Advisory Committee on Evidence Rules
Minutes of the Meeting of April 26-27, 2018
Washington, D.C.

The Judicial Conference Advisory Committee on the Federal Rules of Evidence (the "Committee") met on April 26-27, 2018 at the Thurgood Marshall Building in Washington, D.C.

The following members of the Committee were present:

Hon. Debra Ann Livingston, Chair
Hon. James P. Bassett
Hon. J. Thomas Marten
Hon. Shelly D. Dick
Hon. Thomas D. Schroeder
Daniel P. Collins, Esq.
Traci L. Lovitt, Esq.
A.J. Kramer, Esq., Federal Public Defender
Elizabeth J. Shapiro, Esq., Department of Justice

Also present were:

Hon. David G. Campbell, Chair of the Committee on Rules of Practice and Procedure
Hon. Jesse M. Furman, Liaison from the Committee on Rules of Practice and Procedure
Hon. Sara Lioi, Liaison from the Civil Rules Committee
Hon. James C. Dever III, Liaison from the Criminal Rules Committee
Robert K. Hur, Esq., United States Attorney for the District of Maryland
Dr. Joe S. Cecil, Esq.
Ted Hunt, Esq. (Department of Justice)
Andrew Goldsmith, Esq., (Department of Justice)
Professor Daniel J. Capra, Reporter to the Committee
Professor Daniel R. Coquillette, Reporter to the Standing Committee
Professor Catherine T. Struve, Assistant Reporter to the Standing Committee (by phone)
Professor Liesa L. Richter, Academic Consultant to the Committee
Dr. Timothy Lau, Esq., Federal Judicial Center
Rebecca A. Womeldorf, Esq., Secretary, Committee on Rules of Practice and Procedure
Bridget M. Healy, Esq., Attorney Advisor, Administrative Office of the Courts
Shelly Cox, Administrative Analyst, Committee on Rules of Practice and Procedure
Patrick Tighe, Esq., Rules Committee Law Clerk

I. Opening Business

Approval of Minutes

The Chair welcomed everyone to the meeting and solicited discussion of the minutes from the October 26, 2017 meeting of the Committee in Boston. A motion was made to approve the minutes, which was seconded and approved.

Standing Committee Meeting

The Chair reported on the Standing Committee meeting in January, 2018 during which she updated the Standing Committee concerning the projects and rules amendments being considered by the Evidence Advisory Committee. Judge Livingston noted that she received largely positive, albeit limited, feedback from the Standing Committee with respect to the projects being pursued by the Evidence Advisory Committee.

II. Symposium on Forensic Evidence, FRE 702, and *Daubert*

Judge Livingston then opened discussion of the first item on the agenda: the Committee's role in addressing challenges to forensic expert testimony, as well as more general problems under *Daubert* and Rule 702. Judge Livingston noted that this was the first opportunity the Advisory Committee had to discuss the vast array of information provided to the Committee at the fall symposium on expert forensic evidence and Rule 702, held at Boston College Law School. She further noted that the project began with recommendations from the President's Council of Advisors on Science and Technology ("PCAST") that the Advisory Committee draft a "Best Practices Manual" with respect to forensic evidence or alternatively prepare a new Committee note to Rule 702. Although no specific rule change was recommended, PCAST expressed interest in a revision to the detailed Committee note to FRE 702 to address special considerations associated with forensic evidence.

The Reporter made several observations about the PCAST recommendations. He noted that it is not statutorily permissible to revise a Committee note in the absence of any change to a rule. Although it might be possible that a relatively minor change to a rule would, after discussion, prove appropriate, the Committee has consistently followed the principle that it is not good rulemaking to amend a rule for the purpose of creating a note. In addition, there are problems with a Best Practices Manual emanating from the Advisory Committee. The Reporter noted that a Best Practices Manual for the authentication of electronic evidence was started under the auspices of the Committee, but ultimately had to be published under the names of the contributing authors because of concerns that a Best Practices Manual might be outside the Committee's rulemaking authority.

In light of these concerns, the Chair explained that the Advisory Committee would first discuss and consider the possibility for rule revisions that might assist courts and litigants in dealing with expert opinion evidence, particularly in the area of forensic feature comparison. Short of potential amendments to the Evidence Rules, the Committee could consider what role the Advisory Committee might play in the arena of expert forensic testimony.

The Chair thereafter recognized Dr. Joe Cecil, who had recently retired from the FJC and had served as the Liaison from the FJC to the Evidence Advisory Committee for many years, including in 2000 when the amendments to FRE 702 were enacted. Dr. Cecil is an author of the highly respected Reference Manual for Scientific Evidence relied upon by judges to better understand scientific evidence, and he contributed to the PCAST. The Chair explained that Dr. Cecil had been invited to share with the Committee how his work on scientific evidence might inform or assist in the Committee's inquiry into forensic expert testimony.

Mr. Cecil explained a bit of the background and focus of the Reference Manual for Scientific Evidence, noting that the first Manual was published in 1994 and that the most recent version came out in 2011 shortly after the National Academy of Sciences 2009 Report on forensic evidence. He noted that the Manual is now published in collaboration with the National Academy of Sciences and is extensively peer reviewed. He explained that the focus of the Manual is to give judges who may not have a science background the necessary scientific foundation to decide questions involving science in the courtroom. For example, the Manual includes chapters on statistics, toxicology, epidemiology, and forensic feature comparison. Dr. Cecil emphasized that the Manual is designed to impart scientific information, but is *not* designed to tell judges how to decide issues and cases. It is informative but not prescriptive. For those reasons, Dr. Cecil did not believe that the Reference Manual was a "substitute" for the Best Practices Manual envisioned by PCAST. Dr. Cecil stated that he was open to working with the Committee in the development of a Best Practices Manual should the Committee decide to sponsor such a project.

Judge Livingston inquired whether the FJC has education programs to further assist in addressing issues of forensic expert evidence. Dr. Lau remarked FJC currently does not sponsor many judicial programs on forensic evidence, but that programs could be developed if there is demand. He further noted that the European Union does have a Best Practices Manual on Forensic Evidence. The Reporter inquired of Dr. Cecil whether the FJC would be able to identify the scientists in the relevant fields that the Advisory Committee would need to consult in developing a Best Practices Manual. Dr. Cecil responded that the FJC was in contact with many noted scientists and could help the Committee in identifying those resources. He further noted that the National Academy of Sciences could also help identify experts. Judge Livingston inquired as to the timeline for the next edition of the Reference Manual. Dr. Cecil reported that no firm timeline exists, but that funds are currently being raised to support the publication of a new edition. The Reporter also inquired whether the Reference Manual would be able to resolve disputed issues identified in the PCAST report. Dr. Cecil stated that the Manual served to identify and explain such disputes, but does not provide resolution.

The Chair thereafter introduced a guest from the Department of Justice ("DOJ") who had been invited to the Committee meeting to explain the work being done by DOJ with respect to forensic investigation and testimony. Ted Hunt is the Senior Advisor on Forensic Evidence for DOJ. He began by stating that improving forensic investigation and evidence is a high priority for the Deputy Attorney General. He noted that his position as the Senior Advisor on Forensic Evidence was created last April and that a permanent working group on forensic evidence had been established to bring together all relevant stakeholders to improve and validate forensic testing, and to provide guidelines for testimony by forensic experts. Mr. Hunt noted five key areas of focus:

1. Discontinuing statements by analysts and prosecutors expressing "a reasonable degree of scientific certainty" regarding findings. The Department directed prosecutors and analysts not to use this language in reporting results 18 months ago.
2. Establishing uniform terminology for examiners and analysts to employ in their reports and testimony to ensure that all terminology is scientifically based, appropriately qualified in scope, and not overstated. The first document on uniform terminology in latent print comparison was released in February of 2018 and additional directives for other disciplines will be forthcoming.
3. Monitoring expert forensic testimony for quality assurance to ensure that any mistakes are corrected immediately. This is a permanent program that evaluates testimony through real-time observation of testimonial presentations, as well as through transcript review. Feedback is promptly provided.
4. On-line posting of internal DOJ laboratory policies and procedures to enhance transparency. These documents are provided to defense counsel during discovery and also are being made publicly available, in order to provide greater insight and education into DOJ laboratory methodology, as well as to serve as a model for state crime labs.
5. Performing research and additional scientific study to strengthen the foundations of forensic science. The Department is conducting large-scale studies involving hundreds of examiners and thousands of forensic samples in a multi-year project in order to improve forensic methodologies.

Mr. Hunt concluded his remarks by emphasizing that each of the projects described was designed to enhance the reliability of forensics, to increase collaboration across federal and state laboratories, and to increase the capacity of forensic services.

The Reporter asked Mr. Hunt about who it is that performs the testimonial monitoring function that he described. Mr. Hunt explained that a peer of comparable qualifications does the monitoring and immediately critiques in-court testimony of an examiner to prevent exaggeration or overstatement of results and to avoid deviation from uniform language tailored to each field of forensic study. The Chair asked Mr. Hunt how an expert testifying about a forensic method that had not been validated through black box studies was permitted to express confidence while testifying according to the Department's program. In response, Mr. Hunt described international standards of accreditation established for various forensic disciplines based upon extensive literature and hundreds of training hours that demonstrated the reliability of those methods, though without the more rigorous black box studies emphasized in the PCAST Report. The Reporter followed up, asking Mr. Hunt whether a ballistics expert could say a shell casing was "a match" for a particular weapon. Mr. Hunt stated that pre-trial rulings by the court would determine exactly what the expert could say, but that a ballistics examiner should be able to say that a shell casing was fired from a particular gun. The Reporter again queried whether that meant that examiners could testify to a "match" according to the Department protocol described by Mr. Hunt, to which he responded that it depends upon the discipline.

Dr. Cecil offered that the DOJ efforts to improve research and quality control were commendable, but that difficult issues remain concerning identification of a match between a forensic sample and an exemplar. According to Dr. Cecil, DOJ guidelines continue to permit an

examiner to state that she can identify the source of a particular sample and testimony to that level of certainty conflicts with the consensus in the scientific community that there is inadequate foundation for that specific attribution. Dr. Cecil noted that other groups, like the European Union, require more temperate terminology, involving a "likelihood" of attribution, in order to prevent overstatement. Mr. Hunt responded that the Department's published documents on particular disciplines, such as the ULTR on Latent Prints, would list approved terms of art for the particular discipline, but then require explanations of those terms and a description of limitations. According to Mr. Hunt, it is impossible to craft a single term that accurately captures conclusions across forensic disciplines, and explanation of terminology is far more important than the particular term used.

A member of the Committee asked Dr. Cecil whether the concern of the scientific community is the failure of examiners to explain limitations or uncertainty surrounding a particular forensic methodology. Dr. Cecil explained that scientists prefer to express findings in confidence intervals that more accurately represent the likelihood of a match rather than in conclusions about a match. He stated that the concern of the scientific community is that there is inadequate foundation to make a specific attribution to a particular defendant for many disciplines. Scientists would prefer more discussion of confidence intervals in the legal arena. Mr. Hunt noted that the Department's Latent Print document makes limitations on findings very transparent and that this publicly available document is accessible to defense counsel for purposes of cross-examination.

Another Committee member then asked Mr. Hunt what the remedy would if an examiner did overstate conclusions during his testimony. Mr. Hunt stated that there would be a duty to notify the parties immediately of any misstatement by a testifying expert.

The Chair thanked Dr. Cecil and Mr. Hunt for their helpful contributions and explained that one possible response to the issues surrounding forensic testimony could be a change to the Rules. The Reporter directed the Committee's attention to a draft of a new Rule 707 on Forensic Evidence on page 50 of the agenda materials. He noted that the draft rule was not a proposal, but more of a thought experiment drafted for the Symposium for purposes of discussion. The Reporter noted difficulties surrounding a definition of "forensic evidence" in a rule. In addition, the draft Rule 707 would overlap, problematically, with existing Rule 702. For that reason, amending Rule 702 might be a better solution.

The Reporter stated that one idea for amending Rule 702 would be a new subsection prohibiting an expert from overstating results. That more limited amendment was also prepared for discussion at the Symposium and was received favorably by a number of the panelists. An alternative would be a positive statement, such as that experts must accurately report the strength of their findings. The Reporter suggested that the Committee might review a formal proposal for such a textual change at a subsequent meeting.

Judge Dever, the Liaison from the Criminal Rules Committee, reported that Criminal Rules is addressing some of the concerns surrounding forensic expert evidence with potential amendments involving criminal discovery. Judge Dever stated that a subcommittee had been appointed to determine whether the expert disclosure obligations under Criminal Rule 16 should be broadened along the lines of Civil Rule 26. He suggested that more robust advance disclosure

to criminal defendants could aid them in testing expert testimony through *Daubert* motions and could also help in avoiding overstatement by providing a meaningful opportunity for expert cross-examination. Given the wide array of subjects about which experts are testifying, a broader criminal discovery provision could give defendants better access to information to challenge experts in all fields. Professor Coquillette noted the importance of having the Criminal and Evidence Committees work together on the issue of expert testimony in criminal cases and also commended the Department of Justice for its efforts. Judge Dever noted that the Criminal Rules Committee was gathering information from all constituencies, the Department of Justice, the Federal Public Defender, as well as the scientific community to get a broad perspective on the issue of criminal discovery of expert opinion evidence.

The Chair thanked Judge Dever for his report and noted that it was very helpful to coordinate with the Criminal Rules Committee in thinking about potential amendments to the Evidence Rules. Of the possible amendments, the Chair noted that one preventing overstatement was one that seemed most plausible. She further noted the challenge presented by the disconnect between civil and criminal cases with respect to expert testimony that was highlighted at the Boston College symposium. Civil lawyers lamented the vast resources being needlessly consumed by *Daubert* challenges, while criminal lawyers expressed concern about the lack of attention being given to forensic expert testimony in criminal trials. The divergent experiences in civil and criminal cases present another challenge for rulemakers. She noted that a Best Practices Manual might be an alternative to rulemaking to address these matters.

The Reporter explained that it would not be possible to write a rule prohibiting overstatement by testifying experts on the criminal side only, because that would imply that overstatement is acceptable in civil cases, which of course it is not. He then provided an update on the case law regarding FRE 702 and forensic expert testimony and directed the Committee's attention to the case digest in the agenda materials. A review of recent cases revealed that courts are relying on precedent to support the admissibility of many forensic methods without conducting independent analysis of *Daubert* factors. The cases also showed significant overstatement by forensic experts, including testimony that a sample identification was "100% accurate." A Committee member asked what conclusion a testifying expert could make if testifying to a "reasonable degree of scientific certainty" constituted overstatement. Mr. Hunt responded that with sufficient foundation, an expert should be able to opine that a sample comes from a particular source, but stated that the Department of Justice did not believe that it was necessary to testify to a "reasonable degree of scientific certainty." Mr. Hunt stated that no "magic word" would be adequate in all cases and that explanation by the examiner of the meaning and limitations of her findings was more important.

The Reporter expressed concerns that the findings of both the National Academy of Sciences and of PCAST have been largely ignored by the courts in the recent opinions and that a Best Practices Manual (that cannot emanate directly from the Evidence Advisory Committee) might also be ignored.

Judge Dever then asked Mr. Hunt whether the Department of Justice was working to monitor testimony by state examiners to the extent that state experts testify in federal cases. Mr. Hunt responded that federal prosecutors governed by Department policies would not elicit

improper testimony from state examiners, and further noted that one of the goals of publishing Department of Justice best practices was to provide a model for state laboratories as well.

The Chair then noted that it might be advisable for the Evidence Advisory Committee to appoint a small subcommittee to do intense reading and study regarding the possible role of the Committee in addressing concerns with forensic evidence. She stated that she and the Reporter currently felt that an amendment to Rule 702 preventing overstatement of findings appeared to be the most promising possibility and that a potential amendment distinguishing between scientific and other types of expert opinion testimony appeared less viable.

Mr. Hur then thanked the Reporter for his detailed case digest and stated that the cases are the data that the Committee should be considering. He opined that the courts are grappling carefully and thoughtfully with *Daubert* issues and limiting expert testimony where necessary. He seconded Mr. Hunt's assertion that the Department of Justice was already working to prevent overstatement of expert conclusions. The Reporter emphasized the excessive reliance on precedent by the federal courts in place of detailed consideration of other *Daubert* factors, and the overstatement found in the cases. Mr. Hur noted the longstanding acceptance of certain scientific methods like latent fingerprint analysis. While he acknowledged that courts could start from the ground up in a *Daubert* analysis of such methodologies, he stated that the reliance on the longstanding precedent reaches the same result – the proper admissibility of such testimony. Mr. Hur further opined that the PCAST report is having an impact, noting that defense counsel have cited to it. He further emphasized that the PCAST report looked favorably on the black box studies conducted by the FBI in connection with fingerprint evidence. Mr. Hur stated that the courts need more time to absorb the PCAST report and for its findings to filter into *Daubert* analysis.

The Reporter then turned the Committee's attention to another concern about the application of Rule 702 raised by two members of the public in a law review article. Specifically, the article found that some federal courts treat the sufficiency of an expert's basis, and the application of the expert's methods, as questions of weight for the jury --- when in fact these matters are both questions of admissibility under Rule 702, as amended in 2000. The Reporter explained that the subdivisions of Rule 702 set forth admissibility requirements that a trial judge must find to be satisfied by a preponderance of the evidence *before* allowing the expert to testify before the jury. Therefore, federal courts that are treating these foundational requirements as matters of weight that may be given to a jury are indeed wrong. That said, the Reporter noted that FRE 104(a) clearly applies to the admissibility requirements of FRE 702, and that crafting an amendment that essentially tells federal courts to "apply the rule" may be challenging.

One member of the Committee remarked that the federal cases treating the requirements of FRE 702 as matters of weight are very troubling. Essentially, it is as if some courts are saying that FRE 702 doesn't apply in their circuit. The Committee member suggested that it might be important to amend Rule 702 to prevent it from being ignored. Another Committee member also reported being taken aback by the federal courts blatantly ignoring Rule 702. That Committee member wondered whether a rule revision (that could also be ignored) would be the most fruitful solution or whether judicial education might be a better solution to the problem.

A Committee member reiterated the sharp divide between expert discovery in civil and criminal cases, noting that the adversarial process works out many issues with expert testimony on the civil side and that the failure of the adversarial process on the criminal side is placing greater burdens on trial judges to police the use of forensic experts. Judge Dever noted that the Department of Justice was training on this issue in an effort to get more information about testifying experts to defense counsel earlier in the process to allow for more adversarial testing. Andrew Goldsmith, the Criminal Discovery Coordinator in the Deputy Attorney General's office noted that a January, 2017 memo from Sally Yates on expert discovery was now part of the U.S. Attorney's Manual and that all federal prosecutors are receiving training on early disclosure. He opined that it was important for the Evidence Advisory Committee to collaborate with the Criminal Rules Committee and suggested that a rule change was unnecessary because prosecutors are giving defense counsel the information they need with respect to testifying experts. Professor Coquillette noted that issues regarding expert testimony are well resolved through adversarial testing in civil cases, but that has not historically been the case in criminal trials. He remarked that he was delighted to learn that the Department of Justice was working to rectify the imbalance.

Judge Livingston closed the discussion of the fall symposium and of Rule 702 and *Daubert*. She noted the sense of complexity of the issues raised and the need for further study by the Committee. She stated that proposals for rule amendments regarding overstatement of conclusions, and Rule 702 admissibility requirements, would be considered at a future meeting.

III. Proposed Amendment to Rule 807

The Reporter opened discussion of the proposed amendment to Rule 807 that was released for public comment. The public comment period closed on February 15, 2018. In order to facilitate discussion of revisions raised by the public comment and by the Standing Committee, the Reporter directed the Committee's attention to a supplementary memorandum prepared in advance of the meeting.

The Chair noted that the memo was designed to provide a draft of the amendment to Rule 807 that would make it easier to resolve issues raised during the public comment period. The Chair and the Reporter proceeded to walk the Committee through the following revisions to the proposed amendment as released for public comment:

- The language regarding the hearsay exceptions in Rules 803 and 804 was moved from an admissibility requirement back into the prefatory section of the rule. Both the American Association for Justice and Judge Furman recommended this change, noting concerns that a trial judge might find it necessary to test proffered hearsay against every exception in Rules 803 and 804 before applying Rule 807 – which was never the intent of the proposal.

- In response to concerns that the term "substance" of the statement used in the amended notice provision could prove vague, a "See" cite to Rule 103(a)(2) governing offers of proof (in which the "substance" of the proffered evidence must be presented) was added to the Advisory Committee note.

- A reference to the use of corroborating evidence to determine the "accuracy" of a hearsay statement in the Advisory Committee note was replaced with language requiring the use of corroborating evidence to determine "whether a statement should be admissible under this exception."

- In addition, language requiring a finding of "sufficient guarantees of trustworthiness" was retained over a requirement that a trial judge find the hearsay "trustworthy" to avoid any reading of the amendment that would make Rule 807 narrower and more difficult to satisfy.

- The language in the Rule text regarding Rules 803 and 804 was changed from "not specifically covered by a hearsay exception in Rule 803 or 804" to "not admissible under a hearsay exception in Rule 803 or 804" to reflect the "near-miss" interpretation given to the existing rule by the majority of courts. The near-miss issue was added to the Committee note as well.

- The word "limit" used in the proposed Committee note was changed to "guide" to better reflect the intent of the sufficient guarantees of trustworthiness requirement in informing the trial court's exercise of discretion.

- A reference to Rule 104(a) was added to the Note, in response to a suggestion from a member of the Standing Committee.

- A reference to the Confrontation Clause was added to the Note, in response to a suggestion from a member of the Standing Committee.

The Committee discussed the revised draft of the proposed amendment to Rule 807 and the accompanying Committee note. Judge Furman suggested replacing omitted language in the Committee note clarifying that a trial judge need not make a finding that the hearsay is not admissible under any Rule 803 or 804 exception before employing the residual exception. The language was removed from the Committee note when the Rule 803/804 language was eliminated as an admissibility requirement and moved back into the preface. Judge Furman expressed concern that a trial judge might still think that such findings were necessary and advocated retaining the clarifying language. He also proposed deleting language in the note that rule 807 should be "invoked only when necessary" as unduly limiting. Committee members agreed with these suggestions.

Another Committee member argued that if the intent of Rule 807 is not to allow parties to use the residual exception unless they need it, then inadmissibility under Rules 803 and 804 should be required. The Chair responded that making it an admissibility requirement would risk forcing trial judges to make a threshold examination of every Rule 803 and 804 hearsay exception before applying Rule 807 – which was not intended, and which would unnecessarily constrain the use of the rule. Judge Campbell raised the concern that the Committee Note would say that a party could *not* use Rule 807 to admit hearsay admissible through Rules 803 and 804 (suggesting that a party could not proceed directly to Rule 807 to admit hearsay) when nothing in the text of Rule 807 would prevent a party from doing just that. The Reporter noted that case law interpreting existing Rule 807 does prohibit parties from proceeding directly to Rule 807. Judge Campbell proposed

altering the Committee note to provide that nothing in the amendment is intended to "alter the case law holding that parties may not proceed directly to the residual exception, without considering the admissibility of the hearsay under Rules 803 and 804." Committee members agreed with that suggestion. Another Committee member noted that Rule 807 is always the last exception argued by parties and the Reporter highlighted litigants' natural incentives to start with the Rule 803 and 804 hearsay exceptions because Rule 807 is ordinarily more difficult to satisfy.

The Reporter then explained that revised language in the Committee note had been added to deal with the "near-miss" precedent and the new rule text stating that hearsay not "admissible" through a Rule 803 or 804 exception (as opposed to "not specifically covered by" an exception) could be admissible under Rule 807. He noted that the language was designed to suggest that courts employing a near-miss analysis of hearsay offered through Rule 807 should think about how nearly a proffered hearsay statement misses a standard exception, as well as about the importance of the requirement of a Rule 803 or 804 exception that the hearsay statement fails to satisfy. One Committee member expressed concern that the near-miss language in the Committee note might lead some to believe that near-miss analysis was a substitute for considering sufficient guarantees of trustworthiness. The proposed Committee note was revised to clarify that a near-miss analysis may be part of an inquiry into guarantees of trustworthiness, but is not a replacement for that inquiry. Judge Furman also expressed concern that litigants and judges might not appreciate which requirements of the Rule 803 and 804 hearsay exceptions are the "important ones." The reference to the importance of the admissibility requirements was removed from the Committee note to accommodate that concern.

The Reporter next explained that a member of the Standing Committee suggested adding a sentence to the Committee note clarifying that testimonial hearsay satisfying the requirements of Rule 807 would nonetheless be excluded under the Sixth Amendment Confrontation Clause in a criminal case. Given that the Constitution prohibits the admission of uncross-examined testimonial hearsay through *any* of the hearsay exceptions, the Chair queried why this reference to the Sixth Amendment was needed in the note to Rule 807 when the notes to the other hearsay exceptions contain no such caveat. The Reporter responded that the categorical exceptions generally avoid the admissibility of testimonial hearsay, because the admissibility requirements require a showing that would be inconsistent with primary motivation for use in a criminal prosecution. For example, a record that satisfies the requirements of the business records exception in Rule 803(6) would, by definition, not be testimonial, because it would have to be made in the course of regularly conducted activity. And a statement admissible as an excited utterance will not be testimonial because it must be made under the influence of a startling event, which is inconsistent with preparing a statement for a criminal prosecution. In contrast, Rule 807 presents the greatest risk of admitting testimonial hearsay due to its "sufficient guarantees of trustworthiness" standard. So there is some justification for adding the language about the right to confrontation in the Committee Note. No further objections were made to its inclusion.

The Committee then discussed changes to the notice provision and the Committee Note regarding notice. The Reporter noted that the "See" cite to Rule 103(a)(2) in the Committee Note was designed to inform the court's inquiry into whether the "substance" of the statement had been disclosed. He also noted that language in the note regarding case law under the former requirement that "particulars" be disclosed had been removed as unhelpful. The Reporter also explained that

conflicting statements about the rigor or flexibility of the good cause exception to the notice requirement had been removed. The suggestions were a provision that good cause should not be easily found (provided by a Standing Committee member) and a provision that good cause should be easily found as to criminal defendants (provided by the National Association of Criminal Defense Lawyers). The Committee decided to leave the interpretation of good cause to trial judges and the extensive pre-existing case law from courts that had applied a good cause exception even though it was not specifically provided for in the rule.

At the conclusion of the Committee's discussion, the Chair explained that the Reporter would provide a clean copy of the revised Rule 807 and accompanying Committee note reflecting all changes made during the discussion and that the Committee would vote on sending the proposed amendment to the Standing Committee, with the recommendation that it be released for public comment, on the following day. Thereafter, the Committee adjourned.

The Committee meeting resumed Friday, April 27

Mr. Hur served as the representative of the Department of Justice, as Ms. Shapiro could not be present.

IV. Rule 702 and Rule 104(a) Admissibility Requirements (Revisited)

Judge Livingston explained that the Committee would take Rule 807 back up later in the day after all Committee members had a chance to review the latest version of the proposed amendment prepared by the Reporter. She then asked the Reporter to share an idea for resolving the misapplication of Rule 702 by federal courts who are treating the Rule's admissibility requirements as matters of weight. The Reporter suggested that the preface to Rule 702 that precedes the admissibility requirements could be modified to address this concern by stating that a qualified expert may testify if "the court finds the following by a preponderance of the evidence." The Reporter explained that adding this language would emphasize that the Rule 702 requirements are admissibility requirements governed by Rule 104(a). He explained that a Committee Note could accompany such a revision, explaining that it was a needed clarification to address confusion in the courts. While the new language would basically state the existing rule --- that Rule 104(a) applies to the Rule 702 requirements --- it has the benefit of making the principle explicit, thus hard to ignore. And it might be justified in light of the disregard of the admissibility requirements by many courts.

Judge Campbell then opened the discussion with an example from a hypothetical trial in which an expert testifies in a *Daubert* hearing that he rejects 7 of 10 seminal studies in an area and is relying on the 2 or 3 minority studies in the field as the basis for his opinion. Judge Campbell queried, if the judge is not persuaded that the three minority studies are reliable and sufficient, but the jury might be, does the judge exclude? The Reporter responded that the trial judge must make a finding by a preponderance of the evidence on the admissibility requirements before allowing the expert to testify, and that it would be error to permit the testimony if the judge is not satisfied that the expert's basis is sufficient, as would be the case in Judge Campbell's hypothetical. Another Committee member stated that the question is whether Rule 702 works under a Rule 104(b) analysis, and the Reporter responded that this was indeed the issue that some courts were struggling

with, but that the admissibility requirements in Rule 702 are clearly governed by Rule 104(a) --- as also stated in *Daubert* itself. The Reporter then asked whether the Committee members would be interested in reviewing a draft with revised prefatory language requiring a finding of each of the Rule 702 requirements by a preponderance of the evidence. Committee members expressed interest in reviewing such a draft and the Chair suggested that such a proposal might be part of the broader conversation the Committee would continue to have about its role in helping trial judges apply Rule 702.

V. Prior Inconsistent Statements: Possible Amendment to Rule 801(d)(1)(A)

Judge Livingston next opened the discussion of a potential amendment to Rule 801(d)(1)(A) that would allow for substantive admissibility of prior inconsistent statements of witnesses that were recorded audio-visually and available for presentation at trial. She acknowledged that the Committee had been considering the proposal for a long time. She traced the history of Rule 801(d)(1)(A), noting that the original Advisory Committee had favored a wide open approach allowing substantive admissibility of all prior inconsistent statements by testifying witnesses --- an approach that is now employed in a number of states, including California and Wisconsin. She noted that Congress pushed back on this proposal, expressing concern that a criminal defendant might be convicted solely on the basis of out of court statements of a witness who did not implicate the defendant at trial. This concern resulted in the compromise rule embodied in existing Rule 801(d)(1)(A) requiring prior inconsistent statements to be made under oath and in a prior proceeding if they are to be used substantively.

The Chair noted that this Advisory Committee began reviewing prior inconsistent statements due to concern that the limiting instructions provided to jurors when such statements are admitted for impeachment purposes only are difficult to comprehend and follow. In addition, the Committee noted Wigmore's opinion that cross-examination is the greatest engine for the discovery of truth in exploring the possibility of broader admissibility of hearsay statements made by testifying witnesses. Some expansion of the admissibility of prior inconsistent statements was also thought to be consistent with the basic thrust of the Federal Rules of Evidence to make more information admissible and available to the fact-finder. With the caveat that evidence rulemaking should focus on the process of deriving the truth at trial, some value was also seen in the likelihood that a rule allowing substantive admissibility of audio-visually recorded statements would encourage more recording and greater documentation of witness statements. On the other hand, concerns had been expressed about the reliability of prior inconsistent statements and the ways in which the oath and the grand jury process contribute to reliability. Other potential downsides to an amendment could be added litigation costs needed to determine whether statements were recorded "audio-visually" or were made "off camera." And questions had arisen about the impact of the amendment at a time when recording technology was exploding to include dash-cam and body-cam footage, as well as cellphone and social media recordings. There were also lingering concerns over the impact on summary judgment practice in civil cases. The Chair noted that every straw vote taken on the proposal in the Committee resulted in 2/3 of the Committee in favor of exploring the amendment and 1/3 opposing it.

After this introduction, the Reporter noted that the Department of Justice had proposed allowing substantive admissibility of prior inconsistent statements acknowledged by a witness at trial, in addition to audio-visual witness statements. Committee members inquired about the interaction between the audio-visual and acknowledgement proposals. The Chair explained that the Department's proposal would be more liberal because it would allow substantive admissibility of any prior inconsistent a witness would acknowledge while on the stand – whether recorded or not. Judge Campbell asked whether case law had developed over how a witness "acknowledges" a prior statement. The Reporter noted that there was case law in jurisdictions with an acknowledgement rule and that the acknowledgement provision had sometimes resulted in problematic inquiries at trial, but that this was not an inevitable outcome.

Dr. Lau noted that technologies making it relatively easy to create fake video content were proliferating and that the Committee should consider that falsifying video material might become extremely easy 5-10 years from now. The Reporter responded that if this was a problem, then it was a problem for *all* electronic evidence, not just the narrow band of audiovisual statements that would be admissible under the amendment. The Federal Public Defender noted that defendants and witnesses already deny making statements that appear on video and that experts are employed to determine whether a defendant actually made a statement reflected in a recording.

The Chair asked Dr. Lau to report on the survey performed by the Federal Judicial Center on the proposed admissibility of audio-visual inconsistent witness statements. Dr. Lau noted that federal judges seemed to be split along lines similar to those in the Committee, with little appetite for the adoption of wide-open substantive admissibility of prior inconsistent statements and some support for a compromise approach to expanding admissibility. Judges expressed few concerns about expanded use of prior inconsistent statements in civil cases. In criminal cases, judges reported encountering oral prior inconsistent statements more frequently than they encounter audio-visual statements. Judge Livingston noted the bottom line in the survey that 58% of judges supported or strongly supported the proposal, while 29% opposed or strongly opposed it.

The Reporter thanked the FJC for the survey and the report and noted appreciation for feedback received from the American Association of Justice ("AAJ"), the National Association of Criminal Defense Lawyers ("NACDL"), and the Innocence Project on the proposal as well. He noted that the feedback from AAJ was largely favorable. The AAJ suggested adding a reference to future recording technologies in the Committee note. The Innocence Project suggested a pilot project to further explore the proposal in action due to two primary concerns: 1) the possibility that a recorded statement may be the last in a long series of statements taken from the witness that may not reflect all of what the witness has said and 2) the concern that a defendant could be convicted solely on the basis of a prior inconsistent statement. The Reporter first noted that it would be wonderful to be able to conduct million dollar pilot projects in connection with rulemaking efforts, but that no Committee had ever done such a project prior to rulemaking and that it would be impossible. He also responded to the substantive concerns raised by the Innocence Project. He noted that a Federal Rule of Evidence could not mandate the recording of all of a witness's statements because that would exceed the Advisory Committee's statutory mandate. He explained that an evidence rule might condition admissibility of one recorded statement on the availability of all other statements in recorded form to the opponent, but questioned whether that would be advisable. With respect to the concern that a defendant could be convicted on the basis of a prior inconsistent statement alone,

the Reporter reiterated that Rule 801(d)(1)(A) makes statements admissible for their truth, but does *not* deal with the sufficiency of the evidence to convict. He noted that Congress rejected the same objection to Rule 801(d)(1)(C) dealing with prior statements of identification and that a Committee note could clarify that the amendment does not speak to sufficiency.

Judge Furman noted that the issue of admissibility is intertwined with sufficiency because a prior inconsistent statement that could not be used to get a case to the jury under the existing rule could support submission to the jury under the proposal. He queried whether the Committee has solicited feedback from the defense bar in states where there is wide-open substantive admissibility of prior inconsistent statements. The Reporter responded that the Committee had received such feedback and described research by Professor Dan Blinka into the practice in Wisconsin that solicited input from all constituencies, the defense bar included. That report suggested that there is very little controversy over substantive admissibility of prior inconsistent statements in that jurisdiction. The Reporter also obtained input from noted Evidence expert Professor Ed Imwinkelried, who reported little activity in the California cases concerning the substantive admissibility of prior inconsistent statements in California. The Chair stated that it is not surprising that there is little controversy over the admissibility of prior inconsistent statements in Wisconsin and California because the wide-open rule that makes all such statements substantively admissible is straightforward. She expressed concern, however, that a compromise position that allows only audio-visual or acknowledged prior inconsistent statements could generate significant litigation over the scope of those limitations.

Another Committee member reminded the Committee of the symposium at Pepperdine in 2016 in which California prosecutors talked about the impact of substantive admissibility of prior inconsistent statements in obtaining plea agreements in domestic violence cases, and in proving up gang-related prosecutions, where witnesses often recant. He noted the report that defendants would accept a plea knowing that a prosecution could proceed even without the cooperation of the victim. The Chair noted that one of the concerns of the Innocence Project is that innocent defendants might plead guilty if witness statements taken in the aftermath of an incident, that have since been recanted, can form the basis of a prosecution. The Federal Public Defender also noted situations in which a domestic partner calls police out of anger at a partner and recants later because there was no abuse. He explained that there are times when the initial report is not accurate, even in the domestic violence context, and that the proposal would allow substantive use of these recanted early reports. He also reiterated the concerns of the Innocence Project about a series of interviews that lead up to the final audio-visual statement and the inability of the jury to view the entire back and forth that created the prior inconsistent statement. Finally, he expressed concern that the government might claim that a prior inconsistent statement was substantively admissible under the proposed rule even if the *defense* sought to offer the statement only for impeachment purposes. The Reporter noted that an Advisory Committee note had been included to prevent that possibility. The Federal Public Defender further expressed concern about unreliable body-cam or cell phone recordings, noting that defense lawyers could record witnesses exonerating defendants and substantively admit those statements if the witness shows up and testifies favorably for the prosecution. He suggested that the proposal could create abuses and litigation on both sides of criminal cases.

Another Committee member noted that any prior inconsistent statement may already be used to impeach a testifying witness and that juries don't understand the limiting instruction accompanying such statements. This Committee member suggested that the proposal would be an improvement because it would impose more rigor with respect to the prior inconsistent statements admitted substantively than is currently required of prior inconsistent statements already allowed to impeach. Judge Lioi remarked that it does matter a great deal in criminal cases if the prior inconsistencies are allowed fuller use because substantive admissibility may be enough to defeat a defendant's otherwise valid Rule 29 motion for acquittal. The Chair also noted potential impact on summary judgment practice in civil cases if plaintiffs produce audio-visual statements that are inconsistent with a witness's deposition testimony. Judge Campbell noted that such a recorded statement may allow a civil case to go to trial under the proposal where summary judgment could be granted under the existing rule. The Reporter noted that if the recorded statement were a sham designed to defeat summary judgment, existing case law would permit a judge to disregard the statement even after an amendment. He further queried whether an audio-visually recorded statement by a witness expected to testify at trial that supported the plaintiff's case shouldn't mean that the case *should* proceed to trial.

Another Committee member questioned the absence of an oath requirement for statements that would be admissible under the proposal, indicating that the statements would lack the gravity of the statements admissible under existing Rule 801(d)(1)(A). The Reporter noted that the trial cross-examination before the jury required by the Rule was designed to reveal any weaknesses in the statement. Another Committee member remarked that the effect on Rule 29 practice in criminal cases should drive the result on the proposal, especially in light of evidence suggesting that jurors do not follow instructions with respect to prior inconsistent statements offered only for impeachment once they get a case. This Committee member suggested that audio-visually recorded statements of a testifying witness who is subject to cross-examination at trial -- that the jury can view for itself -- might be worthy of substantive effect and justifiably affect Rule 29 practice. The Committee member expressed some uncertainty regarding the Department of Justice proposal to include acknowledged witness statements in an amendment. The Reporter suggested that the Department's acknowledgement proposal should be included in the rule, if it were released for public comment, in brackets to signal that the Committee had not endorsed the acknowledgement option, but was seeking input from the public concerning it. He noted that this was done with the selective waiver provision of Rule 502 that did not ultimately find its way into the rule as enacted.

Another Committee member asked whether there is data suggesting that jurors do not understand limiting instructions regarding prior inconsistent statements offered for impeachment only. The Reporter noted that there was such data, involving mock juries, as well as judicial experience. The Committee member suggested that jurors do understand when instructed clearly. Another Committee member expressed concern about the voluminous dockets of the federal trial courts and the possibility that the proposed rule could increase the volume of cases requiring evidentiary hearings or trial. The Committee member noted the high volume of prisoner cases that could be impacted by an amended rule. The Reporter suggested that recordings submitted by plaintiffs in prisoner litigation would reflect anticipated testimony at a new trial that might necessitate evidentiary hearings, even without Rule 801(d)(1)(A).

The Chair again expressed skepticism about the proposal, noting concerns about Rule 29 practice in criminal cases and summary judgment practice in civil cases, concerns about plea bargaining impact and increased litigation costs surrounding the Rule. Although she doubted whether a change was worth the candle, she noted that social science has shown that jurors do not understand limiting instructions and noted the results of the Federal Judicial Center survey revealing that the majority of trial judges favored the change. The Chair noted that the Committee could send it out for public comment or table the idea for two years. Another Committee member queried what the standard for releasing a proposal for public comment should be. Judge Campbell noted that there are many potential standards, but that the consensus on the Standing Committee was that the public comment process should not be used as a research tool. On the other hand, if the Advisory Committee thinks the Rule is probably a good idea depending upon what public comment reveals, that is a sound basis for forwarding a proposal. The Reporter noted that the Rule 801(d)(1)(A) proposal certainly had not been rushed to public comment given several years of research, an FJC survey, two symposia, and Committee consideration at six consecutive meetings. Professor Coquillette noted that the risk of sending something forward to the Standing Committee improvidently was a loss of credibility for the Advisory Committee. The Reporter observed that negative public comment has been a catalyst for effective rule changes; in 2006 a proposal to amend Rule 408 to allow civil settlements to be admissible in criminal cases was released at the urging of the Department of Justice. The Reporter noted that very negative commentary fostered a compromise rule, which is now in effect. The Chair opined that tabling the proposal would provide the Committee more time to see how body and dash cameras, as well as cell phone recordings affect trials in the future.

The Reporter explained that the question for the Committee was whether to send the proposal forward to the Standing Committee to be released for public comment or to remove it from the Committee's agenda. A Committee member made a motion to refer the proposed amendment to the Standing Committee with the acknowledgement provision included in brackets for release for public comment. The Committee voted 5-4 *in favor* of sending the proposed amendment to the Standing Committee. The Committee then proceeded through the proposed Committee note to determine which portions of that note would advance with the proposed rule, and reached agreement on a Committee Note.

However, following lengthy discussion by the Committee of potential amendments to Rules 807, 606, and 404(b) [detailed below], and after the lunch break, Rob Hur of the Department of Justice was recognized by the Chair. Mr. Hur stated that he was moved by the many good points made in opposition to the proposal to amend Rule 801(d)(1)(A), particularly those made by the Federal Public Defender. Having consulted with Betsy Shapiro and Andrew Goldsmith, Mr. Hur changed the Department of Justice vote on the proposed amendment from one in favor to one against, making the vote tally 5-4 *against* the proposed amendment, thus defeating it. Therefore, Rule 801(d)(1)(A) was not referred to the Standing Committee for release for public comment.

VI. Rule 807 Approved

After the Committee reviewed all revisions to the proposed amendment to Rule 807, it was unanimously approved for transmission to the Standing Committee, with the recommendation that it be sent to the Judicial Conference for approval.

The text and Note of the Rule, a GAP report, and a summary of public comment, are attached to these Minutes.

VII. Rule 606(b) and *Pena-Rodriguez*

The Chair next raised the Rule 606(b) ban on juror testimony about deliberations, and the impact of the Supreme Court's 2017 decision in *Pena-Rodriguez v. Colorado*. The Court in *Pena-Rodriguez* held that Rule 606(b) could not be applied to bar testimony of racist statements about the defendant made in juror deliberations --- such a bar violated the defendant's Sixth Amendment right to a fair trial. The Chair noted that the Committee had discussed three potential amendments to Rule 606(b) to bring the rule text in line with *Pena-Rodriguez* at its spring 2017 meeting, and had tabled the issue after discussion. Rule 606(b) was back on the Committee's agenda again to consider the need for an amendment to reflect the holding. The Chair explained that if the Committee decided not to take action on Rule 606(b) at this meeting, the topic would be tabled for at least a year to observe the case law developing in the wake of *Pena-Rodriguez*.

The Reporter directed the Committee's attention to a digest of federal cases interpreting *Pena-Rodriguez*, and observed that courts have declined to expand the exception to the no-impeachment rule beyond that holding --- which was limited to statements of racial bias toward the defendant in jury deliberations. He then briefly outlined the potential amendments previously considered by the Committee, including an amendment that would expand an exception beyond that required by *Pena-Rodriguez*, one that would seek to codify the racial animus exception from *Pena-Rodriguez* narrowly in rule text, and a generic amendment that would create an exception to the no-impeachment rule for evidence required by the Constitution. The Committee previously rejected both the expansive and narrowly-tailored potential amendments as problematic, and at the meeting it focused on the more generic constitutional exception in the rule that would flag the *Pena-Rodriguez* issue for litigators consulting only rule text.

Two possibilities have been considered. First, an amendment that makes an exception to the no-impeachment rule "when excluding the testimony would violate a party's constitutional rights." This generic constitutional exception would be modeled upon the one that currently exists in Rule 412(b)(1)(c). Due to concern in the Committee at the spring 2017 meeting that a generic constitutional exception in Rule 606(b) could be read to expand upon *Pena-Rodriguez* and to permit post-verdict juror testimony in any case where a defendant claims violation of a "constitutional right" by the jury, a Committee member suggested using the restrictive language of the AEDPA in a Rule 606(b) amendment to avoid such an expansive reading. Such an amendment would allow juror testimony about deliberations when "excluding the testimony would violate clearly established constitutional law as determined by the Supreme Court of the United States." This proposal was suggested as a way to send up a red flag or at least a yellow light for courts considering using Rule 606(b) to expand beyond the holding in *Pena-Rodriguez*. The Reporter explained that the use of the AEDPA language would be problematic due to its substantive restriction on lower courts and suggested that a generic constitutional exception like the one in Rule 412 was a better solution for the Committee to consider. The Chair and the Committee agreed that the AEDPA alternative would not work, and proceeded to reconsider the generic constitutional exception.

The Reporter also brought to the attention of the Committee a law review note to be published in the Columbia Law Review on *Pena-Rodriguez* that chronicled the Advisory Committee's inaction on Rule 606(b). The note advocated expansion of the *Pena-Rodriguez* exception to the no-impeachment rule beyond racist statements and favored a general constitutional exception in Rule 606(b) that would accommodate such future expansions. The Chair reiterated that the goal of the Committee was to raise the *Pena-Rodriguez* issue for the trial lawyer consulting only the text of evidence rules, without suggesting expansion.

Judge Campbell expressed concern that even a generic constitutional exception would invite lawyers to seek expansion of the *Pena-Rodriguez* holding. He posited a case in which a defendant claims that the jury violated his constitutional rights and points to a constitutional exception to Rule 606(b) to show that the court must hear juror testimony. Judge Campbell suggested that the lack of an exception in Rule 606(b) currently helps courts hold the line on *Pena-Rodriguez* because courts can point to the prohibition in the Rule as support for the idea that no other exceptions exist. If the Committee removes that constraint, he suggested that courts might feel compelled to expand to create exceptions to Rule 606(b) for other constitutional violations. The Reporter noted that the Committee note accompanying an amendment would explain that no expansion was intended. The Reporter also reiterated that courts are finding that *Pena-Rodriguez* did not create constitutional rights outside the narrow circumstance it recognized, meaning there is no other constitutional right to introduce post-verdict juror testimony.

Judge Furman noted that there is a recognized constitutional right not to have the jury draw an adverse inference from a defendant's silence. If a defendant claims that right was violated in the jury room, Judge Furman queried why an amended Rule 606(b) wouldn't also allow juror testimony on that point. The Reporter responded that courts had already rejected such arguments after *Pena-Rodriguez* and that nothing in any Evidence Rule could determine substantive constitutionality.

A Committee member suggested that Judges Campbell and Furman made compelling points and that it would be difficult for a court to refuse to take juror testimony about other constitutional violations with an amended Rule 606(b) containing a generic constitutional exception. The Committee member stated that the proposal to amend Rule 606(b) was rightly tabled by the Committee in the spring of 2017 to avoid potential expansion by rule.

The Reporter emphasized that it is not optimal to have an evidence rule that could be applied unconstitutionally, and queried whether the language of an amendment might be tweaked to provide some signal in rule text without suggesting any expansion of *Pena-Rodriguez*. Another Committee member suggested that the only way to truly prevent expansion would be to reference *Pena-Rodriguez* in rule text. The Reporter suggested that it would not be appropriate rulemaking to have an amendment that specifically referenced a case, and moreover that to so would be to risk the possibility that another amendment would be required should the Supreme Court expand upon the *Pena-Rodriguez* exception.

Other Committee members, after this discussion, agreed that a potential constitutional exception was problematic and that tabling the issue was appropriate. The Chair wrapped up the

discussion by noting that the issue would be tabled for one to two years to allow more time for case law to develop before the Committee reconsidered action on Rule 606(b).

VIII. Possible Amendment to Rule 404(b)

The Chair next turned the Committee's attention to potential amendments to Rule 404(b) that had been considered in light of recent Seventh and Third Circuit cases limiting admissibility of evidence of uncharged misconduct in criminal cases. The Chair explained that four different proposals remained on the Committee's agenda: 1) a proposal to restrict use of the "inextricably intertwined" doctrine that takes prior act evidence outside the protections of Rule 404(b); 2) a substantive amendment requiring judges to exclude bad act evidence offered for a proper purpose, where the probative value as to that purpose proceeds through a propensity inference; 3) a proposal to add the balancing test from Rule 609(a)(1)(B) to Rule 404(b) to require that the probative value of prior act evidence offered against a criminal defendant outweigh unfair prejudice; and 4) a proposal to expand the prosecution's notice obligation in criminal cases. The Chair explained that she met with the Reporter prior to the meeting in an effort to streamline the Committee's consideration by subjecting each proposal to an independent determination and vote by the Committee.

The Chair first addressed the "inextricably intertwined" proposals. She stated that the inextricably intertwined doctrine in the courts is problematic, partly due to the variable terminology adopted by courts employing it (including acts that "pertain" to the charged crime, those that are "integral" to the charged crime, those which "complete" the story of the charged crime, or are "intrinsic" to the charged crime). The proposal before the Committee to limit the inextricably intertwined doctrine was an amendment requiring all acts "indirectly" proving the charged crime to proceed through Rule 404(b). The Chair concluded that such an amendment would not be workable or helpful in applying Rule 404(b), particularly because it might sweep any and all conduct apart from the act specifically charged into a Rule 404(b) analysis. The Chair gave an example of a defendant fleeing the scene of the charged crime as indirect evidence that would have to proceed through Rule 404(b) if such an amendment were adopted. One Committee member noted that the inextricably intertwined doctrine is important in determining which acts of a defendant are "other" acts for purposes of Rule 404(b) and opined that the restyling project was wrong to move the word "other" (to read "crimes, wrongs or other acts" instead of "other, crimes, wrongs or acts"). That Committee member suggested that if any other amendments to Rule 404(b) are proposed, the word "other" should be relocated to its former position. The Reporter agreed that a change might be made if other amendments were proposed, but noted that such a change would not affect the case law on inextricably intertwined acts, because courts would still need to decide which acts were "other" regardless of the placement of the term. The Reporter also noted that the style change did not result in any change in the courts in the application of the inextricably intertwined doctrine.

The Committee determined that it would no longer proceed with any attempt to rectify the "intextricably intertwined" doctrine through an amendment to Rule 404(b).

The Chair then recommended that the Committee remove from the agenda the proposal to bar admission of uncharged misconduct unless the court found the evidence probative of a proper

purpose by a chain of reasoning that did not rely on any propensity inferences. She noted that the proposal came from the Seventh Circuit's opinion in *United States v. Gomez*. She expressed skepticism that a required "chain of non-propensity inferences" could be a workable requirement. She suggested that requiring a trial judge to find a chain of non-propensity inferences sounded more like taking an evidence exam than managing a trial. She further suggested that the original Advisory Committee had rejected "mechanical solutions" in drafting Rule 404(b) and had rejected the notion that there was a truly binary distinction between a "propensity use" and use for a proper purpose -- to show "intent" for example. The line between intent and propensity is often difficult if not impossible to draw. The Chair concluded that *Gomez* made the exercise in eliminating propensity inferences sound easy and straightforward when it often is not.

One Committee member suggested that Rule 404(b) is the most critical rule of evidence in a criminal case and that the real reason that other acts are offered is in fact to suggest the defendant's propensity to commit crimes. In this Committee member's opinion, this evidence improperly tips the scales significantly against the defendant, and so the prosecution ought to bear a heavier burden in establishing admissibility. The member concluded that incorporating the *Gomez* test would not be too burdensome on judges, and that the amendment should be adopted. The Federal Public Defender agreed, stating that Rule 404(b) evidence is by far the most prejudicial evidence offered in criminal trials. He noted that proof of Rule 404(b) acts often consumes far more time at trial than proof of the charged offense. He further contended that the instruction given to jurors regarding the use of Rule 404(b) evidence is incomprehensible and offers defendants no protection.

Rob Hur noted that the Department shared the Chair's concerns that requiring articulation of the chain of reasoning would be unworkable. He opined that a review of pre-trial transcripts reveals that trial courts are already putting the burden on prosecutors to demonstrate the admissibility of this evidence and that Rule 404(b) issues are thoroughly flushed out at the trial level. Mr. Hur further stated that the recent shift in Circuit precedent was having an effect on prosecutorial behavior vis a vis Rule 404(b). Prosecutors know they need to follow the Rule and defend the admissibility of the evidence on appeal. Therefore, he argued that the courts are resolving these issues appropriately and no amendment is necessary. The DOJ did concede that an amendment to the notice provision of Rule 404(b), to codify what the Department is already doing to ensure that defendants receive timely and proper notice, might be viable.

In response to the suggestion that further development in the courts would resolve any problems with Rule 404(b), the Reporter pointed to a recent opinion in the Tenth Circuit, *United States v. Banks*. In that case, the court acknowledged recent efforts to analyze other acts carefully in other circuits, but rejected this trend and held summarily that drug crimes are admissible in the Tenth Circuit to show knowledge. The Reporter suggested that cases like *Gomez* might arguably go too far in preventing use of other act evidence through Rule 404(b), but that other circuits may continue to do too little to prevent misuse. He suggested that an amendment that falls somewhere in between these divergent approaches may be optimal. Mr. Hur cautioned that Congress may get involved if the Committee chose to pursue an amendment limiting admissibility of Rule 404(b) evidence.

The Chair highlighted another recent Tenth Circuit opinion, *United States v. Henthorn*, in which the government was permitted to offer evidence to show that the defendant's first wife died

alone in his presence in very suspicious circumstances, to rebut the defendant's argument that his second wife's death while alone with him in suspicious circumstances was an unfortunate accident. She noted that the relevance of the prior accident turned to some degree on the doctrine of chances --- it is highly unlikely that one husband would lose two wives in such similar and tragic circumstances by accident. But she also explained that some suggestion of the defendant's propensity to kill his wives might be found in the evidence. She noted that Wigmore opined that there should be room for a difference of opinion. The Chair explained that the propensity ban in *Gomez* failed to account for that difference of opinion and could confuse trial judges.

A motion to remove the non-propensity inference requirement from discussion passed by a vote of 6-3.

The next amendment alternative discussed was a proposal to add a new balancing test to Rule 404(b) requiring the probative value of other acts evidence offered against a criminal defendant to outweigh unfair prejudice. The Reporter explained that this alternative would offer a more flexible solution that avoids the mechanical tests rejected by the Advisory Committee Note to the current rule, and would avoid any rigid requirement of a chain of non-propensity inferences. He noted that the proposed balancing test would not be a true "reverse" balancing because it would not require probative value to "substantially" outweigh prejudice. Instead, it would be the same balancing test found currently in Rule 609(a)(1)(B), that protects criminal defendants from similar character prejudice. He suggested that it made good sense to have similar balancing tests governing Rule 404(b) and Rule 609(a)(1)(B) evidence offered against criminal defendants because the two rules deal with similar character concerns. He further explained that Congress crafted the protective test in Rule 609(a)(1)(B) that could be usefully applied to Rule 404(b) evidence as well. The Reporter explained that making the balancing test slightly more protective would eliminate the characterization of Rule 404(b) as a rule of inclusion --- a characterization that has resulted in almost per se admission of prior offenses in many federal drug prosecutions. Still, the balancing test would continue to permit probative other acts to be admitted. The Reporter noted that there is support for such a balancing test in pre-Rules cases and that the Uniform Rules of Evidence and some states employ the more protective standard.

Rob Hur from the Department of Justice noted that the applicable balancing represents a policy choice about Rule 404(b) evidence and that Congressional adoption of Rule 404(b), limited only by the standard Rule 403 balancing test, is reason enough to reject a balancing amendment. Another Committee member expressed concern that a balancing amendment would not help courts deal with the issue of what counts as prejudice and whether propensity uses are permissible. That Committee member suggested that no change be made unless it is one to fix the concern about other acts offered for propensity purposes. The Reporter responded that a balancing test requiring the prosecution to demonstrate that probative value outweighs bad character prejudice would do a better job of protecting defendants from improper uses of Rule 404(b) evidence. Another Committee member questioned whether having the same test for Rules 404(b) and 609(a)(1)(B) was appropriate, given that the past convictions are offered for impeachment only under Rule 609, but can be offered on the merits under Rule 404(b).The Reporter responded that the prejudice in both instances is the same, and that the different goals in admitting the evidence is factored in as part of the consideration of probative value --- so that there is no reason not to apply the same test for both situations.

The Chair asked for a straw vote on whether to continue discussing a balancing amendment or whether to remove it from the agenda. The Committee voted 5-4 to continue discussing the balancing alternative.

One Committee member queried why the test to protect criminal defendants from character prejudice in Rule 609(a)(1)(B) should differ from the balancing test in Rule 404(b), apart from historical practice. The Chair noted that Rule 404(b) helps the prosecution sustain its burden of proof, while Rule 609 pertains to impeachment only. The Reporter then noted that decisions about balancing and protections are indeed policy decisions commonly underlying rules of evidence like Rule 412. The policy underlying the balancing amendment of Rule 404(b) would be living up to our commitment to try cases and not people. Judge Lioi commented that the Rule 403 factors serve that purpose well and put the government through its paces, to which the Reporter responded that the proposed balancing test would utilize the identical factors but would simply replace the Rule 403 balance favoring inclusion with one requiring probative value to outweigh prejudice. Another Committee member noted that an amended balancing test would ensure that Rule 404(b) is a rule of exclusion and not inclusion. The Reporter noted that it would be a rule of "mild exclusion" where it would simply require probative value to overcome prejudice to even a slight degree to be admitted.

The Chair then stated that Rule 404(b) is not a rule of exclusion. Instead, it prohibits one inference that a defendant is a bad person due to past misdeeds. She opined that other act evidence relevant to anything other than that bad character inference is admissible subject to Rule 403. She further argued that young prosecutors are so nervous about overstepping with Rule 404(b) evidence that they often limit comments on such evidence in closing argument to brief statements that the evidence is admissible to prove "intent" for example. The Chair concluded that the balancing test should not be made more protective because it might limit the admissibility of evidence prosecutors need to prove a case.

The Reporter noted that the courts permissively admitting other act evidence under the Rule 403 standard are not necessarily ruling incorrectly because that standard favors admissibility so heavily. The question raised by a balancing alternative is whether Rule 404(b) should allow evidence of other acts to come in as freely as it does. Although the drafters of Rule 404(b) limited it only with Rule 403, the Reporter emphasized that there is much less legislative history regarding Congressional intent for Rule 404(b) than there is regarding the proposed balancing test found in Rule 609. Therefore there should not be substantial concern about overriding congressional intent.

At the conclusion of these remarks, another straw vote was taken on whether to proceed with consideration of a balancing amendment. The Committee vote was 7-2 against continuing consideration of a balancing amendment.

The Committee then discussed the final potential amendment to Rule 404(b) – changes to the notice provision in criminal cases. The Reporter explained that a proposal to eliminate the requirement that the defense request notice in criminal cases had already been unanimously approved by the Committee. The Reporter also called the Committee's attention to a proposed amendment to the notice provision circulated to the Committee by the DOJ prior to the meeting.

This provision would require a prosecutor to "provide reasonable notice of the general nature of any such evidence." It would also require a prosecutor to "articulate in the notice the non-propensity purpose for which the prosecutor intends to offer the evidence and the reasoning supporting the purpose." Finally, it would require the prosecution to provide notice "in writing" before trial or during trial "if the court, for good cause, excuses lack of pretrial notice."

Committee members raised concerns about requiring the prosecution to provide notice of only the "general nature" of Rule 404(b) evidence. Some discussion was had about requiring the government to disclose "the substance" of the evidence to make the Rule 404(b) notice provision consistent with the notice provision in the proposed amendment to Rule 807. Concern was also raised about the lack of any timing requirement for the notice. Some suggested that requiring notice 14 days in advance of trial could be superior, although Mr. Hur thought a timing requirement could prove rigid and unworkable. The Reporter suggested that the language used in the proposed amendment to Rule 807 requiring disclosure sufficiently before trial to allow the opponent to meet the evidence could be a useful solution to the timing issue, and would promote uniformity in the Rules. Other Committee members agreed that trial judges set deadlines in pre-trial orders and that including a 14-day limit in rule text was unnecessary.

The Federal Public Defender commented that prosecutors commonly provide the minimum notice possible and resist all efforts by the defense to obtain more information. He noted that there is a great deal of needless litigation over who the Rule 404(b) witness will be and what act will be proved and that prosecutors rely on the terms "general nature" in Rule 404(b) to defend minimal notice. The Reporter queried whether use of the term "substance" would represent an improvement over "general nature." The Department of Justice suggested that the articulation requirement in the proposed notice provision would resolve the existing concerns over the quality of the notice. The Federal Public Defender did not think the articulation of reasoning requirements would necessarily help in identifying the specific act to be proved and thought that a "particulars" or "specific details" requirement would be superior. Judge Furman suggested putting the term "substance" together with the "fair opportunity to meet the evidence" qualification to address the problem. Judge Campbell suggested deleting the required description of the act in the notice and simply stating that the prosecutor must provide "reasonable notice of any such evidence" --- which all agreed was workable. Committee members agreed that requiring notice in writing sufficiently in advance of trial "to give the defendant a fair opportunity to meet the evidence" would be a good solution to the timing issue as well. The DOJ noted that the good cause exception to the notice requirement should apply to all of the prosecutor's obligations (including articulation). The Reporter explained that the good cause exception was made applicable to all notice obligations due to its placement at the conclusion of all notice requirements, and that the Committee Note could emphasize that the good cause exception would go to articulation as well as timing.

The Committee voted unanimously to approve the amendment to the notice provision of Rule 404(b).

The Reporter then took the Committee through the text of Rule 404(b) and a proposed Committee Note that was set forth in the agenda book. During that discussion, one Committee member proposed moving the word "other" in the heading of Rule 404(b) and in the text of Rule 404(b)(1) to return the word to its correct pre-restyling position; "Other crimes, wrongs, or

acts." The Committee unanimously agreed with this proposal. The Reporter also recommended changing "Permitted Uses" in the heading of Rule 404(b)(2) to "Other Uses." He explained that headings were added to the Rule as part of the restyling and that "Other Uses" more accurately reflects the operation of Rule 404(b)(2). The Committee tentatively agreed with this proposal.

The Committee generally approved the proposed Committee Note, subject to further wordsmithing after the meeting. After discussion by email, the following changes were made to the proposal:

- "Permitted uses" in the heading of Rule 404(b)(2) would be retained.
- Two changes proposed by the Style Subcommittee to the Standing Committee would be implemented.
- The good cause provision would be amended to provide, consistently with Rule 807, that if the court finds good cause to allow notice during the trial, that notice can be given in any form.
- Minor changes to the Committee Note were made to clarify that the good cause exception as to articulation would apply to additional proper purposes that became evident after notice was provided.

The Committee, by email, unanimously approved the text and the Committee Note of the proposed amendment to Rule 404(b). The proposed amendment will be submitted to the Standing Committee with the recommendation that it be released for public comment.

The Committee resolved that it would revisit certain questions during public comment, such as whether notice provided after trial has begun (upon a showing of good cause) must be made in writing, and whether the Committee Note should be changed with respect to good cause and the articulation requirements.

The text and Committee Note of the proposed amendment to Rule 404(b) is attached to these Minutes.

IX. Possible Amendment to Rule 106

The next item on the agenda for the Committee's consideration was a potential amendment to the Rule 106 rule of completion. The amendment would rectify a conflict in the courts over the admissibility of otherwise inadmissible hearsay to complete misleading statements, and would include oral statements within the coverage of Rule 106. The Reporter reminded the Committee that Judge Paul Grimm had raised these problems about Rule 106 for the Committee's consideration, and directed the Committee's attention to Judge Grimm's thoughtful opinion on the issues in the agenda materials.

The Reporter explained that the hearsay issue relates to a very narrow circumstance in which the government offers a portion of a defendant's statement that is misleading (as a statement of a party opponent under Rule 801(d)(2)(A)) and the remainder of the statement is necessary for completion --- but is hearsay. Some courts find that the hearsay rule bars the defendant's attempt to admit the remainder of his own hearsay statement through Rule 106 to correct the distortion, because a defendant may not admit his own hearsay statement under Rule 801(d)(2). In those

cases, the unfairness created by the government's misleading presentation of a partial statement goes uncorrected. The question for the Committee is whether this result is appropriate under the traditional "door-opening" approach of the evidence rules that seeks to ensure that adversaries are not prejudiced by a misleading presentation of evidence.

The Reporter explained that Rule 502(a), regarding subject matter waiver of privilege, borrowed the language of Rule 106 exactly and embodies the same principle: that a misleading use of privileged information by one side allows the opponent full access to privileged materials on the same subject to correct any distortion. He argued that it was difficult to understand why the government should be permitted to lodge a hearsay objection to prevent needed completion of a misleading statement, when similar behavior by a litigant is sufficient to waive privilege. An amendment would be necessary to address the cases in which courts prevent defendants from correcting a misleading partial statement due to the rule against hearsay.

One option previously discussed by the Committee would be to amend Rule 106 to allow the completing statement to be admitted solely for its not-for-truth purpose in showing the full "context" of the partial statement already admitted. The Reporter suggested, however, that the "context" option would be problematic in that the parties would not be left on equal footing: the government could argue the truth of the misleading portion of the statement, while the defendant could not argue the truth of the completing portion. The only way to a fair result would be to allow the completing statements to be admissible for their truth. Otherwise the proponent is given an advantage from a misleading presentation.

The Reporter also noted that, prior to a style amendment designed to make Rule 106 gender neutral, the language of Rule 106 required the *proponent* of the original partial and misleading statement to admit the completing portion of the statement at the same time the misleading portion was admitted. If the government were required to admit the completing statement itself, the hearsay objection would be eliminated because the government would be offering the defendant's entire statement through Rule 801(d)(2)(A), as a statement by a party-opponent. That prior version of the Rule suggests that Congress did not intend to have the hearsay rule prevent completion of a misleading partial statement. Moreover, the legislative history indicates that Congress rejected a DOJ request to provide in Rule 106 that the completing statement had to be independently admissible.

Judge Furman suggested that a return to the language requiring the original proponent to do the completing would be a good alternative to an amendment that would allow the opponent's completion over a hearsay objection. This would avoid establishing a hearsay exception outside the context of Article 8 of the Federal Rules. The Reporter expressed concern that a return to the old provision might be too subtle to correct the unfair result in some of the recent cases. A Committee member stated that requiring the proponent to do its own completing would not be too subtle and would represent a more surgical solution to the problem than a broader hearsay exception would.

Another Committee member noted a footnote in Judge Grimm's opinion on Rule 106 stating that the Advisory Committee had voted unanimously against an amendment to address these issues in 2002-2003, finding that the costs of an amendment exceed its benefits due to judicial handling

of the issues. The Reporter explained that amendments to Rule 106 had come up in 2002 and again in 2006, but were rejected due to other more pressing rulemaking priorities at the time. He noted that recent cases allowing misleading partial statements to go uncorrected present a more significant conflict and concern in the case law. The Chair queried whether the conflict is confined to the Sixth and Ninth Circuit, and whether everyone else is basically getting it right. The Reporter noted prior amendments designed to correct even lesser conflicts and concluded that an amendment would be the only way to correct the unfairness in the Circuits that allow a misleading partial statement to go uncorrected, given the many years in which this conflict has gone uncorrected.

The Chair agreed that the function of the Advisory Committee is to resolve conflicts, but advocated proceeding slowly. She expressed reluctance to propose a hearsay exception for completing statements and more interest in a housekeeping amendment that would require the party offering a misleading portion to also offer the completing remainder --- without creating a broader hearsay exception. The Chair noted that the Department of Justice had proposed limiting completion to circumstances in which the original portion is "misleading." The Reporter noted that Judge Grimm thought that limiting the rule to "misleading" statements would be workable.

Judge Furman reiterated his proposal to return to the language of Rule 106 requiring the original proponent to complete the proffered statement, to be accompanied by Advisory Committee notes explaining that hearsay is not a bar to completion and that the Committee was returning to the original language to resolve the split in the cases. Judge Campbell expressed the concern that opponents would use such a requirement as a tactical advantage to interrupt the proponent of a statement repeatedly to demand completion. Judge Furman noted that the Rule 106 existing requirement that completion is required only in narrow circumstances would limit such interruptions. The Reporter stated that limiting Rule 106 to "misleading" statements expressly might further clarify that the Rule is limited in scope.

The Chair asked the Committee whether it was interested in considering an amendment requiring the proponent to do its own completion, with a "misleading" limitation added to the rule text. The Committee voted to consider such a proposal for the next meeting with a Committee note explaining that there "can be no hearsay objection because the proponent is required to introduce the completing portion."

The discussion then moved to whether oral statements should be covered by Rule 106. The Chair noted that Rule 106 currently applies only to written or recorded statements and that Judge Grimm advocates extending Rule 106 to cover oral statements needed to complete misleading statements. She noted that many courts allow completion of oral statements through their inherent Rule 611(a) authority, but that the question was whether to bring oral statements under the umbrella of Rule 106. The Reporter noted that one concern that had been raised about completing oral statements was the difficulty in proving the content of an oral statement. He noted that Judge Grimm thought that extensive and distracting inquiries into the content of an oral statement could be prevented by the trial judge through Rule 403 --- and that courts have done so. The Reporter further questioned why the difficulty in proving the content of completing oral statements should foreclose their use, when the difficulty in proving the content of the oral statement originally offered by the proponent poses no obstacle to its proof.

Committee members discussed practical problems in the completion of oral statements testified to by a witness and how they might be handled at trial. Judge Lioi noted that the most common statements sought to be corrected at trial appear in depositions or in transcripts of wiretap recordings. In those cases, she explained, the trial judge knows exactly what was said, can see whether a proffered portion is misleading, and decide how much of the remainder is necessary to complete. Extending Rule 106 to oral statements might open up a can of worms because it would allow completion without providing the judge access to this crucial information needed to rule on this issue. The Reporter stated that an Advisory Committee Note would be useful in giving the court guidance that trial judges should decline to consider completion of oral statements if problems of proof become too complicated and time-consuming. Andrew Goldsmith from the DOJ noted that Criminal Rule 16 ensures pre-trial notice of any oral statements of the defendant that will be offered at trial, meaning that disputes about completion should not arise on the fly in the heat of trial. The Reporter remarked that such pre-trial disclosures should make completion issues surrounding a defendant's oral statements easier to resolve.

The Committee voted to continue consideration of an amendment to Rule 106 that would add oral statements to the rule at its next meeting. The Reporter agreed to write up amendment alternatives for the fall meeting including a hearsay exception proposal, a requirement that the proponent complete to avoid the hearsay issue, the addition of the limiting term "misleading," and the addition of oral statements to Rule 106.

X. Proposed Amendments to Rule 609(a)(1)

The Chair explained that there were multiple proposals on the table concerning Rule 609(a)(1) and the use of a criminal defendant's non-dishonesty felony convictions to impeach his trial testimony. She noted that there are only a small number of states with greater protections for criminal defendants, and that the vast majority of states are following the federal approach. The Reporter noted that the first alternative to an amendment was to prohibit non-dishonesty felony impeachment of criminal defendants --- or even more broadly to abrogate Rule 609(a)(1) entirely. The Committee at the previous meeting, however, expressed reluctance about such bans, as in tension with the hard-fought compromise in Congress that resulted in Rule 609(a).

The Chair asked whether Committee members wished to discuss an abrogation alternative. No interest was expressed in pursuing abrogation and no further discussion about an amendment abrogating Rule 609(a)(1)(B) impeachment was had.

The Reporter noted another potential amendment, suggested by Professor Ric Simmons, to limit Rule 609(a)(1) impeachment to theft convictions. Michigan follows this approach. The Reporter explained that such an amendment would allow impeachment with the non-dishonesty felony convictions most probative of untruthfulness --- like theft and receipt of stolen property --- while eliminating impeachment with less probative felonies like assault and sex crimes. The Reporter recognized that there could be some difficulty in defining the crimes to be included in a theft-related amendment (such as receipt of stolen property) but a Committee Note might be useful in defining such crimes. A Committee member opined that crimes such as drug distribution should not be absolutely barred, because they are often indicative of a life of underhandedness that could

be probative for impeachment. The Chair noted that defense counsel in criminal cases frequently impeach prosecution witnesses with felony convictions that are not theft-related, and suggested that defendants it would not be advisable to abrogate impeachment for these witnesses, or solely for the criminal defendant. The Committee thereafter rejected a potential amendment to Rule 609(a)(1) that would limit felony impeachment to theft-related offenses.

The Reporter then raised the possibility of an amendment to the balancing test in Rule 609(a)(1)(B) suggested by Professor Jeff Bellin. A small adjustment to the balancing test could restore congressional intent to protect defendants from routine felony impeachment and provide defendants with prior convictions a more meaningful opportunity to testify. This revision would require courts to consider the marginal impeaching value of prior felony convictions in light of the inherent bias of a criminal defendant testifying to evade conviction. Professor Bellin notes that a defendant is already significantly impeached by his desire to avoid punishment and that the probative value of prior felony convictions is reduced by this alternative impeaching factor. A balancing test that expressly requires courts to take the defendant's bias into account would result in a more accurate assessment of probative value. Professor Bellin has also suggested that courts should be strongly cautioned against admitting prior felonies similar to the current charges for the purpose of impeachment. The Reporter noted that the extensive digest compiled in the agenda materials on Rule 609(a)(1)(B) rulings demonstrates that courts frequently admit similar crimes for impeachment purposes. The Reporter described data compiled by Professor Bellin indicating that jurors do not limit consideration of prior felonies to impeachment, do not follow limiting instructions as to impeachment, and that jurors punish defendants who choose to remain off the stand to avoid impeachment with a silence penalty notwithstanding instructions not to do so.

Judge Campbell contended that the suggested modifications to the Rule 609(a)(1)(B) balancing test seemed pretty prescriptive and would micromanage a trial judge's balancing process unduly. Further, Judge Campbell thought that including some specific factors for consideration might suggest the omission of others, making the amended test underinclusive. In the end, he did not see why it would be advisable to mandate specifics for trial judges applying this balancing test. The Reporter agreed that it may not have been necessary to include such specifics in the initial rule, but that evidence from the cases shows that judges are not properly accounting for these factors such that spelling them out now may be necessary. Moreover, the proposed amendment focuses on marginal probative value and the similarity of the conviction to the crime charged, but does not purport to limit the court's use of other factors.

The Chair stated that trial judges don't think in terms of "marginal probative value," but evaluate impeachment in light of the defendant's position on the stand and in the hurly burly of the courtroom. The Reporter responded that the reported cases belie that notion --- they indicate that the courts do take account of other matters affecting marginal probative value (such as other convictions) but not the self-interest of the defendant.

The Chair expressed her view that it was inadvisable to micromanage trial judges in their assessments of probative value and prejudicial effect. No Committee member provided further discussion or moved for the adoption of a proposed amendment to the balancing test. In the absence of any further comment, the Chair stated that the proposed amendment to the balancing test would

be tabled. The Reporter noted that he had hoped for a more robust Committee exchange on potential amendments to Rule 609(a)(1)(B), particularly with regard to the balancing test.

XI. Rule 611 and Illustrative Evidence

The final item on the agenda originated with a proposal from a law review article suggesting that the Committee should adopt a rule on the use of illustrative evidence at trial. The line between "demonstrative" evidence, used substantively to prove disputed issues at trial, and "illustrative" evidence, offered solely as a pedagogical aid to assist the jury in understanding other evidence, is a difficult one to draw. An idea for a draft of an amendment to Rule 611 was included in the agenda materials to govern the use of truly "illustrative" evidence at trial. This draft rule was not designed as a proposal for the Committee, but was included to give the Committee an idea of what might be done if it wished to consider the matter further. The draft amendment was placed in Rule 611 because courts typically find authority to regulate illustrative evidence in Rule 611(a). The draft would not cover demonstrative evidence at all, but would regulate the use of illustrative aids. It would prohibit a judge from sending an illustrative aid to the jury during deliberations absent the consent of all parties.

Judge Campbell asked whether there is any indication that courts are confused about these issues. The Reporter noted that there is some confusion in the cases regarding the distinction between demonstrative and illustrative evidence, and also between pedagogical summaries and those substantively admissible under Rule 1006. The Reporter opined that there was not a crying need for an amendment, but that there could be value in providing organizing principles around illustrative evidence. The Chair asked for the experience of the trial judges in the room with respect to illustrative aids. There was a consensus among judges that illustrative aids present no significant difficulty and that there is no need for a rule covering their use. Several members of the Committee noted, however, that they found the Maine rule on illustrative evidence and the thoughtful accompanying legislative notes, which were included in the agenda materials, to be extremely valuable.

XII. Closing Matters

The Committee thanked the Reporter for the immense amount of work he put into the excellent agenda materials and the meeting was adjourned.

XIII. Next Meeting

The fall meeting of the Evidence Rules Committee will be held at the University of Denver in Colorado on Friday, October 19, 2018.

Respectfully submitted,

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Daniel J. Capra