had no probative value and could only be admitted if the defendant's direct testimony was contradicted by the prior conviction.

IV. The Court Admits Some, But Excludes Other Felony Convictions Under Rule 609(a)(1)(B)

Some courts compromise by admitting some, but not all, prior felony convictions eligible for impeachment under Rule 609(a)(1)(B). Some of these courts apply a careful analysis in choosing admissible felonies, while others call balls and strikes more summarily.

- **United States v. Barker, 2023 WL 2663241 (E.D. Okla.):** In a murder prosecution, the government sought to impeach the defendant with two felony convictions for assault and battery, one felony conviction for preventing a witness from attending court, and one felony conviction for possession of a firearm. The defendant first argued for sanitization of the convictions, but the court rejected that as an option. It stated: "The well-settled rule in this circuit is that the permissible scope of cross-examination under Rule 609 extends to the essential facts of convictions, the nature of the crimes, and the punishment." Proceeding to the balancing factors, the court found that the two assault and battery convictions "do not involve characteristics that would go to Defendant's capacity for truthfulness. Crimes of violence, generally, have little impeachment value." Similarly, "the felon in possession of a firearm conviction does not have the impeachment value of a crime involving dishonesty." In contrast, the conviction for preventing a witness from attending court, while not automatically admissible because the elements do not require proof of a dishonest act or false statement, was nonetheless probative of character for truthfulness. As to prejudice, the prior convictions for felon in possession of a firearm and preventing a witness from attending court "are plainly dissimilar to the current charged crime of murder." The prior convictions for assault and battery "do, however, have some similarly to the charged crime because they both involve acts of violence" --- accordingly there was a greater risk of unfair prejudice as to those convictions. Putting everything together, the court held that the firearm conviction and the conviction for preventing a witness from testifying in court would be admissible for impeachment, but the assault and battery convictions would not. The most important factor to the court was, therefore, the similarity or dissimilarity of the conviction to the crime charged.

- **United States v. Thomas, 2023 WL 4585919 (N.D. Okla):** In a case involving sex trafficking and firearms violations, the court found that prior convictions for aggravated assault

and firearms violations would not be admissible to impeach the defendant. But convictions for possession of controlled substances and attempted robbery would be admissible. The dividing line between admissibility and inadmissibility was the similarity or dissimilarity of the convictions to the crime charged.

• **United States v. Bracy, 2022 WL 17801133 (E.D.N.Y.):** The defendant was charged with (1) conspiring to distribute and possess with intent to distribute a controlled substance, (2) possessing, brandishing, and discharging a firearm during a drug trafficking crime, and (3) being a felon in possession of a firearm and ammunition. The government sought to impeach him with two prior drug-related convictions. The court found that one of the convictions should be admitted because the jury was already going to hear about it, as it was a predicate for one of the charges. Thus, while the probative value was low, so was the prejudicial effect. But the court excluded the second conviction, which the jury would hear about only if allowed for impeachment. The court stated: "Once a prior felony has been presented to the jury, the incremental probative value of additional convictions may be diminished."

• **United States v. Tate, 2022 WL 130821 (S.D. Ind.):** In a narcotics prosecution, the court held that the following convictions would be admissible for impeachment: Robbery resulting in serious bodily injury; battery; possession of a firearm; Failure to Return to Lawful Detention; and Unlawful Possession of a Syringe. But the court excluded two convictions: 1. A cocaine conviction from 2005 (which was probably excluded under Rule 609(b)); and 2. A conviction for possession of a controlled substance. As to those convictions, the determining factor, according to the court, was their similarity to the charged crime.

● **United States v. Jessamy, 404 F.Supp.3d 671 (M.D. Pa. 2020):** The defendant was charged with possession of contraband (a shank) in prison. The government sought to impeach him with a conviction for discharging a firearm and a conviction for reckless endangerment. The court reviewed the relevant factors and concluded that the majority of the factors weighed in favor of admissibility for the discharging a firearm conviction, but against the admissibility of the reckless endangerment conviction. The firearms conviction was about conduct unlike the shank incident in prison, whereas the reckless endangerment conviction was precisely like the conduct underlying the charge in this case.

● **United States v. Carey, 2019 WL 6492566 (M.D. Pa.):** In a drug prosecution, the court held that the following convictions could be admitted to impeach the defendant: 1) drug distribution; 2) theft; and 3) taking property from another by force. In contrast, the court found that a prior conviction for escape would not be admissible. The court's distinction was one of probative value --- the first three convictions gave off a whiff of underhandednesss, whereas the escape conviction was not at all related to honesty. The court specifically said that the probative value of the drug conviction was so high that it would be admissible even though it was substantially similar to the crime charged --- and even though the defendant was already being impeached with other convictions.

● **United States v. Trejo, 2018 WL 4773106 (D.N.Mex.):** The defendant was charged with firearms offenses relating to a serious injury imposed on his girlfriend in a shooting

incident. The government sought to admit a conviction for aggravated assault and battery on a family member, and a conviction for drug offenses. The court excluded the assault and battery conviction, but found the drug conviction to be admissible. The distinction in admissibility was based on similarity/dissimilarity to the charged crime of violence.

- **United States v. Jett, 2017 WL 466286 (S.D. Ind. 2017):** It appears that two defendants were charged in connection with a bank robbery and the government sought permission to use the prior felony convictions of one to impeach his trial testimony. The defendant had one prior bank robbery conviction and another for unlawful use of a firearm in connection with a crime of violence. The court analyzed both felonies under Rule 609(a)(1)(B), excluding the bank robbery conviction due to its low probative value for veracity and its high risk of propensity prejudice in the defendant's trial on the same charge. The court stated that the bank robbery conviction should be excluded under the Rule 609(a)(1)(B) balancing test even though it was a "close call." The court allowed evidence of the firearm conviction notwithstanding the use of a "pellet gun" in the charged offense, finding that credibility and impeachment were important and that the past conviction and the instant offense were sufficiently dissimilar such that unfair prejudice would not be great.

- **United States v. North, 2017 WL 5185270 (N.D. Ga. 2017):** The defendant was charged with carjacking, discharging a firearm, and unlawful possession of a firearm by a felon after allegedly shooting a man and stealing his car. The defendant had six prior felonies that the government sought to use to impeach the defendant's trial testimony: 1) a 1985 aggravated assault, battery and criminal interference with property conviction; 2) a 1987 aggravated assault and felon-in-possession of a firearm conviction; 3) a 1995 felon-in-possession of a firearm conviction; 4) a 1998 armed robbery, aggravated assault, and felon-in-possession of a firearm conviction; 5) a 2004 possession of cocaine with intent to distribute conviction; and 6) a 2013 possession of cocaine and heroin with intent to distribute conviction. The court found that all convictions prior to 2004 were not admissible for the purpose of impeachment because they were governed by Rule 609(b) and were old and similar to the charged offense (although several of them would be admissible under Rule 404(b)). The court analyzed the remaining 2004 and 2013 drug convictions under Rule 609(a)(1)(B). The court found that the defendant's credibility would be critical where he would have to contradict his alleged victim to defend himself. The court found that drug convictions were not unduly prejudicial in nature. (The court did not discuss the effect of the other felon-in-possession convictions on the probative value of these drug convictions, nor did it address potential connections between guns, carjacking and the drug trade). The court found both drug convictions admissible along with a limiting instruction explaining their impeachment purpose.

- **United States v. Figueroa, 2016 WL 126369 (D.N.J. 2016)**: The defendant was charged with being a felon in possession of a firearm and the government sought to use two prior felony convictions to impeach his trial testimony: 1) a 2010 conviction for possession of drugs in close proximity to a school and 2) a 2000 conviction for the receipt of stolen property. The court carefully weighed the Rule 609(a)(1) factors in assessing the admissibility of the drug possession conviction, noting that the relevance of prior convictions to veracity falls along a continuum. The court found the probative value of narcotics convictions in the middle of that continuum,

explaining that convictions for mere possession are even less probative of veracity than crimes involving distribution. The court noted that the prior drug possession was not identical to the charged felon-in-possession offense, but found some propensity risk due to the association between guns and drugs. Still, the court found that the jury would need information to assess the defendant's credibility if his testimony turned the trial into a swearing match between law enforcement officers and himself, and the court noted that the nature of the prior offense would give the jury important information in assessing its impact on the defendant's credibility. Where the jury would already know the defendant was a "felon" as a result of the current charges, the court found that any prejudice in telling the jury that he was convicted of a drug offense was outweighed by probative value to impeach. Thus, the court found the prior conviction admissible to impeach, but cautioned that the government should make no mention of the "school zone" where the possession offense was committed. The court analyzed the 2000 receipt of stolen property conviction under Rule 609(b) and found the probative value of the older conviction inadequate to survive the more stringent balancing in that provision, particularly because the government would be permitted to use the 2010 drug conviction to impeach the defendant's testimony.

> **Note: This is a careful balancing and it makes the important point that 609(a)(1) convictions run a long a spectrum of probative value in impeaching a witness's character for truthfulness. That insight raises substantial questions about "sanitization compromise" under which the jury is just told that the defendant has a felony conviction without being told what it is.**

- **United States v. Wilson, 2016 WL 2996900 (D.N.J. 2016):** The defendant was prosecuted for being a felon in possession of a firearm. The defendant had two prior felony convictions potentially eligible for admission through Rule 609(a)(1)(B): 1) a 2004 conviction for heroin distribution; and 2) a 2004 conviction for receiving stolen property. The court carefully analyzed the probative value of the heroin conviction under Rule 609(a)(1)(B), finding that drug offenses are not very probative of veracity. Conversely, the court found the unfair prejudice of the heroin conviction to be high, emphasizing that jurors may associate drugs and guns. The court found that it was important to allow the defendant to testify and present a defense, and so concluded that the probative value of the heroin conviction could not overcome prejudice and excluded it. The court next weighed the receipt of stolen property conviction, finding that knowing receipt of stolen property implies dishonesty that may have impeachment value. Because the receipt of stolen property offense was not similar to or associated with the charged gun offense, the court found less unfair propensity prejudice. Although the conviction was older, there was a continuing criminal history suggesting that it retained its probative value as to defendant's credibility. Although allowing the defendant to testify was important, that testimony would set up a credibility contest with testifying officers. Accordingly, the court allowed the defendant to be impeached with his 2004 receipt of stolen property conviction only.

- **United States v. Steele, 216 F. Supp. 3d 317 (S.D.N.Y. 2016)**: **[SIMILAR OFFENSE ADMITTED]** In the defendant's prosecution for being a felon in possession of a firearm, the government sought to impeach the defendant with three prior felony convictions pursuant to Rule

609(a)(1)(B). The government sought to use two previous possession with intent to deliver illegal narcotics convictions and one prior first degree robbery with a firearm conviction. The court ruled that the robbery conviction could be used to impeach after noting that crimes of violence do not indicate dishonesty, but that crimes of theft usually do. The court found that the prejudice from impeachment with the robbery would be minimal where the facts were not similar to the instant offense and where the government would use only the date and statutory name of the offense to impeach. (The court did not discuss the "firearms" component of the prior robbery offense or why its similarity would not be prejudicial). The court ruled that narcotics convictions rarely indicate dishonesty and found that the government had provided no facts indicating that the drug convictions bore on defendant's veracity. Thus both prior drug convictions were excluded.

- **United States v. Waller, 2016 WL 1746057 (N.D. Ga. 2016): [IDENTICAL OFFENSE ADMITTED]** The defendant was charged with being a felon in possession of a firearm and the prosecution sought to use five prior convictions to impeach him: 1) a 2008 felon-in-possession of a firearm conviction; 2) two 2008 burglary convictions; 3) a 2013 felon-in-possession of a firearm conviction; and 4) a 2013 conviction for possession of methamphetamine and marijuana with intent to distribute. The court first found that the defendant's credibility would be critical if he chose to testify because he would necessarily contradict the testimony of the arresting officers. This added probative value to his prior convictions. The court noted that the similarity of the prior firearms convictions weighed against admitting them, but did not "preclude" admission. The court suggested that the similar prior convictions could reflect negatively on the defendant's honesty due to his motivation to lie to avoid punishment again for a similar offense. Ultimately the court held that both of the 2013 convictions for drug possession with intent to distribute and for unlawful possession of a firearm would be admitted because they were recent and the defendant's credibility was central to the defense. The court held that one of the two 2008 convictions for burglary could be used to impeach because of the connection between burglary and dishonesty. The court excluded the second 2008 burglary and the 2008 felon-in-possession convictions as cumulative and prejudicial. Therefore, the court allowed three of the defendant's five prior convictions, including one for an offense identical to the charged offense to be used for impeachment.

  Comment: It seems dangerous to reason that the similarity to the crime charged is a reason for *admitting* a prior conviction for impeachment --- the idea being that the defendant would be especially motivated to lie in order to avoid conviction for the same crime (thus perhaps facing sentencing enhancements?). That thinking counteracts the prejudice and could result in routine admissibility of convictions that are identical to the crime charged. If that theory is employed, it should at least be limited to a finding of marginal probative value --- not the probative value of being self-interested, but the marginal probative value of being more self-interested than the defendant is in all cases where they are charged with a crime.

- **United States v. Barr, 2015 WL 6870062 (D.N.J. 2015):** The defendant was charged with possession of a firearm and ammunition by a convicted felon. The government sought permission to impeach the defendant's trial testimony with two prior felony convictions: 1) a 2011 conviction for the manufacture and distribution of heroin and cocaine and 2) a 2013 conviction for the

possession and distribution of drugs in a school zone. The court carefully analyzed the Rule 609(a)(1)(B) factors, finding that drug dealing requires planning and secrecy that is quite relevant to credibility. Because prior drug dealing was not identical to the charged offenses, the court found that there would be no classic propensity problem in using these priors to impeach. That said, the court noted the common association between drugs and guns and cautioned that the government could make no reference to the narcotics trade in the neighborhood where the defendant was apprehended in connection with the instant gun charges. Because both prior convictions were recent, the court found both relevant to the defendant's credibility at trial. The court also noted the importance of the defendant's testimony and credibility where his defense would come down to a "swearing contest" between the defendant and the arresting officers. The court noted that allowing both recent prior convictions would give the jury a more complete picture of the defendant's credibility, but determined that the incremental impeachment value of the second conviction would not outweigh the unfair prejudice of a "career criminal" or "bad apple" inference the jury might draw. Therefore, the court allowed the government to use only the defendant's 2013 distribution of narcotics conviction to impeach him and cautioned against any mention of the school zone where that prior offense took place.

- **United States v. Bailey, 2015 WL 7013545 (N.D. Iowa 2015): [IDENTICAL OFFENSE ADMITTED]** The defendant was charged with cocaine distribution and the government sought to use four prior felony convictions to impeach his trial testimony. The court excluded a ten year-old obstruction of justice conviction as too remote (even under Rule 609(a)(1)(B)), but found two aggravated misdemeanor convictions for "harassment and neglect," which were punishable by more than one year in prison, admissible. The court stated that these convictions would be more probative than prejudicial with appropriate limiting instructions. Finally, the court found a seven year-old conviction for a cocaine conspiracy admissible to impeach. The court did not analyze the prejudice caused by the admissibility of this similar prior conviction, but found that its recency had "less of a distorting influence on its probative nature and prejudicial impact." Thus, the court admitted three of four proffered prior convictions, including a similar cocaine offense.

- **United States v. Alexander, 2014 WL 64124 (N.D. Ill. 2014): [SIMILAR OFFENSE ADMITTED]** The defendant was charged with conspiracy to possess and with attempted possession of cocaine with intent to distribute. The government sought to impeach his trial testimony with six prior felony convictions, a 2011 aggravated assault conviction and five prior drug possession and distribution convictions dating from 2006 back to 2002. The court first considered the four most recent drug convictions under Rule 609(a)(1)(B). Although the court noted the similarity of these past offenses to the charged offense, the court found that the defendant's credibility would be critical at trial where he was expected to testify about interactions with a confidential informant and where he would likely contradict the testimony of other witnesses. For this reason, the court held that all four prior drug offenses could be used to impeach his trial testimony because their probative value outweighed prejudice. The court found the 2011 aggravated assault conviction more probative of veracity than the drug convictions due to its recency and less prejudicial to the defendant due to its dissimilarity to the charged offense. The court reserved ruling on its admissibility to impeach, however, until the government provided

information about the punishment for the assault to show that it qualified as a Rule 609(a)(1)(B) felony. Finally, the court excluded the fifth and oldest drug possession conviction, explaining that it could fall under the more stringent Rule 609(b) balancing test and that its age, similarity, and cumulative nature precluded its use.

- **United States v. Ollie, 996 F. Supp. 2d 351 (W.D. Pa. 2014): [SIMILAR OFFENSE ADMITTED]** The defendant was charged with an offense arising out of an alleged burglary and the government sought permission to use three prior felony convictions to impeach his trial testimony: 1) a 1988 forgery/theft by deception conviction; 2) a 2012 falsification of a firearms record conviction; and 3) a 2012 burglary/theft conviction. The court excluded the 1988 forgery conviction, finding that its probative value to show a lack of veracity could not overcome prejudice given its age and the admissibility of other convictions to impeach the defendant. The court found the 2012 falsification of a firearms record automatically admissible to impeach under Rule 609(a)(2) as a crime requiring an element of dishonesty. The court also admitted the 2012 burglary conviction, finding that burglary suggested a lack of veracity and noting the recency of the conviction and the importance of the defendant's credibility. Although the court acknowledged "prejudice" resulting from the similarity of the prior conviction to the charged offense, the court nonetheless found the recent prior burglary admissible to impeach the defendant's trial testimony pursuant to Rule 609(a)(1)(B).

  Comment: Is it really necessary to admit an identical crime to impeach a witness who is already being impeached by a crime that contains an element of false statement? One would think this would be a classic situation in which probative value is marginal and prejudice outweighs it.

- **United States v. Rivas, 2013 WL 5700742 (N.D. Ill. 2013): [SIMILAR OFFENSE ADMITTED]** The defendant was charged with drug distribution offenses involving both cocaine and marijuana, as well as with firearms offenses. After being convicted at trial, he moved for a new trial based, in part, on the admission of his 2004 felony conviction for the distribution of cocaine for impeachment purposes. The district court denied the motion for new trial and found that her ruling with regard to impeachment under Rule 609(a)(1)(B) was appropriate. Specifically, the court noted that the government had sought to use three prior drug convictions to impeach the defendant's testimony. She excluded two due to their similarity to the charged offense and the cumulative prejudicial effect of multiple drug convictions. Still, she held that the defendant's credibility at trial was crucial and that it was important for the government to be able to impeach him with one of his prior convictions, notwithstanding its similarity to the charged offense.

- **United States v. Lane, 2013 WL 3759903 (D. Ariz. 2013):** The defendant was charged with offenses involving controlled substances analogues and sought to prevent the government from impeaching his trial testimony with two prior felony convictions: 1) a 2000 bank robbery conviction (with a 2007 release date) and 2) a 1989 fraud conviction (with a 1994 release date). The court analyzed each conviction using the relevant Rule 609 factors, first noting that the fraud conviction fell outside the requisite ten-year time period and could only be admitted if it satisfied the stringent balancing test in Rule 609(b). The court concluded that the twenty-plus year-old fraud conviction lacked sufficient probative value to overcome that high hurdle and excluded the

dishonesty crime. The court noted that the bank robbery was indicative of veracity (why?) and was committed only four years prior to the offense in the instant case, increasing its impeaching value. The court also emphasized that the defendant's credibility and knowledge would be critical if he testified in his own defense, further enhancing probative value. Therefore, the court found that the probative value of the bank robbery conviction outweighed any unfair prejudice and held that the government could cross-examine the defendant as to the fact of his bank robbery conviction and the date of conviction.

- **United States v. Boyce, 2011 WL 5078186 (N.D. Ill. 2011):** The defendant was charged with being a felon in possession of a firearm and ammunition. Anticipating that the defendant would take the stand to contradict the version of events provided by his arresting officers, the prosecution sought permission to impeach the defendant's testimony with seven prior felony convictions: five convictions in 1990 for aggravated battery, robbery, and armed robbery, one in 1994 for unlawful use of a weapon, and one in 2002 for drug dealing. The court found that none of the prior convictions involved dishonesty, but also found that the prejudice from impeachment would be diminished where the jury would already know the defendant was a felon due to the nature of the instant charges. The court found the defendant's credibility central to the case in light of his anticipated defense and found impeachment important. That said, the court excluded all but the 2002 drug dealing conviction, finding that the remaining convictions were outside the Rule 609(a)(1) time limitation. The court found that impeachment with the 2002 conviction was appropriate under 609(a)(1)(B) because the prosecution needed at least one prior conviction to question the defendant's credibility. Because the 2002 conviction was available for impeachment, the court found that defendant's multiple old felonies should be excluded.

- **United States v. Evans, 82 Fed. R. Evid. Serv. 878 (E.D. Ill. 2010):** Three defendants were charged with bank robbery and with the use of a firearm in furtherance of a robbery. One of the three also was charged with being a felon in possession of a firearm. Two of the three defendants sought to exclude evidence of their prior felony convictions to impeach their trial testimony. The defendant who was charged as a felon in possession of a firearm sought to exclude eight prior convictions for cocaine delivery, aggravated battery, unlawful possession of a firearm, aggravated assault, drug possession, and possession of a stolen vehicle dating back to 1990. Addressing the Rule 609(a) factors, the court found that five of the eight offenses committed in the 1990's should be excluded at trial. The age of these convictions, as well as the availability of more recent convictions reduced their probative value significantly. The three remaining convictions in the 2000's for possession of drugs, possession of a stolen vehicle, and aggravated assault all were admitted for impeachment purposes. The court found possession of a stolen vehicle highly probative of veracity and noted the recency of all three of these convictions. Because none of these past offenses were similar to the bank robbery charges in the instant case and because the defendant's credibility would be crucial, the court held that all three could be admitted if the defendant chose to testify. A second defendant sought to exclude two 2008 convictions for drug possession, arguing that they had little bearing on his veracity and could cause the jury to infer that he had a propensity to commit crime. Because the convictions were only two years old, were not similar to the charged bank robbery, and would give the jury much-needed information in assessing the defendant's credibility, the court found both admissible to impeach.

- **United States v. Hampton, 2009 WL 2431291 (C.D. Ill. 2009):** The defendant was charged with being a felon in possession of a firearm. The government sought to use three prior felony convictions to impeach his trial testimony: 1) a 2007 conviction for aggravated battery of an officer; 2) a 1999 conviction for aggravated battery of an officer; and 3) a 1999 conviction for home invasion. Arguing that he had to testify to explain away his confession to the current charges, the defendant sought to exclude all three or to sanitize them if admitted. *The government opposed any sanitization, claiming that the jury needed to know the nature of the prior convictions to assess their effect on the defendant's credibility.* Without analysis, the court agreed with the government that some evidence of the defendant's prior convictions was needed to impeach his testimony, found that two prior felonies were sufficient to impeach, and admitted the 2007 aggravated battery conviction and the 1999 home invasion to be used without any sanitizing.

- **United States v. Gulley, 2010 WL 3834612 (C.D. Ill. 2010): [SIMILAR OFFENSE ADMITTED]** The defendant was charged with distribution of crack cocaine and sought to exclude evidence of two prior felony convictions: 1) a 2003 conviction for delivery of a controlled substance and 2) a 2006 conviction for possession of a controlled substance. The court noted the Rule 609(a)(1)(B) factors, but was persuaded by the government's argument that the defendant's credibility would be critical at trial and that some impeaching evidence of his past crimes should come in. That said, the court found that one of the two convictions would be adequate for impeachment if the defendant chose to testify and held that the most recent 2006 conviction for the possession of a controlled substance could be admitted, including the nature of the crime charged.

- **United States v. Blake, 2010 WL 3025584 (C.D. Ill. 2010): [SIMILAR OFFENSE ADMITTED]** The defendant was charged with distribution of crack cocaine and with being a felon in possession of a firearm. He sought to exclude evidence of two prior felony convictions for impeachment purposes: 1) a 2007 conviction for possession of a controlled substance and 2) a 2002 conviction for possession of a controlled substance. The court noted the Rule 609(a)(1)(B) factors, but was persuaded by the government's argument that the defendant's credibility would be critical at trial and that some impeaching evidence of his past crimes should come in. That said, the court found that one of the two convictions would be adequate for impeachment if the defendant chose to testify and held that the most recent 2007 conviction for the possession of a controlled substance could be admitted, including the nature of the crime charged.

- **United States v. Wooten, 2010 WL 3614922 (S.D. Ill. 2010): [SIMILAR OFFENSE ADMITTED]** The defendant was charged with possession with intent to distribute cocaine and sought to preclude the government's use of his felony convictions in 1996 and 1998 to impeach his trial testimony. Because the government did not seek to use the 1996 conviction, the court granted the defendant's motion with respect to that conviction. The defendant had been released from confinement in 2008 for his 1998 conviction for cocaine distribution, making it eligible for admission under Rule 609(a)(1)(B). In analyzing the relevant factors, the court found that all felonies have some impeaching value. The conviction remained sufficiently recent because of the defendant's release from confinement only two years prior to the instant offense. The court noted the similarity of the prior drug crime to the current drug charges and noted the special caution

warranted by such similarity. That said, the court stated that similarity did not require exclusion and was only one of several factors to be considered. The court found the defendant's credibility to be extremely important because he would likely contradict other witnesses in his testimony. The court found that the probative value of the prior drug conviction outweighed any prejudice and ruled that it would be admissible to impeach the defendant.

- **United States v. Baker, 2009 WL 3672061 (C.D. Ill. 2009): [SIMILAR OFFENSE ADMITTED]** The defendant was charged with the possession of crack cocaine with the intent to distribute and the government sought permission to impeach his trial testimony with his 1999 and 2000 felony convictions for narcotics delivery. Without detailed analysis or mention of the similarity between the prior convictions and the charged offense, the court agreed with the government that the prior convictions had impeachment value. The court found that one prior felony was adequate to impeach and allowed the 2000 felony conviction for narcotics delivery to be used with the name of the crime charged.

TAB 5

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Memorandum To: Advisory Committee on Evidence Rules
From: Liesa L. Richter, Academic Consultant
Re: Amending Federal Rule of Evidence 801(d)(2)(E) to Insert Two Commas
Date: March 27, 2025

The Committee has received a suggestion to amend the coconspirator exception to the hearsay rule to add two commas to the text to set off a clause. The coconspirator exception to the hearsay rule is found in Federal Rule of Evidence 801(d)(2)(E). It reads as follows:

> (d) STATEMENTS THAT ARE NOT HEARSAY. A statement that meets the following conditions is not hearsay:
>
> (2) *An Opposing Party's Statement*. The statement is offered against an opposing party and:
>
> > (E) was made by the party's conspirator during and in furtherance of the conspiracy.

The suggestion is to amend Rule 801(d)(2)(E) to add two new commas as follows:

> (E) was made by the party's conspirator during, and in furtherance of, the conspiracy.

The recommendation was submitted by Sai, who explains that he favors adding "commas separating the subordinate clause, for better clarity." The Reporter has consulted the stylists regarding the need for commas in Rule 801(d)(2)(E). Joe Kimble opined that the recommended commas are not needed because the "during" and "furtherance" requirements both clearly relate to the "conspiracy" and there is no ambiguity in the provision to be remedied. Indeed, there is no confusion in the federal courts with respect to the three separate requirements for admissibility of coconspirator hearsay.[1]

The question for the Committee is whether to proceed with an amendment to Rule 801(d)(2)(E) to add commas setting off the clause. It would be most unusual for the Committee to propose an amendment to a Federal Rule of Evidence to make a purely stylistic change in a

[1] *See, e.g.*, United States v. Wenxia Man, 891 F.3d 1253 (11th Cir. 2018) (district court properly admitted emails sent to defendant by unidentified third party through co-conspirator exception; government presented sufficient evidence that defendant and third party were part of a conspiracy and that emails were sent during and in furtherance of conspiracy).

circumstance where there is no confusion in the courts about the application of the Rule and where the stylists do not consider the change to be necessary or important. That said, the coconspirator exception is routinely utilized in federal court and the Committee could choose to proceed with the suggested change if for some reason it considered it to be necessary to improve the clarity of Rule 801(d)(2)(E).

TAB 6

TAB 6A

U.S. Department of Justice

950 Pennsylvania Ave, N.W.
Washington, D.C. 20530

March 28, 2025

Hon. Jesse Furman
Chair, Advisory Committee on the Rules of Evidence
Administrative Office of the United States Courts
One Columbus Circle, N.E.
Washington, D.C. 20544

Re: Federal Rule of Evidence 902

Dear Judge Furman:

We write to support an amendment to Federal Rule of Evidence 902(1) that would add federally recognized tribes to the list of governmental entities that can provide sealed and signed documents for self-authentication. As we explain below, there is no reason to exclude documents of federally recognized tribes from the types of domestic public documents that are currently self-authenticating.

Background:

(1) Tribal Documents

Federally recognized Tribes, like other sovereigns, regularly issue a variety of documents in carrying out their governmental functions, and the federal government regularly relies on such documents. Documents related to tribal membership are of particular importance in federal prosecutions because federal criminal jurisdiction in Indian country is both created and limited by federal law. Federal criminal jurisdiction dependent on the Indian status of a defendant and victim can be found in the General Crimes Act, 18 U.S.C. § 1152, and the Major Crimes Act, 18 U.S.C. § 1153. Pursuant to both Acts, Indian status is an essential element, "which the government must allege in the indictment and prove beyond a reasonable doubt."[1] In proving this essential element, the government must prove, first, that the defendant has "some quantum of Indian blood, whether or not that blood derives from a member of a federally recognized Tribe," and second, the government must establish that the defendant has "membership in, or affiliation with, a federally recognized tribe."[2] A Certificate of Indian Blood or Tribal Certificate ("tribal certificate") often

[1] *See United States v. Rainbow*, 813 F.3d 1097, 1103 (8th Cir. 2016); *United States v. Prentiss*, 273 F.3d 1277, 1280-1281 (10th Cir. 2001).
[2] *See United States v. Rogers*, 45 U.S. 567 (1846).

satisfies proof of Indian status because the tribal certificate contains proof of Indian blood as well as membership in a federally recognized tribe. At present, the government must use extrinsic evidence to authenticate a tribal certificate before it can be introduced.

(2) Federal Rule of Evidence 902(1)

Federal Rule of Evidence ("FRE") 902(1) provides that the sealed and signed documents of an expansive list of governmental entities are self-authenticating, such that no other extrinsic evidence is required to establish their authenticity. The covered governmental entities include "any state, district, commonwealth, territory, or insular possession of the United States; a political subdivision of any of these entities; or a department, agency, or officer of any [such] entity." Fed. R. Evid. 902(1)(A).

By contrast, and even though the United States "recognizes the sovereignty of" and "maintains a government-to-government relationship with" all federally recognized tribes,[3] Rule 902(1) does not recognize sealed and signed documents of federally recognized tribes as self-authenticating. Both the Ninth and the Tenth Circuits – which include the majority of federally recognized tribes – have confirmed that, under the "plain language of Rule 902(1)," tribal documents are not self-authenticating.[4] In these cases, courts have reversed convictions after finding that they rested on tribal documents that were not properly authenticated.

In 2013, the Advisory Committee on Evidence Rules (Evidence Committee) considered amending 902(1)(A) to include federally recognized tribes but decided not to do so at that time. The concern was that amending FRE 902(1) in isolation would impact other rules that exclude tribes. The Committee therefore determined that the "treatment of Indian tribal documents raised a question that spanned all the national rules, and therefore it would await the direction of the Standing Committee."[5] When this was reported at the Standing Committee meeting later that year, Judge Sutton (then-Chair of the Standing Committee) indicated that the "practical concerns" raised by Rule 902(1)'s omission of Indian tribes "placed [it] in a different category" from other rules, and so "some action by the Evidence Rules Advisory Committee might be warranted" as to this Rule.[6]

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[3] Federally Recognized Indian Tribe List Act of 1994, P.L. 103-454 (Nov. 2, 1994).

[4] *United States v. Alvirez*, 831 F.3d 1115 (9th Cir. 2016); *see also United States v. Harper*, 118 F.4th 1288 (10th Cir. 2024); *United States v. Wood*, 109 F.4th 1253 (10th Cir. 2024); *United States v. PMB*, 660 Fed.Appx. 521 (9th Cir. 2016).

[5] *Minutes of Advisory Committee on Evidence Rules*, JUDICIAL CONFERENCE (May 3, 2013), at 10-12, https://www.uscourts.gov/sites/default/files/fr_import/2013-05-Evidence-Minutes.pdf.

[6] *Minutes of Committee on Rules of Practice and Procedure*, JUDICIARY CONFERENCE (June 3-4, 2014), at 10-12, https://www.uscourts.gov/sites/default/files/fr_import/ST06-2013-min.pdf.

These "practical concerns" are underscored by the Tenth Circuit's recent reversals of convictions due to their reliance on tribal records that were not proper authenticated. In these cases, as in the earlier Ninth Circuit cases, there does not seem to be any question of the *actual* authenticity of the tribal records but only of the adequacy of the authentication. [7]

Reasons for Adding Federally Recognized Tribes to FRE 902(1)

(1) *Logic.* Clearly, "it is anomalous that self-authentication is granted to cities and, for example, the Trust Territory of the Pacific Islands, but not to Indian tribes."[8] And there is precedent for adding federally recognized tribes to the list of governmental entities initially included in a specific federal rule. Federal Rule of Criminal Procedure 6(e)(3) – addressing the circumstances under which the government may disclose matters occurring before the grand jury – authorizes disclosure of grand jury materials to federally recognized tribes to the same extent disclosure may be authorized to state, state subdivision, or foreign governments.[9] The Rule was amended in 2002 to include federally recognized tribes, and the Advisory Notes explain that this was done to recognize both "the sovereignty of Indian tribes" and the potential need "to disclose grand jury information to appropriate tribal officials" to support enforcement of federal or tribal laws.[10] There is no logical reason why federally recognized tribes should be excluded from the category of governmental records that is self-authenticating, when they were added long ago to the governmental officials entitled to access grand jury information.

(2) *Reliability.* At the last meeting of this committee, and in 2013, some members suggested that adding federal recognized tribes to FRE 902(1) would be inappropriate because "Indian tribes might vary in their degree of rigor in maintaining public documents."[11] But it is not

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[7] *See, e.g., Alvirez*, 831 F.3d at 1120, 22-23 (reversing conviction for assault with serious injury because sealed Certificate of Indian Blood issued by Colorado River Indian Tribes was not self-authenticating and could not be authenticated by officer of Hualapai Nation); *Harper*, 118 F.4th at 1296-1300 (reversing conviction for kidnapping, aggravated sexual abuse and assault certified because letter from Choctaw Nation of Oklahoma verifying defendant's tribal membership and tribe's possession of defendant's Certificate of Degree of Indian Blood not self-authenticating and not properly authenticated); *Wood*, 109 F.4th at 1257-58 (reversing conviction for assault resulting in serious bodily injury and assault with a dangerous weapon with intent to do bodily harm because tribal Certificate of Indian Blood was neither self-authenticating nor properly authenticated); *PMB*, 660 Fed.Appx. at 523 (reversing conviction for aggravated sexual abuse sealed certificate of tribal enrollment issued by Navajo Nation was not self-authenticating and could not be authenticated by FBI agent).

[8] *May 2013 Evidence Committee Minutes*, at 10.

[9] Fed. R. Crim. P. 6(e)(3)(A)(ii); Fed. R. Crim. P. 6(e)(3)(E)(iv).

[10] Fed. R. Crim. P. 6(e)(3)(A)(ii), Committee Notes on Rules – 2002 Amendment.

[11] *May 2013 Evidence Committee Minutes*, at 11.

clear why this would be more of a concern for federally recognized Indian tribes than for the multiple governmental entities listed in Rule 902(1)(A), when the reliability of these entities' record-keeping practices undoubtedly vary. The current rule, for example, permits self-authentication for political subdivisions of remote territories overseas without any evidence that those political units keep reliable records. Indeed, it appears that there was no analysis of disparate record-keeping practices when the Rules of Evidence were first adopted in 1972. Indeed, the list of covered entities in FRE 902(1) has not been revised since the initial adoption of the Rules, and at that time, the list was drafted in purposely broad terms without regard to the specific recordkeeping practices of the listed entities.[12] Federally recognized tribes, moreover, have at least as strong an incentive to keep reliable records as any other governmental unit, particularly as to their membership and governmental structure. Tribes set criteria for enrollment and maintain related records, which are critical to their government-to-government relationships with the United States and for determining the benefits to which tribes and their members may be entitled.[13]

The federal government also recognizes the reliability of tribal recordkeeping by accepting tribal documents for multiple purposes. The Transportation Security Administration, for example, "accepts IDs from Federally recognized Tribes" for airport security screening, and "Native American tribal documents" from federally recognized tribes can be used for employment verification purposes. TSA does not distinguish among tribes based on the purported reliability of their record systems. *See, e.g.,* https://www.tsa.gov/travel/tsa-cares/tribal-and-indigenous#:~:text=TSA%20accepts%20IDs%20from%20Federally,referenced%20with%20the%20Federal%20Register; US Citizenship & Immigration Services, Handbook for Employers M-274, at 7.2, https://www.uscis.gov/i-9-central/form-i-9-resources/handbook-for-employers-m-274/70-evidence-of-employment-authorization-for-certain-categories/72-native-americans. And multiple states – including Arizona, New Mexico, Oregon, Washington, and Wisconsin – have amended their evidentiary rules, or enacted statutes, to provide for self-authentication of sealed and signed tribal documents.[14] These states do not distinguish among federally recognized tribes in providing for the self-authentication of their documents.

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[12] Fed. R. Evid. 902(1), Advisory Committee Notes to 1972 Proposed Rules (recognizing broad acceptance of documents bearing a public seal and the "practical underlying considerations … that forgery is a crime and detection is fairly easy and certain").

[13] *See generally* https://www.doi.gov/tribes/enrollment (tribally established membership criteria are "set forth in tribal constitutions, articles of incorporation or ordinances"); *see also* https://www.bia.gov/bia/ois/tgs (Department of the Interior assists tribes "with the resources they need to foster strong and stable Tribal governments," including through self-determination contracts to perform government services that might otherwise be handled by federal agency).

[14] Ariz. R. Evid. 902(1)(A); N.M.R. Evid. 11-902(1)(A); Or. Rev. Stat. Ann. § 40.510(k)(A); Wis. Stat. Ann. § 806.245(2); Wash. Rev. Code Ann.§§ 5.44.010, 5.44.050, 5.44.050.

(3) *Burden and Cost.* The current need to have a tribal official travel to the courthouse to authenticate routine governmental documents creates unnecessary burdens and costs. Indian country is vast, and witnesses often travel from hundreds of miles away to testify for five minutes. The cost of mileage/airfare, lodging, and incidentals can be upwards of $800 per trip. Multiplied by the number of times tribal documents need to be introduced and authenticated in criminal cases, these unnecessary journeys result in an enormous waste of time and taxpayer dollars. As one citizen of the Choctaw Nation of Oklahoma wrote,

> One of the primary methods of verifying tribal documents ... is testimony at trial by a tribal membership officer, who can attest to the accuracy of the documents. This takes valuable time away from these tribal officials, complicates the jobs of prosecutors, and forces courts to dedicate resources to these disputes, even when those resources could be better allocated elsewhere. [15]

The burden, moreover, not only affects prosecutors, but impacts defendants as well. Because tribes have exclusive jurisdiction over some crimes where both defendant and victim are Indian for purposes of criminal law, defendants charged in federal court may seek to establish their own or a victim's Indian status in order to challenge federal jurisdiction.[16] *See also* Henry Oostrom-Shah, *"Authentic" from Time Immemorial: Reforming Rule of Evidence 902 to Reflect Tribal Sovereignty*, 58 ARIZONA ATTORNEY 40 (2022) (attached) ("When a criminal defendant cannot prove his tribal citizenship, a judge may transfer his case from a tribal legal system to the Anglo-American courts, where he may face harsher penalties in front of a non-Native judge and jury.")

And the burden extends beyond criminal cases. The need to authenticate sealed and signed tribal records is also an issue in civil cases. There, both the parties and the court are forced to expend resources obtaining, introducing, and reviewing the adequacy of extrinsic evidence to establish a particular record's authenticity. *See, e.g., Manzano v. Southern Indian Health Council, Inc.*, 2021 WL 2826072, at *4-5 (S.D. Cal. 2021) (engaging in lengthy analysis of adequacy of extrinsic evidence to support authenticity of tribal compact). These problems may be exacerbated where the federally recognized tribe that issued the records is not a party to the litigation, or where it is not possible for parties to secure witnesses who are able to authenticate such documents.

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[15] Crispin South, *Unjustifiable Expense: Tribal Nations Should be Included in FRE 902(1)*, ARIZONA STATE LAW JOURNAL (Nov. 2, 2024), Unjustifiable Expense: Tribal Nations Should be Included in FRE 902(1) – Arizona State Law Journal.

[16] *Id.*

Proposed Draft

Of the two drafts proposed in the prior committee memorandum on this topic, we recommend the first and most straight-forward version, set forth below. This version treats federally-recognized tribes as equivalent to the other government entities listed in the rule. The alternative version, for no demonstrated reason, distinguishes tribes from the other listed entities by eliminating self-authentication for "political subdivisions." In the committee note, we suggest a reference to the list of federally recognized tribes published in the Federal Register, and one stylistic edit.

(1) Domestic Public Documents That Are Sealed and Signed.

A document that bears:

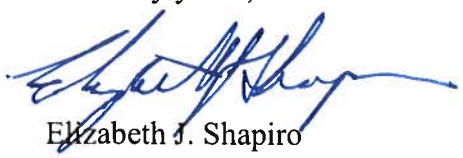
(A) a seal purporting to be that of the United States; any state, district, commonwealth, territory, or insular possession of the United States; **a federally-recognized Indian tribe;** the former Panama Canal Zone; the Trust Territory of the Pacific Islands; a political subdivision of any of these entities; or a department, agency, or officer of any entity named above; and

Draft Committee Note:

The rule has been amended to recognize the sovereignty of Indian tribes and ~~the fact that a~~ **provide that a** sealed document from a federally-recognized Indian tribe is entitled to the same presumption of authenticity as a comparable document from the government entities currently listed in Rule 902. *See* Fed. R. Crim. P. 6(e)(3)(A)(ii) and (iii), and 2002 Committee Note (amendments recognize "the sovereignty of Indian tribes and the possibility that it would be necessary to disclose grand-jury information to appropriate tribal officials in order to enforce federal law."). Under the Federally Recognized Indian Tribe List Act of 1994 (P.L. 103-454), the Secretary of the Interior publishes a list of all federally recognized Indian tribes in the Federal Register.

We look forward to discussing these issues further in our upcoming meeting.

Sincerely yours,



Elizabeth J. Shapiro
U.S. Department of Justice

58-AUG Ariz. Att'y 40

Arizona Attorney
July/August, 2022

Feature

Special Feature

Indian Law

Special Focus on Indian Law
Henry Oostrom-Shah[a1]

"AUTHENTIC" FROM TIME IMMEMORIAL

Reforming Rule of Evidence 902 to Reflect Tribal Sovereignty

"If I get arrested when I'm in Arizona, how will the court know I'm Navajo? I don't want to end up back in state jail--I want to be with other tribal folks."

I was speaking to my client in front of the tribal jail after he served time for yet another misdemeanor charge. He was excited to be released and leave Montana for a road trip to visit relatives in Tséhootsooí (Fort Defiance) on the Arizona side of Navajo Nation. But he also worried about running into law enforcement when he got there.

I had nothing to soothe his anxieties. I had only the dreaded, if frequently invoked, answer of the legally trained: "It depends."

That Navajo client is sometimes required to produce evidence to prove his tribal citizenship when he arrives in court. Depending on whether the court's evidence rules allow for self-authentication of tribal government documents, that often-homeless client must find a way to get a witness qualified to authenticate his tribal ID, his Certificate of Indian Blood (CDIB), or other papers showing he's an enrolled Navajo member.

Tribal citizens face a checkerboard of conflicting rules. If my client appears in Navajo tribal court, the judge's discretion governs authentication.[1] If he appears in Arizona state court,

Arizona's self-authentication rule does not explicitly allow self-authentication of tribal government documents.[2] Nor would the evidence rules of federal courts in Arizona clearly allow self-authentication. Even some tribal courts in Arizona do not expressly permit for self-authentication, including the Fort McDowell Yavapai Nation through whose jurisdiction my client planned to drive on his way to Phoenix.[3]

Recognition of tribal citizenship means the world to Native people and to courts. When a mother cannot prove her daughter's tribal affiliation, courts might sever the bonds of parenthood under the Indian Child Welfare Act. When a criminal defendant cannot prove his tribal citizenship, a judge may transfer his case from a tribal legal system to the Anglo-American courts, where he may face harsher penalties in front of a non-Native judge and jury. When a landowner cannot prove her tribal status, she might lose a claim to the land her ancestors roved freely for millennia. When indigenous religious practitioners fail to substantiate their claims to a holy site (as at Oak Flat), the federal government might take the site, transfer it to a foreign mining conglomerate, and turn the dwelling place of the Creator's messengers into a gaping crater.

These practical consequences sharpen the need for evidence rules that create consistent--and consistently affirming--standards of proof for tribal nations and their citizens. But by complicating this recognition, conflicting authentication rules flout tribal sovereignty.

For starters, the Diné people and Navajo Nation's sovereignty existed long before they signed treaties with the federal government, and long before Arizona became a state. Tribal sovereignty is inherent from time immemorial. According to the law of the Navajo Nation, "The fundamental laws ... remain unchanged," and Navajo citizens "remain Diné forever."[4] This Navajo legal provision reflects the consistent legal understanding that tribal sovereignty does not derive from the federal government or any state. Accordingly, legal recognition of Diné belonging should not depend on the unpredictability of federal or state evidentiary standards.

The State of Arizona should change Rule of Evidence 902 to affirm the meaning of tribal citizenship. Rule 902 should unambiguously provide for the self-authentication of all documents issued by tribal governments, just like the documents of tribes' federal, state and local counterparts.

Arizona's Advisory Committee need look only as far as neighboring New Mexico when drafting amendments to Rule 902. New Mexico classifies all documents of "Recognized American Indian Tribe[s] or Nation[s]" as "Domestic Public Documents." New Mexico Rule 902 thus allows self-authentication of documents that either: (1) bear a seal and signature of the tribal government and its employee(s); or (2) bear no seal but are signed by a tribal government employee and have been certified as genuine by another tribal government employee with the authority to establish ***42** the tribal seal. New Mexico's model has several advantages:

> ¶ New Mexico's Rule 902 is unambiguous about the inclusion of tribal government documents.

> ¶ New Mexico's rule places federally, tribally and state-issued documents on equal footing as parties seek to admit government documents without authentication. This structure most accurately reflects the status of tribes as both "domestic" and also "nations" with government-to-government relationships with both federal and state entities.

> ¶ New Mexico's rule is more expansive than options in other states. New Mexico's Rule 902 does not restrict self-authentication to documents issued only by federally recognized tribes. Other states with tribal-friendly Rule 902 analogues, like Oregon, bar self-authentication for documents issued by state-recognized tribes. Some of these tribes gain federal recognition after a long struggle. When these tribes gain recognition, their members should be able to freely use their tribal government documents in legal proceedings, even if those documents were issued prior to federal recognition. After all, federal recognition just overlays the inherent sovereignty that has existed since time immemorial.

Arizona, unlike other states, has a rules amendment process that aids citizen participation. Rule 28 of the Arizona Rules of the Supreme Court allows "any person" to petition to amend any court rule. The Arizona Advisory Committee on Rules of Evidence meets regularly year-round to review all amendment proposals and recommend revisions to the Arizona Supreme Court. Native nations within Arizona's boundaries might consider convening to discuss amendments to Rule 902 and other state evidentiary standards that burden tribal governments and citizens.

Arizona's particularities sharpen the need for changes to Rule 902. Arizona has more Native Americans than all but two other states. Twenty-two tribal nations operate legal systems within Arizona's borders. And some of those individual tribal nations in Arizona, like the Apache and Navajo, have relatives across state borders. The Navajo Nation's boundaries span three states, and each has different authentication rules. A Navajo document can be self-authenticated in state court in New Mexico, but that exact same document cannot be self-authenticated in Arizona.

So too should federal judges in Arizona allow self-authentication of tribal government documents under Rule 902. They need not adhere to the Ninth Circuit's decision in *United States v. Alvirez*.[5] In that case, the government successfully introduced the defendant's CDIB to prove

essential facts that brought the case under federal Indian Country jurisdiction. On appeal, the Ninth Circuit rejected admission of the defendant's Certificate, holding that the "plain language" of Federal Rule of Evidence 902(1) "specifically lists the entities that may issue self-authenticating documents."[6] The court reasoned that, because tribal governments do not figure on the list, tribal governments cannot produce self-authenticating documents. The *Alvirez* court fundamentally misunderstood the nature of the documents at issue. CDIBs are federal documents, not tribal government documents.[7] Following even a narrow reading of Federal Rule of Evidence 902(1), the *Alvirez* court should have come out the other way and allowed admission of the defendant's CDIB.

The *Alvirez* decision sparked well-deserved concern from distinguished commentators.

Ninth Circuit Judge Andy Hurwitz, a former member of the federal Advisory Committee on Evidence Rules, wrote to Committee Reporter Professor Daniel Capra. Judge Hurwitz suggested that the *Alvirez* court's interpretation of Rule 902 was "unnecessarily denigrating of tribal sovereignty."[8] Beyond any concerns about the dignity of tribal nations, Judge Hurwitz assessed the court's logic as "silly" because the Navajo Nation's documents could not be self-authenticated, while a small New Jersey town's documents could be.[9]

And not just silly, but inconsistent: Professor Wenona Sengel noted that the Department of Homeland Security accepts any and all "current tribal documents" as adequate forms of ID and citizenship at the border, just so long as the document has a photo attached.[10] Furthermore, the Transportation Security Administration accepts any "Native American Tribal Photo ID" at airport security checkpoints.[11]

Yet when the Advisory Committee on Evidence Rules took the matter up for discussion, they "resolved unanimously that it would be unwise to proceed." The committee delayed action after judging the "problem ... not significant," questioning the "degree of rigor" that tribal governments displayed in maintaining official documents, raising the need for a "process of consultation" with tribes, and suggesting that amendments would push other federal rules committees down the slippery slope of full consideration of tribal sovereignty.

In the end, it seems that the latter concern won out. Because the question "spanned all the national rules" within the federal courts, evidentiary and otherwise, the committee punted for further direction from above.[12] The far-reaching scope of the problem does not limit the need for change--it amplifies the urgent call for full legal recognition of tribal sovereignty.

Pending future committee consideration, federal judges in Arizona should follow more recent Ninth Circuit precedent in *United States v. Mancha*,[13] where, in an appeal from an Indian Country prosecution, the Ninth Circuit took judicial notice of the defendant's Blackfeet Indian Tribe enrollment certificate. Although the court did not spell out its reasoning, basic principles of tribal sovereignty and evidence law support ***43** the panel's conclusion.

The sovereign authority of the Blackfeet and other tribal nations is precisely the sort of fact that yields judicial notice under Federal Rule 201(b). The Blackfeet Tribe's sovereign authority to issue membership documents like the enrollment certificate is both "generally known within the trial court's territorial jurisdiction" as well as "accurately and readily determined from sources whose accuracy cannot reasonably be questioned." The *Mancha* method allows for self-authentication in Arizona's federal courts without contradicting binding, if faulty, precedent.

Difficulties with authentication do not reflect a general reluctance of the crafters of federal or state evidentiary rules to allow self-authentication. Under federal and state Rules 902, my client wouldn't need an authenticating witness if he wanted to admit into evidence a document from his 100-person town in rural Montana, some 1,000 miles from Arizona. He wouldn't even need such a witness if he wanted to admit into evidence a document issued by the administration of Guam, the non-state insular possession of the United States where he was stationed during his military service.

Amending Rule 902 is an easy fix that carries real consequences. And evidence rules should not stand still while recognition of tribal sovereign authority keeps growing. The *McGirt* decision,[14] federal recognition of the Little Shell Tribe in Montana, reaffirmation of the Mashpee Wampanoag Tribe's reservation and other recent events show that federal and state governments cannot ignore the everyday realities of tribal governance. Nor should the crafters of Arizona's and other evidence rules remain idle. They should affirm full recognition of tribal sovereign authority by amending their evidence rules to explicitly provide for self-authentication of tribal documents.

Tribal nations have been authentically sovereign since time immemorial. It's long past time that rules of evidence catch up to that truth.

Footnotes

a1 **HENRY OOSTROM-SHAH** is a 2L at Boston University School of Law. Many people contributed to this inquiry into evidentiary injustice, notably: the citizens of the Confederated Salish & Kootenai Tribes of the Flathead Nation, Prof. Jasmine Gonzales Rose, Prof. Ann Tweedy, Ann Miller, Claire Charlo, Shanley Swanson, Sage Nicolai, Michele Moretti, Dan Kaplan, and Doug Mo.

1 Navajo R. Evid. 30.

2 Ariz. R. Evid. 902.

3 Fort McDowell Yavapai R. Evid. 39.

4 1 N.N.C. § 201.

5 831 F.3d 1115, 1123 (9th Cir. 2016).

6 *Id.*

7 *See* Certificate of Indian or Alaska Native Blood, Certificate of Indian or Alaska Native Blood, 65 Fed. Reg. 20775, 20776 (April 18, 2000) ("[The Bureau of Indian Affairs] issue[s] CDIBs so that individuals may establish their eligibility for those programs and services based upon their status as American Indians[.]")

8 Advisory Committee on Evidence Rules, Tab 4, May 3, 2013, Coral Gables, Fla., available at https://bit.ly/3N0KbVs.

9 *Id.*

10 *Id.*

11 *Id.*

12 Advisory Committee on Evidence Rules, Minutes of the Meeting of May 3, 2013, Coral Gables, Fla., available at https://bit.ly/3tIBus0.

13 773 Fed. Appx. 447, 448 (9th Cir. 2019).

14 *McGirt v. Oklahoma*, 591 U.S. __, 140 S. Ct. 2452, 2459 (2020).

58-AUG AZATT 40

End of Document

TAB 6B

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April 3, 2025

Hon. Jesse M. Furman
Chair, Advisory Committee on the Rules of Evidence
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, DC 20544

Re: Proposed Amendment to Federal Rule of Evidence 902

Dear Judge Furman:

We write to urge the Advisory Committee on the Rules of Evidence ("Advisory Committee") to reject the proposed amendment to Rule 902 of the Federal Rules of Evidence relating to self-authenticating documents. This proposal would add "***a federally-recognized Indian tribe***" to the list of entities whose documents are self-authenticating. In 2013, the Advisory Committee considered an identical proposal and rejected it. Nothing has changed in the last twelve years that merits revisiting the Advisory Committee's original decision to forego changes in the Rule.

As will be outlined below, this proposed amendment, while undoubtedly well-intentioned, is insufficiently informed by, and insufficiently considerate of, the diversity of Native tribes. Moreover, the amendment is unnecessary, given that the Rules of Evidence already provide multiple mechanisms to properly admit evidence of Indian status that the government has used successfully for decades in prosecutions of Indian defendants. The government has pointed to two cases out of the Northern District of Oklahoma where it recently failed to make the proper showing. However, only one of those two cases implicated Rule 902 at all, and in that case, the sole issue was a failure by the local federal prosecutors to comply with the notice requirements of Rule 902(11), not a general inability to authenticate documents using presently available rules. To the extent that any difficulty exists, it appears to be a localized issue in a single jurisdiction that has only recently begun to see significant numbers of Indian jurisdiction cases and does not have sufficient familiarity with relevant documents and applicable Rules.

If the Advisory Committee is interested in amendments to Rule 902, we ask the Advisory

Committee to refrain from taking any action without ***first***, consulting with representatives from Indian Tribes and ***second***, undertaking a thorough and comprehensive study to determine how widespread the problem of authentication is.

BACKGROUND

I. Proof of Indian Status

A person's Indian status triggers federal criminal jurisdiction in two situations. First, 18 U.S.C. § 1153 grants jurisdiction to federal courts over Indians who commit any one of more than a dozen enumerated offenses when those offenses occur in Indian country.[1] In such cases, the defendant's Indian status is an element of the crime.[2] Second, in cases where the defendant is not an Indian, but the crime occurs in Indian country and involves an Indian victim, jurisdiction arises under 18 U.S.C. § 1152, and the victim's Indian status is an element of the crime.[3]

The two jurisdictional statutes do not define the term "Indian;" however, courts generally agree on a two-part test to determine someone's Indian status: (1) does the individual have a degree of Indian blood; and (2) is he recognized as an Indian by the tribe or by the government.[4] As with all elements of an offense, the burden falls on the Government to prove beyond a reasonable doubt a defendant's Indian status.[5]

With respect to the first factor – degree of Indian blood – courts have held that, "Indian status is a political classification, not a racial or ethnic one. Indian status requires… proof of some quantum of Indian blood, whether or not that blood derives from a member of a federally recognized tribe."[6] As to the second factor – recognition by the tribe or by the government – Indian status requires proof of a "link to a federally recognized tribe."[7] This link can be shown through proof of "(1) enrollment in a federally recognized tribe; (2) government recognition formally and informally through receipt of assistance available only to individuals who are members, or eligible to become members, of federally recognized tribes; (3) enjoyment of the benefits of affiliation with a federally recognized tribe; [or] (4) social recognition as someone affiliated with a federally recognized tribe through residence on a reservation and participation in the social life of a

[1] In 1953, Congress enacted Public Law 83-280, which grants certain states criminal jurisdiction over Indians living on reservations. Those states are generally not at issue here because in those states Indian jurisdiction cases do not appear in federal court.
[2] *See United States v. Bagola*, 108 F.4th 722, 726 (8th Cir. 2024). In § 1152 cases, the defendant's status as an Indian is an affirmative defense to the charge. *See United States v. Bruce*, 394 F.3d 1215, 1222–23 (9th Cir. 2005).
[3] *See United States v. Reza-Ramos*, 816 F.3d 1110, 1120 (9th Cir. 2016); *United States v. Walker*, 85 F.4th 973, 978 (10th Cir. 2023).
[4] *United States v. Zepeda*, 792 F.3d 1103, 1110 (9th Cir. 2015) (en banc).
[5] *United States v. Diaz*, 679 F.3d 1183, 1187 (10th Cir. 2012).
[6] *United States v. Cooley*, 919 F.3d 1135, 1142 (9th Cir. 2019), *overruled on other grounds*, 593 U.S. 345 (2021).
[7] *Zepeda*, 792 F.3d at 1114.

federally recognized tribe."[8]

Typically, the government will establish a person's Indian status in a criminal prosecution by introducing documents reflecting that the person has some degree of Indian blood and is affiliated with a tribe. With respect to blood quantum, the government may introduce a Certificate of Degree of Indian Blood ("CDIB") issued by the Bureau of Indian Affairs ("BIA"). The BIA is a federal agency of the Department of the Interior, and CDIBs "certif[y] that an individual possesses a specified degree of Indian blood of a federally recognized Indian tribe."[9] CDIBs are issued by, and bear the seal of, the United States and are already self-authenticating under rule 902(1).[10]

With respect to the issue of tribal affiliation, prosecutors commonly introduce documents that show evidence of tribal enrollment. "Enrollment is the common evidentiary means of establishing Indian status, but it is not the only means nor is it necessarily determinative."[11] One commonly used document is a certificate of enrollment, though there is no requirement that tribal enrollment documents be issued in any particular format, and there is wide variation among the tribes with respect to what these documents look like. An enrollment certificate introduced for the purpose of showing tribal affiliation may also suffice to establish that a person has Indian blood, even in the absence of a CDIB, because blood quantum information is sometimes included on the enrollment certificate.[12]

Unlike CDIBs issued by the BIA, enrollment certificates and other documents issued by the various Indian tribes are not self-authenticating under Rule 902.[13] In order to introduce these documents at trial, the government either must proffer, alongside the tribal certificate, the testimony of a "custodian or other qualified witness" who can explain that the certificate reflects regularly conducted business activity relating to enrollment," or it must furnish a certificate under Rule 902(11) before trial that explains how the document meets the requirements of the hearsay exception for records of a regularly conducted activity.[14]

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[8] *Id.*

[9] *United States v. Rainbow*, 813 F.3d 1097, 1103 (8th Cir. 2016); *see also* Bureau of Indian Affairs, Certificate of Degree of Indian or Alaska Native Blood Instructions, available at https://www.bia.gov/sites/default/files/media_document/1076-0153_cdib_form_expires_05.31.2025_updatedlink_508.pdf (directing applicants to submit their CDIB application to their regional BIA office).

[10] *See Harper*, 118 F.4th at 1296 (citing *Walker*, 85 F.4th at 981–82).

[11] *United States v. Broncheau*, 597 F.2d 1260, 1263 (9th Cir. 1979).

[12] *United States v. Alvirez*, 831 F.3d 1115, 1121 (9th Cir. 2016); *see also Bagola*, 108 F.4th at 727 (enrollment certificate reflected blood quantum and tribal affiliation); *Zepeda*, 792 F.3d at 1115 (enrollment certificate reflected blood quantum and tribal affiliation); *but cf. Harper*, 118 F.4th at 1297 (no CDIB or enrollment paperwork introduced).

[13] *Alvirez*, 831 F.3d at 1123.

[14] *Harper*, 118 F.4th at 1297 (discussing Fed. R. Evid. 803(6) and quoting *United States v. Wood*, 109 F.4th 1253, 1258 (10th Cir. 2024)).

ARGUMENT

The Advisory Committee should reject the proposed amendment because it is inconsistent with the history and purpose of Rule 902, does not take into account the wide variation among tribes and tribal histories, and is not necessary to address any observed deficiency in the existing rules.

I. The proposed amendment is inconsistent with the history and purpose of Rule 902.

FRE 902 was created to codify existing caselaw holding that certain records were self-authenticating "because practical considerations reduce the possibility of unauthenticity to a very small dimension."[15] Rule 902(1), which allows for the self-authentication of "documents bearing a public seal and signature" was justified specifically by "the practical underlying considerations . . . that forgery is a crime and detection is fairly easy and certain."[16] Where there could be "greater ease of effecting a forgery," however, such as where documents are signed but not sealed, more is required in order to authenticate the document.[17]

With this background in mind, it appears that the Advisory Committee presently lacks information sufficient to determine that "the possibility of unauthenticity" of tribal documents would be of a similarly "small dimension." This is especially true given that (1) tribal documents are not subject to FOIA requests,[18] and many tribes have no tribal public records laws (2) tribal sovereign immunity may place relevant documents beyond the reach of subpoenas by private parties,[19] (3) tribes have no jurisdiction to prosecute non-Indian defendants—or Indian defendants who commit crimes on non-Indian land—for forgery, and (4) federal prosecutions for forgery or obstruction of justice require proof of additional elements, such as "intent to defraud the United States,"[20] that can render the threat of federal prosecution less effective. By contrast, every state or territory has adopted a public records law allowing members of the public, including non-residents, to obtain documents and other public records from state and local governments. State records and state officials are subject to subpoena, and there are few legal barriers to prosecuting people for forgery of state documents.

In sum, different treatment of tribes under the Rule is justified given the history and purpose of the Rule and the different legal status of tribes compared to entities currently covered under the Rule.

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[15] Fed. R. Evid. 902, Advisory Committee Notes.
[16] *Id.*
[17] *Id.*
[18] 42 CFR § 137.176.
[19] As a matter of law, a federally recognized tribe "is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe of Okla. v. Mfg. Techs.*, 523 U.S. 751, 754 (1998).
[20] 18 U.S.C. § 495.

II. The proposed amendment ignores the diverse histories of tribal-government relations.

There are 574 federally recognized Indian tribes in the United States.[21] Although each of these tribes has at some point been recognized by the federal government, none of these tribes is a creation of the federal government. Each and every one is comprised of descendants of the people who inhabited the territorial lands of the United States for thousands of years before the widespread arrival of European settlers.

To provide one example, the Little Shell Tribe of Chippewa Indians did not gain federal recognition until December 20, 2019.[22] Undoubtedly, the tribe possesses many records that predate this formal recognition. The proposed amendment provides little assistance to courts or litigants in determining whether tribal documents created prior to December 20, 2019, yet bearing appropriate seals and signatures, should be considered self-authenticating under the Rule. More complicated yet, the Ottawa Tribe of Oklahoma's reservation was created by treaty in 1867, terminated in the 1890s by the Dawes Act, reestablished in 1936 by the Oklahoma Indian Welfare Act, terminated again in 1956 by the Ottawa Termination Act, and finally reestablished again in 1978 by the 1978 Reinstatement Act.[23] It is unclear from the language of the proposed amendment whether documents from each of these historical periods should be treated the same or differently under the Rule.

Without a more nuanced understanding of the universe of tribes and tribal documents potentially affected by the amendment, the amendment risks introducing uncertainty into a system that is, at the present time, easily understood by all parties.

III. The proposed amendment fails to appreciate the wide disparity in recordkeeping practices and recordkeeping capacity among tribes.

The proposed amendment also fails to appreciate the diversity in recordkeeping practices among tribes. Undoubtedly, some tribes keep excellent records. And some tribes who previously struggled with recordkeeping have made tremendous progress. The Hocak Nation, for example, currently has a high-quality tribal records management program and gives presentations about best practices in tribal records management.[24] The Hocak Nation was not, however, always a success story. It did not have any records management program at all prior to 1993.[25] When the tribe first implemented its records management program, the Hocak record manager had to begin by "sorting through papers/documents in pest-infested basements, storage units and garages all around Wisconsin"

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[21] *Indian Tribes Recognized by and Eligible to Receive Services,* 89 Fed. Reg. 99899 (Dec. 11, 2024).
[22] Kathleen McLaughlin, *A Big Moment Finally Comes for the Little Shell: Federal Recognition of Their Tribe*, THE WASH. POST (Dec. 21, 2019).
[23] *See generally Oklahoma v. Brester*, 531 P.3d 125 (Okla. Crim. App. 2023) (discussing the termination and reestablishment of the tribe)
[24] *See* Denise Redbird and Bethany Redbird, Hocak Nation Records Managers, Presentation at the Association of Tribal Archives, Libraries and Museums Annual Conference: Tribal Records Management 102 (Sept. 9–12, 2015), available at https://www.youtube.com/watch?v=retaN8KDs3M.
[25] *Id.*

without any clear idea of what she might find.[26] Unfortunately, there are many tribes today that are still in the same position that the Hocak Nation was in 1993, including tribes that lack funds sufficient to buy filing cabinets.

Among the 574 federally recognized tribes, there are many who have admirable recordkeeping practices. There are many others that fall short of desired completeness, accuracy, and reliability. A rule that affords all public records from all 574 the same presumption of authenticity without any serious inquiry or investigation into the variety of recordkeeping practices among various groups risks unfair prejudice to litigants, who have limited legal options for investigating any potential or perceived irregularity in the documents.

IV. The proposed amendment is not necessary to solve any problem that currently exists under the Rules.

The Rules already provide a mechanism under Rule 902(11) for tribal records to be admitted absent testimony by a live witness. Instead of a seal and a signature, Rule 902(11) simply requires that the "custodian or another qualified person" certify that the record "meets the requirements of Rule 803(6) (A)–(C)," and requires the proponent to provide "reasonable written notice of the intent to offer the record [and to] make the record and certification available for inspection."

It is unclear, and the Government has made no attempt to explain, why Rule 902(11) is impracticable or unworkable. Of the four cases the government cites in support of the need to reform the rule, only one of the cases—*United States v. Wood*, 109 F.4th 1253 (10th Cir. 2024)—involved a failed attempt to use Rule 902(11) to authenticate tribal documents. And in that case, the issue was not that the documents could not be authenticated under the Rule, it was that the government simply failed to comply with the notice requirement. *United States v. Harper*, 118 F.4th 1288 (10th Cir. 2024), on the other hand, did not involve Rule 902 at all. In that case, the tribal custodian and author of the contested piece of evidence testified at trial and authenticated the document. On appeal, the defendant did not raise an authentication challenge. Instead, the defendant's conviction in *Harper* was overturned because the letter on which the government relied to prove enrollment was hearsay that did not meet the requirements of Rule 803(6).[27] In sum, while the losses in *Wood* and *Harper* are no doubt frustrating for the Government, neither case supports an inference that tribal records are unreasonably difficult to authenticate under the current Rules.

Indeed, experience shows that they are not.[28] There is a long history of federal prosecutors successfully complying with these rules in the course of prosecuting cases under §§ 1152 and 1153. In

[26] *Id.*

[27] *Harper*, 118 F.4th at 1300 ("At bottom, the district court abused its discretion in admitted the verification letter because the document was hearsay. . . .")

[28] *See e.g., Bagola*, 108 F.4th at 727 (director of enrollment confirmed the certificate's accuracy); *Rainbow*, 813 F.3d at 1104 ("the enrollment clerk prepared certificates using records maintained in the ordinary course of business"); *Zepeda*, 792 F.3d at 1108, 1115 (enrollment officer confirmed that the certificate confirms the fact of enrollment and blood quantum, and then parties stipulated to admitting it); *United States v. Ramirez*, 537 F.3d 1075, 1082–83 (9th Cir. 2008) (director of membership services explained information reflected on enrollment certificate); *Prentiss*, 273 F.3d at 1282–83 (listing three examples from the 1970s and 1980s of successful presentation of tribal enrollment certificates).

fact, as the Committee reporter acknowledges, "the absence of Indian tribes from the list in Rule 902(1) does not raise a significant problem in practice." As the cases below demonstrate, parties have been following these procedures, with no issue, for decades.

For instance, in *United States v. Dodge*, the court held that testimony from the superintendent of an Indian entity that the defendant was listed on the roll and that a one- quarter blood quantum was required to be so listed was sufficient to sustain a conviction under § 1153.[29] Similarly in *United States v. Lossiah*, a certificate from the tribal enrollment officer explaining that the defendant was enrolled and had three-quarters blood quantum was sufficient to sustain a conviction under § 1153.[30] In *United States v. Ramirez*, testimony from the victims that they were enrolled members of a tribe, coupled with their tribal enrollment certificates and testimony from the tribe's enrollment officer, was sufficient to establish jurisdiction under § 1152.[31] In *United States v. Rainbow*, testimony from a BIA agent about how enrollment certificates were generated was sufficient to allow admission of the certificates themselves as business records under Rule 803(6).[32] And finally, in *United States v. Walker*, the court held that an enrollment certificate issued by the BIA was self-authenticating, and thus supplied sufficient proof of Indian status.[33]

This long history shows that the government regularly succeeds in properly introducing evidence of a person's Indian status in prosecutions under §§ 1152 and 1153. It is only when the government deviates from these procedures that appellate courts will reverse convictions. For instance, when the government presents a certificate in a manner other than as prescribed under FRE 902(11) and also fails to introduce testimony from the appropriate tribal officials, the failure to follow the rules of evidence will sometimes be deemed not harmless and the conviction reversed.[34]

Amending Rule 902(1) to render tribal enrollment certificates self-authenticating is unnecessary to prevent convictions from being reversed. Complying with existing procedures for authenticating evidence of tribal enrollment is not onerous. Even where the government does not comply with those procedures, the courts of appeals reverse convictions only when there is no *other* admissible evidence that would address the two prongs of the definition of the term "Indian."[35] Most federal prosecutors manage to present enough evidence to insulate convictions under the harmless-error rule. *Harper* and *Wood* appear to represent isolated instances in which the prosecutors may

[29] 538 F.2d 770, 786 (8th Cir. 1976).
[30] 537 F.2d 1250, 1251 (4th Cir. 1976).
[31] 537 F.3d 1075, 1082–83 (9th Cir. 2008).
[32] 813 F.3d 1097, 1103–05 (8th Cir. 2016).
[33] 85 F.4th 973, 981–82 (10th Cir. 2023).

[34] *Compare United States v. Alvirez*, 813 F.3d 1115 (9th Cir. 2016) (conviction reversed), *with United States v. Tsosie*, 709 F. App'x 447, 449 (9th Cir. Sep. 25, 2017) (conviction affirmed because testimony from the defendant's wife about his Indian status made the evidentiary error harmless).
[35] *See Harper*, 118 F.4th at 1301 (finding non-harmless error where the government did not prove an element of the crime "by legal and competent evidence beyond a reasonable doubt"); *Wood*, 109 F.4th at 1266–67 (noting that absence of other information in the record on the defendant's Indian status meant that the error was not harmless); *Alvirez*, 813 F.3d at 1124 (other properly admitted testimony that did not corroborate the improperly admitted certificate meant that the error in admitting the certificate was not harmless).

not have been familiar with the relevant tribal documents and therefore did not adequately prepare to meet the minimal showing required to establish a defendant's Indian status under the current rules.

V. The government's arguments in favor of the proposed amendment are unpersuasive.

A number of the arguments in favor of the amendment appear to be misinformed. For example, it has been suggested that the BIA has stopped issuing CDIB documents. There is no evidence to support this suggestion. In *Harper*, *Wood*, and *Walker*, these BIA-issued documents were available to the government for use as evidence at trial. In *Walker*, the government presentedsuch a document, and the conviction was affirmed.[36] In *Harper*, the court specifically noted that the government opted to prove its case without relying on such a document.[37] The BIA continues to issue CDIB documents and appears to intend to continue doing so.[38]

The government's arguments about the burden and cost of the current Rule appear to assume that the current Rule requires personal appearance in federal court by a tribal official at every trial in which tribal documents are to be introduced. This is not correct. As noted above, tribal documents can be authenticated under Rule 902(11) without testimony by a live witness. It is not clear why obtaining a certification under Rule 902(11) is more burdensome or costly than obtaining a signed and sealed document under Rule 902(1).

The Government's argument that the Transportation Security Administration ("TSA") "does not distinguish among tribes based on the purported reliability of their record systems" is not correct. TSA provides tribes with an opportunity to enter into an agreement with the Department of Homeland Security to produce scannable identifications that meet the requirements of the Western Hemisphere Travel Initiative (WHTI) and that can be used in place of passports at land and sea ports of entry.[39] Tribal identifications that do not meet these high standards and that cannot be scanned are in fact treated differently. Specifically, they are "inspected manually and cross-referenced with the Federal Register,"[40] a process similar to that employed to screen individuals who arrive at the airport with no acceptable identification at all.[41] In other words, TSA does expressly distinguish between tribes and does not treat all tribal

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[36] *See* 85 F.4th at 981–82.
[37] *See* 118 F.4th at 1297 (observing that the defendant had a CDIB card but the government chose not present it at trial).
[38] *See* Bureau of Indian Affairs, *Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Request for Certificate of Degree of Indian or Alaska Native Blood*, 89 Fed. Reg. 84927, 84928 (Oct. 24, 2024) ("Currently, the BIA certifies an individual's degree of Indian or Alaska Native blood if the individual can provide sufficient information to prove his or her identity and prove his or her descent from an Indian ancestor(s) listed on historic documents approved by the Secretary of the Interior that include blood degree information.").
[39] *See, e.g., Western Hemisphere Travel Initiative: Designation of an Approved Native American Tribal Card Issued by the Kickapoo Traditional Tribe of Texas as an Acceptable Document To Denote Identity and Citizenship for Entry in the United States at Land and Sea Ports of Entry*, 87 FR 37879 (June 24, 2022).
[40] Transportation and Safety Administration, Tribal and Indigenous, *available at https://www.tsa.gov/travel/tsa-cares/tribal-and-indigenous*
[41] Transportation and Safety Administration, Acceptable Identification at the TSA Checkpoint, *available at https://www.tsa.gov/travel/security-screening/identification.*

identification the same regardless of their demonstrated reliability.

The Government's analogy to FRCP 6(e)(3), on the other hand, has no clear relevance to the issue under review. FRCP 6(e)(3) allows tribes to receive grand jury information "in order to enforce federal law."[42] The role that tribal law enforcement plays in enforcing federal law and the documents tribes might need to perform that task is not obviously related to the question of what rules federal courts should follow when accepting tribal records in evidence, and the government does not explain the connection between the two.

Nor is the government's analogy to "political subdivisions of remote territories overseas" a good fit given that, as noted above, these subdivisions are subject to public records laws, and their records and recordkeepers are subject to subpoenas. These important tools—nearly completely absent in the context of tribes—give litigants a fair opportunity to test the authenticity and reliability of those materials before trial and to raise appropriate objections in response.

VI. If the amendment is intended to bolster the dignity of Indian tribes, the Advisory Committee should seek input from tribes.

As the Committee Reporter has already acknowledged, the absence of Indian tribes from the list in Rule 902(1) does not raise a significant problem in practice and therefore the issue was one of the "dignity" of Indian tribes. Yet, the Advisory Committee has not sought nor received any feedback from Indian tribes on this proposed amendment. Nor has the Committee heard from judges and attorneys who regularly deal with these evidentiary issues to determine how widespread this problem is. Before amending the rule, the Advisory Committee should solicit feedback from relevant parties.

Regards,

/s/ Ebise Bayisa
Assistant Federal Public Defender
District of Nevada

/s/ Jami Johnson (Choctaw Nation of Oklahoma)
Assistant Federal Public Defender
District of Arizona

[42] Fed. R. Crim. P. 6, Advisory Committee Notes to the 1999 Amendment.

TAB 7

TAB 7A

Advisory Committee on Evidence Rules
May 2025

Court-Appointed Experts II: Defining the Role of Experts Appointed Under Federal Rule of Evidence 706

Samantha Smith, the 2024-2025 Supreme Court Fellow[1] assigned to the Federal Judicial Center organization, will present to the Committee her research on court-appointed experts under Rule 706. An executive summary of the research paper prepared by the Supreme Court Fellow is included under Tab 7. The Committee is encouraged to provide comments and feedback on her research and presentation at the May meeting.

[1] The Supreme Court Fellows Program, founded in 1973, offers mid-career professionals, recent law school graduates, and doctoral degree holders from the law and political science fields an opportunity to broaden their understanding of the judicial system through exposure to federal court administration. The Supreme Court Fellows Commission selects four individuals to work for one of four federal judiciary agencies for a year-long appointment in Washington, D.C.: the Supreme Court of the United States, the Administrative Office of the U.S. Courts, the Federal Judicial Center, and the U.S. Sentencing Commission. All Fellows gain practical experience in judicial administration, policy development, and education. They also benefit from time to study and write, and a vantage point from which to develop an academic research agenda. During the Fellowship year, presentation of their research to an appropriate Judicial Conference committee is encouraged.

TAB 7B

Rule 706 and Court-Appointed Experts

Samantha C. Smith
Supreme Court Fellow[1]
April 4, 2025

I. Overview

Updating and building upon a Federal Judicial Center study from 1993, this project seeks to assess the current state of Federal Rule of Evidence 706 (which is attached), and it asks whether appointments of experts under the rule are being used or could be used to address the "battle of the experts" problem in the post-*Daubert* Trilogy, post-Internet Revolution world. This study determined that use of Rule 706 remains rare, yet certain aspects of its use, particularly compensation practices, regularly misalign with the rule as written. Since Rule 706 is rarely used and orders relating to the rule often do not make their way onto searchable databases, this project will provide guidance for judges on when and how to use Rule 706, as well as a list of cases for judges to reference. The study also compares participating judges' perceptions about using court-appointed experts with their perceptions of alternative ways of working with expertise in the courtroom. The results of this research suggest that Rule 706 is not a viable solution to competing, partisan experts in standard cases; nevertheless, judges generally seem open to trying new tools or procedures to help translate expertise to the courtroom, particularly concurrent expert proceedings. This study is ongoing, and all results described herein are preliminary.

II. Background

For centuries, court-appointed experts have been used to assist the courts in understanding complex subject areas and for just as long, has been one of, if not the most, recommended reforms

[1] Although the author prepared this Executive Summary while serving as a Supreme Court Fellow from 2024−2025, the views expressed herein are made in her personal capacity alone.

to address the so-called battle of the experts.[2] Yet in recent decades, commentators have declared the solution of court-appointed experts a "a resounding failure."[3] That so-called failure is not based on the merits or effectiveness of using a court-appointed expert but instead on a lack of adoption. Accordingly, the recent focus has shifted to promoting other solutions that might stand a better chance of adoption.

The literature on the rare use of court-appointed experts points (at least in part if not entirely) to the results of a 1993 study published by the Federal Judicial Center.[4] That publication, *Court-Appointed Experts: Defining the Role of Experts Appointed Under Rule 706*, indicated that about 20% of federal district court judges have used a court-appointed expert at some point.[5] Nearly thirty years since that publication was first issued, the same expertise issues plague the courts, but much has changed in those three decades that could influence the courts' relationship with Rule 706. The *Daubert* trilogy and its codification in amendments to Rule 702 not only emphasized a judge's active role as the gatekeeper of expert evidence but also increased the amount of litigation and case management involved in making admissibility decisions for parties' experts.

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[2] Edward K. Cheng, *Same Old, Same Old: Scientific Evidence Past and Present*, 104 MICH. L. REV. 1387, 1393 (2006); Michael J. Saks, *The Phantom of the Courthouse*, 35 JURIMETRICS J. 233, 240 (1995) ("Court appointment of non-party experts is one of the most commonly recommended reforms"). *See also* Gen. Elec. Co. v. Joiner, 522 U.S. 136, 149 (1997) (Breyer, J., concurring) ("[A] judge could better fulfill this gatekeeper function if he or she had help from scientists. Judges should be strongly encouraged to make greater use of their inherent authority . . . to appoint experts" (quoting an amicus brief filed by the New England Journal of Medicine) (alterations in the original)); Natasha I. Campbell and Anthony Vale, *Encouraging More Effective Use of Court-Appointed Experts and Technical Advisors*, 67 DEF. COUNS. J. 196 (2000); Richard A. Posner, *What is Obviously Wrong with the Federal Judiciary, Yet Eminently Curable: Part I*, 19 GREEN BAG 2D 187, 190 (2016) ("The authority to make such an appointment is explicitly conferred on federal judges by Rule 706 of the Federal Rules of Evidence, but is alien to the Anglo-American judicial culture, in which the witnesses in a case are designated by the lawyers rather than by the judge."); Bradford H. Charles, *Rule 706: An Underutilized Tool to be Used when Partisan Experts Become "Hired Guns"*, 60 Vill. L. Rev. 941 (2016) (discussing his positive perspective on Rule 706 court-appointed experts from his experience as a Pennsylvania trial judge).

[3] Saks, supra note 2 at 240.

[4] *See e.g.*, Cheng, supra note 2, at 1395 (also discussing how "mechanisms to facilitate neutral experts have historically been non-starters, often due to judicial apathy or outside resistance," listing a history of initiatives that failed within year of starting, and suggesting the Court Appointed Scientific Experts (CASE) program that started in 2001 also "face[d] an uphill battle").

[5] COURT-APPOINTED EXPERTS: DEFINING THE ROLE OF EXPERTS APPOINTED UNDER FEDERAL RULE OF EVIDENCE 706 at 3 (1993).

Technological advances have changed the courts' relationship to expertise. The Internet Revolution changed the pace of technological advancement and, by extension, the complexity of issues reaching the steps of the courthouse, as expert specialties regularly generate new subspecialties and sub-subspecialties, each in turn increasing the distance between a generalist judge or lay juror and the topic of litigation. At the same time, the Internet took the world a step closer to expertise by making independent research more accessible. The library moved directly into a judge's chambers, allowing one to quickly Google technical terms for definitions, look up scientific articles, or watch an educational video on a topic. The 1993 study also does not account for increasingly complex litigation with class actions, collective actions, and multidistrict litigation, or changes in the court's relationship with soft sciences like history and linguistics. Despite all these changes in the thirty years since the study was published, it remains the primary basis for understanding Rule 706 and court-appointed experts.

The present study set out to update and expand the FJC's work from three decades earlier to ensure the data being discussed in the literature is still relevant and to work towards solutions to the problems posed by expertise in today's cases.

III. Summary of Preliminary Results

A survey was sent to all active district court judges and was later expanded to senior judges. The survey assessed basic information including whether responding judges had used or considered using Rule 706, if they had used special masters or technical advisors, what types of cases Rule 706 was best suited for, and what educational tools judges prefer to use to learn about an area of expertise in a case. The survey was followed by interviews of certain survey participants. Judges who had used Rule 706 were interviewed individually, and a combination of small group interviews and individual interviews were conducted for responding judges who had not used Rule

706. At the time of writing, the survey expansion recently closed, and the interviews are ongoing. All results described herein are preliminary and not all survey and interview topics are addressed.

A. Preliminary Survey Results

Use of Court-Appointed Experts. Survey results indicate that the use of court-appointed experts has declined since the 1993 study. Of the responding judges, 15% (79 of 521) indicated they had used Rule 706 since 2000, compared to 20% (86 of 431) in the 1993 study. The remaining responding judges had either not used Rule 706 (82.3% or 429 of 521 respondents) or were unsure if they had (2.5% or 13 of 521). Of the responding nonusers, 23.8% (101 of 424) had considered using the rule.

Even for those who used Rule 706, that use was sparing. The majority of responding judges who had used Rule 706 (54.4% or 43 of 79) had done so only in one case. Only 5 of the 79 judges who had used Rule 706 had used it in more than 10 cases.

Responding judges from the Fifth, Seventh, and Ninth Circuits most often indicated that they had used Rule 706.

Reasons for nonuse. Survey respondents who indicated that they had not used but had considered using Rule 706 were asked why they did not ultimately use it. Reasons for nonuse were varied. The leading reasons selected were "[d]etermination that the subject matter of the case was not significantly complex or specialized enough to warrant it" and "[p]hilosophical concerns of interfering with the adversarial system" (both at 29.7% or 30 of 101 respondents). The third most frequently selected reason (at 18.8% or 19 of 101 respondents) was timing concerns.

Other appointments. Rather than being "appointment friendly," responding judges were more likely to have only used one type of appointment (out of Rule 706 experts, special masters, and technical advisors). Of responding judges, 36.8% (189 or 513) had appointed a special master,

and 10.7% (55 of 513) had appointed a technical advisor. Sixty-one judges had used two of the three appointment types, and only nine judges had used all three appointment types.

B. Preliminary Interview Results

Types of Cases and Role of the Appointed Expert. Rule 706 tends to be used in unusual cases with a particular difficulty that Rule 706 could resolve. Rule 706 was not used primarily to resolve a traditional battle-of-the-experts problem.

Certain themes emerged in the types of cases where interviewed judges were using the rule. More than one interviewed judge used Rule 706 when the judge needed an independent competency or fitness examination, when a prison-system's employee was the only expert in a plaintiff-prisoner case, when the case involved potential harms to children, when the competing experts involved in the case were some of the only people in the world with expertise in the field, or when neither party had an expert or at least not a convincing expert. Rule 706 appointments were universally used in matters before the judge and were not used with juries. Almost all interviewed judges expressed reservations about using Rule 706 with a jury.

As to the role the appointed expert served, Rule 706 appointments are sometimes used in a traditional testifying capacity like a party expert, but they are also used in roles more like technical advisors, serving only a consulting function, and sometimes in roles more like special masters where their expert report eventually became a plan that the court or parties adopted. When asked about their familiarity with and the distinction between these three appointment types, multiple judges indicated they were familiar with only one or two of the three.

Neutrality. Although interviewed judges who had not used Rule 706 had serious concerns about finding a neutral expert, those who had used Rule 706 were satisfied with the neutrality of the expert in their case. Interviewed judges typically identified these experts either by calling upon

their own resources (for example, connections with a local university) or by taking suggestions from the parties.

Compensation. Although Rule 706 contemplates that the parties pay for the expert in most civil cases, multiple interviewed judges used court funds to pay for the expert. Experts sometimes offered services pro bono or for a reduced rate as a public service.

Reasons for Nonuse. Interviewed judges expressed various reasons for nonuse and concerns with Rule 706. A primary mention was that Rule 706 appointments are an extraordinary tool that is so out of the usual it needed to be highly justified. This often aligned with concerns of interfering with the adversarial process, as interviewed judges expressed that doing something outside the normal litigation process could be seen as meddling in a lawyer's case and/or grounds for reversal. Still, many interviewed judges indicated that Rule 706 simply never came to mind or that they had never had a case so complicated as to require going beyond the normal course of Rule 702 motions and other party arguments.

Alternative tools. Judges were asked about a variety of tools that have been suggested in the literature as alternatives to court-appointed experts. The most promising among the alternatives discussed is concurrent expert proceedings. Some interviewed judges indicated that they had used concurrent expert proceedings, and most judges who had not used or were not previously familiar with this tool indicated a positive reaction and curiosity about it. Far fewer indicated that they were definitively against it. However, no interviewee indicated that they had used it with a jury. One judge wondered if a Rule 706 expert could be used as a moderator among party experts giving concurrent testimony, rather than a judge, so as not to jeopardize the judge's relationship with the jury during trial.

Interviewed judges had mixed reactions to jury questions after expert testimony, with the primary concerns being interfering with the symbiotic relationship between judge and jury if a juror's question was not answered and/or showing the jury's hand too early. Interviewed judges who had used jury questioning seemed pleased with the results.

As to other tools, interviewed judges had mixed experiences regarding the effectiveness of science days/tutorials and mixed reactions to the use of science days or tutorials for jury trials to provide basic background on an area of expertise in a case prior to argument or expert testimony. Two interviewees who had used a video on the patent process prepared by the FJC prior to a patent trial indicated that they would be open to showing similar videos explaining basics of other areas of expertise; others agreed that a short background reading to prime the jury could be helpful. Still others were adamantly opposed to the use of these forms of jury education and thought it should be left to the parties to present the information as they see fit. Even those willing to try these methods often indicated that they would be reluctant to order the parties to prepare these presentations or materials and instead would be open to using them if one or more parties suggested it.

IV. Discussion

Use of Rule 706 does not align directly with the text of the rule or how the academic literature imagines the rule should be used.

To start, Rule 706(c) makes compensation payable by either (1) funds provided by law in criminal cases or civil cases involving just compensation or (2) the parties in a proportion set by the court in any other civil case. However, as mentioned above, numerous judges indicated that they have used court funds to compensate an appointed expert, typically those set aside through attorney-admissions fees or the bench bar funds of that district. Several judges indicated that they

struggled with trying to determine if using court funds was possible and/or appropriate, and other judges indicated that if they had been able to use court funds rather than charge the expert to the parties, they would have appointed the expert. The Advisory Committee may wish to consider an amendment to address this inconsistency.

A more difficult issue is the actual role that the expert plays in the case. Rule 706 as written seems to contemplate a testifying function, separate from a special master or technical advisor. Importantly, those appointment types have their own rules and requirements that are different and apart from Rule 706. If Rule 706 is amended to reflect the compensation practices of various courts, it may be helpful to provide additional guidance in the notes that highlight these other two options for judges trying to find the right type of appointment for their case. For example, it may be helpful to clarify when an expert opinion is Rule 706 testimony and when it is a recommendation adopted by the court under Rule 53, especially when the expert opinion goes to the ultimate issue in the case or a plan of action. Similarly, it may be helpful to note that Rule 706 does not usurp the court's inherent authority to appoint a non-testifying expert as a technical advisor and to flag the technical advisor option for judges looking to use Rule 706 for a consulting expert.

To a similar end of identifying the scope of Rule 706, some interviewed judges indicated that they were unclear on when Rule 706 would ever be used, saying, for example, it should be up to the parties to bring forward experts and if a court expert was needed, a party probably had not met its burden. Still, some other interviewed judges who wanted to use a court-appointed expert could not tell if Rule 706 was intended to be used in the type of case in front of them. As such, some judges appear unclear on the purpose and scope of the rule and therefore might not be using it when it could be helpful. While the rule currently is open-ended and essentially allows for an

appointment whenever a party cannot show cause that it should not be used, it may be helpful to add specific language such as "when such an appointments is needed to assist the court, is agreed upon by the parties, or is in the interest of justice" to gives judges the confidence to use Rule 706 as needed.

Finally, Rule 706 is not being used for the battle-of-the-experts problems as the literature would hope, and the literature is likely right that it will not gain traction in that arena. While some interviewed judges indicated that they believed in the fairness of most experts in their courtrooms, many instead expressed skepticism or cynicism about party experts. Rule 706 nevertheless seemed a step too far to these judges, with courts leaving the issue to the adversarial parties and not wanting to be seen to be tipping the balance. As mentioned above, this appeared more as a respect for lawyers arguing their case with many judges reflecting on their own previous practice experience, as institutional concerns for the perceived neutrality of the court, or as a fear of reversal. Nevertheless, many judges seemed open to trying new methods to help address partisan experts, but they leaned towards tools that fit more seamlessly into typical litigation practice. To that end, judges generally seemed open to the idea of concurrent expert proceedings at the Rule 702 hearing or at a bench trial, and a take-away from this study is a desire among judges for more information about and a clear authority for this tool. The Advisory Committee may wish to speak to the use of concurrent expert testimony to answer these calls for clear authority.

V. Conclusion

Use of Rule 706 has declined and remains rare. If the rule is amended to address new compensation practices, the Advisory Committee may wish to give guidance on the scope of the rule, particularly in terms of differentiating it from Federal Rule of Civil Procedure 53 (special masters) and technical advisors. The Advisory Committee may wish to consider providing an

explicit authority for concurrent expert proceedings. The final project output will describe use and practices for using Rule 706 and include an appendix of Rule 706 cases; separately, the author will work with the FJC on possible educational programs to promote consideration of Rule 706 and alternative tools.

Rule 706. Court-Appointed Expert Witnesses

(a) Appointment Process. On a party's motion or on its own, the court may order the parties to show cause why expert witnesses should not be appointed and may ask the parties to submit nominations. The court may appoint any expert that the parties agree on and any of its own choosing. But the court may only appoint someone who consents to act.

(b) Expert's Role. The court must inform the expert of the expert's duties. The court may do so in writing and have a copy filed with the clerk or may do so orally at a conference in which the parties have an opportunity to participate. The expert:

(1) must advise the parties of any findings the expert makes;

(2) may be deposed by any party;

(3) may be called to testify by the court or any party; and

(4) may be cross-examined by any party, including the party that called the expert.

(c) Compensation. The expert is entitled to a reasonable compensation, as set by the court. The compensation is payable as follows:

(1) in a criminal case or in a civil case involving just compensation under the Fifth Amendment, from any funds that are provided by law; and

(2) in any other civil case, by the parties in the proportion and at the time that the court directs — and the compensation is then charged like other costs.

(d) Disclosing the Appointment to the Jury. The court may authorize disclosure to the jury that the court appointed the expert.

(e) Parties' Choice of Their Own Experts. This rule does not limit a party in calling its own experts.

Notes

(Pub. L. 93–595, §1, Jan. 2, 1975, 88 Stat. 1938; Mar. 2, 1987, eff. Oct. 1, 1987; Apr. 26, 2011, eff. Dec. 1, 2011.)

Notes of Advisory Committee on Proposed Rules

The practice of shopping for experts, the venality of some experts, and the reluctance of many reputable experts to involve themselves in litigation, have been matters of deep concern. Though the contention is made that court appointed experts acquire an aura of infallibility to which they are not entitled. Levy, Impartial Medical Testimony—Revisited, 34 Temple L.Q. 416 (1961), the trend is increasingly to provide for their use. While experience indicates that actual appointment is a relatively infrequent occurrence, the assumption may be made that the availability of the procedure in itself decreases the need for resorting to it. The ever-present possibility that the judge may appoint an expert in a given case must inevitably exert a sobering effect on the expert witness of a party and upon the person utilizing his services.

The inherent power of a trial judge to appoint an expert of his own choosing is virtually unquestioned. *Scott v. Spanjer Bros., Inc* ., 298 F.2d 928 (2d Cir. 1962); *Danville Tobacco Assn. v. Bryant-Buckner Associates, Inc* ., 333 F.2d 202 (4th Cir. 1964); Sink, The Unused Power of a

Federal Judge to Call His Own Expert Witnesses, 29 S.Cal.L.Rev. 195 (1956); 2 Wigmore §563, 9 *Id* . §2484; Annot., 95 A.L.R.2d 383. Hence the problem becomes largely one of detail.

The New York plan is well known and is described in Report by Special Committee of the Association of the Bar of the City of New York: Impartial Medical Testimony (1956). On recommendation of the Section of Judicial Administration, local adoption of an impartial medical plan was endorsed by the American Bar Association. 82 A.B.A.Rep. 184–185 (1957). Descriptions and analyses of plans in effect in various parts of the country are found in Van Dusen, A United States District Judge's View of the Impartial Medical Expert System, 322 F.R.D. 498 (1963); Wick and Kightlinger, Impartial Medical Testimony Under the Federal Civil Rules: A Tale of Three Doctors, 34 Ins. Counsel J. 115 (1967); and numerous articles collected in Klein, Judicial Administration and the Legal Profession 393 (1963). Statutes and rules include California Evidence Code §§730–733; Illinois Supreme Court Rule 215(d), Ill.Rev.Stat.1969, c. 110A, §215(d); Burns Indiana Stats. 1956, §9–1702; Wisconsin Stats.Annot.1958, §957.27.

In the federal practice, a comprehensive scheme for court appointed experts was initiated with the adoption of Rule 28 of the Federal Rules of Criminal Procedure in 1946. The Judicial Conference of the United States in 1953 considered court appointed experts in civil cases, but only with respect to whether they should be compensated from public funds, a proposal which was rejected. Report of the Judicial Conference of the United States 23 (1953). The present rule expands the practice to include civil cases.

Subdivision (a) is based on Rule 28 of the Federal Rules of Criminal Procedure, with a few changes, mainly in the interest of clarity. Language has been added to provide specifically for the appointment either on motion of a party or on the judge's own motion. A provision subjecting the court appointed expert to deposition procedures has been incorporated. The rule has been revised to make definite the right of any party, including the party calling him, to cross-examine.

Subdivision (b) combines the present provision for compensation in criminal cases with what seems to be a fair and feasible handling of civil cases, originally found in the Model Act and carried from there into Uniform Rule 60. See also California Evidence Code §§730–731. The special provision for Fifth Amendment compensation cases is designed to guard against reducing constitutionally guaranteed just compensation by requiring the recipient to pay costs. See Rule 71A(*l*) of the Rules of Civil Procedure.

Subdivision (c) seems to be essential if the use of court appointed experts is to be fully effective. Uniform Rule 61 so provides.

Subdivision (d) is in essence the last sentence of Rule 28(a) of the Federal Rules of Criminal Procedure.

Notes of Advisory Committee on Rules—1987 Amendment

The amendments are technical. No substantive change is intended.

Committee Notes on Rules—2011 Amendment

The language of Rule 706 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.