Advisory Committee on Evidence Rules

Minutes of the Meeting of April 3, 2012

Dallas, Texas

The Judicial Conference Advisory Committee on the Federal Rules of Evidence (the "Committee") met on April 4, 2012, at the SMU Dedman School of Law, in Dallas, Texas.

The following members of the Committee were present:

Hon. Sidney A. Fitzwater, Chair
Hon. Brent R. Appel
Hon. Anita B. Brody
Hon. John A. Woodcock, Jr.
William T. Hangley, Esq.
Marjorie A. Meyers, Esq.
Elizabeth J. Shapiro, Esq., Department of Justice

Also present were:

Hon. Richard Wesley, Liaison from the Standing Committee
Hon. Paul Diamond, Liaison from the Civil Rules Committee
Hon. Judith H. Wizmur, Liaison from the Bankruptcy Rules Committee
Professor Daniel J. Capra, Reporter to the Committee
Professor Kenneth S. Broun, Consultant to the Committee
Timothy Reagan, Esq., Federal Judicial Center
Peter McCabe, Esq., Secretary to the Standing Committee
Jonathan Rose, Chief, Rules Committee Support Office
Benjamin Robinson, Esq., Rules Committee Support Office
Dean John B. Attanasio, SMU Dedman School of Law
Professor Jeffrey Bellin, SMU Dedman School of Law
Professor Jeffrey Kahn, SMU Dedman School of Law
Professor Nathan Cortez, SMU Dedman School of Law
Tina Hoang, Law Clerk to Judge Fitzwater
Roger A. Sharpe, Law Clerk to Judge Fitzwater

I. Opening Business

Introductory Matters

Judge Fitzwater, the Chair of the Committee, welcomed the members and thanked Dean Attanasio for hosting the Committee. Dean Attanasio greeted the members and observers, and expressed his thanks for holding the Committee meeting at the law school. He highlighted recent events and distinguished speakers on campus.

Judge Fitzwater observed that the forthcoming edition of the William & Mary Law Review will collect the proceedings of the October 2011 Symposium on the Restyled Federal Rules of Evidence. He encouraged those who were unable to attend the events to obtain a copy of the Symposium edition.

The minutes of the Fall 2011 Committee meeting were approved.

Judge Fitzwater reported on the January meeting of the Standing Committee. He summarized the Committee's report and his presentation to the Standing Committee including the Committee's consideration of Rule 801(d)(1)(B). Several members of the Standing Committee expressed support for the Committee's consideration of Rule 801(d)(1)(B) and none discouraged the Committee's continued work. Judge Fitzwater also updated the Standing Committee on the status of Professor Broun's privileges project. He received and conveyed a clear preference from Judge Kravitz, the Chair of the Standing Committee, that the Committee avoid any role in approving or otherwise placing the Judicial Conference's imprimatur on published work in the area of privileges. Professor Broun expressed his full agreement with this approach, and several members thanked him for his significant and ongoing research. Judge Wesley echoed the thanks given and counseled the Committee to avoid even the slightest appearance of endorsing publications in the area of privileges.

II. Proposed Amendment to Rule 803(10)

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

The Advisory Committee at its Spring 2011 meeting proposed an amendment to Rule 803(10), which currently allows the government to introduce a certificate to prove that a public record does not exist. A certificate of the absence of public record is ordinarily prepared for use in a criminal case, and so under *Melendez-Diaz*, such a certificate would be testimonial — and lower courts after *Melendez-Diaz* have so found. The proposed amendment to Rule 803(10) adds a

"notice-and-demand" procedure to the Rule: requiring production of the person who prepared the certificate only if, after receiving notice from the government of intent to introduce a certificate, the defendant makes a timely pretrial demand for production of the witness. In *Melendez-Diaz*, the Court declared that the use of a notice-and-demand procedure (and the defendant's failure to demand production under that procedure) would cure an otherwise unconstitutional use of testimonial certificates. The Advisory Committee's proposed amendment was approved for release for public comment.

At the Spring meeting, the Committee reviewed the comments received on the proposed amendment. Only two comments were received. The Magistrate Judges' Association is in favor of the proposal. The National Association of Criminal Defense Lawyers commented that it agreed in principle with a notice-and-demand solution to the Confrontation problem inherent in Rule 803(10), but it had several objections to the Committee's proposal. The Reporter provided a memorandum for the meeting that considered the NACDL suggestions in detail, and suggested that the proposed changes were unnecessary and in fact several would raise problems in the application of other rules. A member of the Committee observed that the comments submitted were insubstantial and unpersuasive, and that the rule is very much needed. No member expressed support for the alternative recommendations received from the National Association of Criminal Defense Lawyers.

The Committee unanimously decided by voice vote to amend Rule 803(10) by adopting the language published for public comment, and to transmit the matter to the Standing Committee with the recommendation that the proposed amendment be approved and sent to the Judicial Conference. The full text of the proposed amendment and Committee Note provides as follows:

Rule 803. Exceptions to the Rule Against Hearsay — Regardless of Whether the Declarant Is Available as a Witness

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

* * *

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

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

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

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

(B) in a criminal case, a prosecutor who intends to offer a certification provides written notice of that intent at least 14 days before trial, and the defendant does not object in writing within 7 days of receiving the notice — unless the court sets a

different time for the notice or the objection.

Committee Note

Rule 803(10) has been amended in response to *Melendez-Diaz v. Massachusetts,* 557 U.S. 305 (2009). The *Melendez-Diaz* Court declared that a testimonial certificate could be admitted if the accused is given advance notice and does not timely demand the presence of the official who prepared the certificate. The amendment incorporates, with minor variations, a "notice-and-demand" procedure that was approved by the *Melendez-Diaz* Court. See Tex. Code Crim. P. Ann., art. 38.41.

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

At the Spring 2011 meeting the Committee considered a proposal to amend Evidence Rule 801(d)(1)(B), the hearsay exemption for certain prior consistent statements. Under the proposal, Rule 801(d)(1)(B) would be amended to provide that prior consistent statements are admissible under the hearsay exemption whenever they would otherwise be admissible to rehabilitate the witness's credibility. The justification for the amendment is that there is no meaningful distinction between substantive and rehabilitative use of prior consistent statements.

Under the current rule, some prior consistent statements offered to rehabilitate a witness's credibility — specifically those that rebut a charge of recent fabrication or improper influence or motive — are also admissible substantively. In contrast, other rehabilitative statements — such as those that explain a prior inconsistency or rebut a charge of faulty recollection — are not admissible under the hearsay exemption but only for rehabilitation. There are two basic practical problems in the distinction between substantive and credibility use as applied to prior consistent statements. First, the necessary jury instruction is almost impossible for jurors to follow. The prior consistent statement is of little or no use for credibility unless the jury believes it to be true. Second, and for similar reasons, the distinction between substantive and impeachment use of prior consistent statements has little, if any, practical effect. The proponent has already presented the witness's trial testimony, so the prior consistent statement ordinarily adds no real substantive effect to the proponent's case.

At the Spring 2011 meeting the Committee unanimously agreed that the current distinction between substantive and impeachment use of prior consistent statements is impossible for jurors to follow. But some members were concerned that any expansion of the hearsay exemption to cover all prior consistent statements admissible for rehabilitation might be taken as a signal that the Rules were taking a more liberal attitude toward admitting prior consistent statements generally. Members opined that parties might seek to use the exemption as a means to bolster the credibility of their

witnesses. The Committee at the Spring meeting resolved to consider the amendment further, and also to seek the input of Public Defenders, the Department of Justice, and state court judges on the merits of amending Rule 801(d)(1)(B). Before the Fall 2011 meeting, the Department of Justice submitted a letter in favor of the amendment and the Public Defender submitted a letter opposed to the amendment.

At the Fall 2011 meeting, the Committee again considered the proposed amendment and resolved to seek further input. Pursuant to the Committee's recommendation, the Reporter worked with Dr. Reagan, the FJC representative, to send out a survey to district judges to seek their views on the need for and merits of the proposed amendment. The proposal was also sent to the ABA Litigation Section, the American College of Trial Lawyers, the NACDL, and other interested groups for their views. The Chair also raised the proposal as an information item at the January, 2012 Standing Committee meeting, to seek guidance on whether the amendment was worth pursuing.

As might have been expected from asking the views of so many sources, the responses were mixed. The Standing Committee, in its discussion at the January 2012 meeting, appeared to favor the amendment on the ground that the instruction required under the current rule is impossible for jurors to follow. The lawyers' groups were of two minds — some lawyers agreed with the premise of the amendment and some thought it would increase the use of prior consistent statements and might lead to impermissible bolstering. The majority of judges surveyed appeared to favor the amendment but there was no unanimity.

At the Spring 2012 meeting, Judge Fitzwater queried whether any members, regardless of discussion, planned to vote against a recommendation to the Standing Committee that a proposed amendment be published for public comment. A member indicated opposition to publication because of the momentum generated merely by soliciting public comments. Another member indicated skepticism but encouraged further discussion. The Reporter invited Dr. Reagan to summarize the responses to the email questionnaire, which the Federal Judicial Center sent to district judges in January 2012.

Dr. Reagan observed that there was support for the feeling that jurors find the instruction difficult. The survey showed substantial support for the idea that the proposed amendment to Rule 801(d)(1)(B) would have a positive practical effect, but also some support for the empirical prediction that the amendment would lead to an increase in prior consistent statements coming into evidence. Two rebuttals to this concern–that more prior consistent statements would be good or that Rule 403 would mitigate any trend toward increased admission of prior consistent statements–received lukewarm support.

The Committee discussed whether to use the word "rehabilitates" as opposed to "supports" credibility if the rule were to be proposed. The Committee ultimately determined that the word "rehabilitates" was preferable because "supports" might be read too broadly to admit almost any prior consistent statement, and it could mean that a consistent statement might be admitted under the rule even though the declarant's credibility had ever been attacked — an expansion that the Committee rejected.

The Reporter then introduced an alternate draft of the rule, which was developed after distributing the agenda materials based on a suggestion from a respondent to the FJC questionnaire. The survey respondent had encouraged the Committee to retain language familiar and comfortable to judges and practitioners, such as the phrase "motive to fabricate." The Reporter welcomed this suggestion as did several members.

A member suggested that the better way to treat prior consistent statements would be to provide that none of them are admissible for their truth, i.e., to abrogate Rule 801(d)(1)(B). Such a result would alleviate the problem of giving incomprehensible jury instructions. The member suggested that there was no reason why prior consistent statements should ever be exempt from the hearsay rule.

The Reporter responded that the hearsay rule exists as a safeguard against admitting testimonial evidence not subject to cross-examination, but that in the cases of both prior consistent and prior inconsistent testimony, the declarant is present and subject to cross examination. Thus, there is every reason to admit prior consistent statements for their truth and the only real concern is to prohibit impermissible bolstering and unnecessary padding of a witness's credibility. Thus, the proposal to abrogate Rule 801(d)(1)(B) cut against the theory of and the reason for the hearsay rule. The Reporter also noted that the Committee had never proposed an amendment that would completely remove one of the initial rules from the Federal Rules of Evidence — thus the proposal was fairly radical and needed to be substantially supported.

The Public Defender reiterated concerns that more prior consistent statements would be admitted than have been in the past. She expressed concerns about "evidence shaping" and the incentive to package prior statements in an effort to shore up a witness's performance on the stand. She explained the common scenario of child witnesses "falling apart" in sexual abuse cases, and suggested that the amended rule may incentivize the prosecution to introduce the reports of child assessment interviews (at which the defendant is obviously not present). There may be an effort to build up "insurance in case the witness crumbles on the stand." A liaison responded that rulemaking should not be based on an assumption that lawyers will violate their professional responsibilities.

The DOJ representative stated that Rule 801(d)(1)(B) is particularly impervious to a limiting instruction, and used as an example *United States v. Frazier*, 469 F.3d 85, 88 (3d Cir. 2006). She repeated a consensus view that there can be no intellectually honest way to distinguish between accepting a prior consistent statement for the purpose of assessing credibility and accepting it substantively. She resisted any notion that the Department might want to have more prior statements come in or win a tactical advantage through a rules amendment.

Several members noted the temptation to bolster, but ultimately agreed that a rule change would have no effect on the prohibition against bolstering.

A member expressed concern that the cure may be worse than the problem and that any issue could be cured up front through the pretrial conference. Another member mentioned the risk of unintended consequences, noting the significant number of respondents to the survey who believe

that more evidence of prior consistent statements will be admitted.

A member concluded that while the amendment might have a disproportionate impact on the criminal defendant, the change should be pursued. The member stated that the distinction between substantive and rehabilitative evidence in prior consistent statements is "mind numbing" for a jury and thus adds to the burdens of jurors. From the judicial perspective, prior consistent statements are typically cumulative and are almost always considered harmless error. The member remarked that the rule would bring much-needed clarity and uniformity to the circuit courts of appeal. The member also expressed a strong preference for the updated draft that included familiar language, but also encouraged the Reporter to bolster the accompanying note to emphasize the importance of applying Rule 403. Other members agreed that the updated draft was a step forward and that the note should be fortified, with a particular emphasis on the danger of admitting cumulative evidence.

After this extensive discussion, the Committee approved the proposed amendment to Rule 801(d)(1)(B) (as revised), and voted to recommend to the Standing Committee that it be released for public comment. One Committee member abstained. The Committee also agreed with an addition to the Committee Note emphasizing that the Rule is not to be used to expand the admissibility of prior consistent statements or to allow cumulative consistent statements to be admitted.

What follows is the full text of the proposed amendment to Rule 801(d)(1)(B), and the Committee Note, both as approved by the Committee with the recommendation that they be released for public comment:

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

* * *

(d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:

(1) ***A Declarant-Witness's Prior Statement.*** The declarant testifies and is subject to cross-examination about a prior statement, and the statement:

* * *

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

* * *

Committee Note

Rule 801(d)(1)(B), as originally adopted, provided for substantive use of certain prior consistent statements of a witness subject to cross-examination. As the Advisory Committee noted, "[t]he prior statement is consistent with the testimony given on the stand, and, if the

opposite party wishes to open the door for its admission in evidence, no sound reason is apparent why it should not be received generally."

Though the original Rule 801(d)(1)(B) provided for substantive use of certain prior consistent statements, the scope of that Rule was limited. The Rule covered only those consistent statements that were offered to rebut charges of recent fabrication or improper motive or influence. The Rule did not provide for admissibility of, for example, consistent statements that are probative to explain what otherwise appears to be an inconsistency in the witness's testimony. Nor did it include consistent statements that would be probative to rebut a charge of faulty recollection. Thus, the Rule left many prior consistent statements potentially admissible only for the limited purpose of rehabilitating a witness's credibility. The original Rule also led to some conflict in the cases; some courts distinguished between substantive and rehabilitative use for prior consistent statements, while others appeared to hold that prior consistent statements must be admissible under Rule 801(d)(1)(B) or not at all.

The amendment provides that prior consistent statements are exempt from the hearsay rule whenever they are admissible to rehabilitate the witness. It extends the argument made in the original Advisory Committee Note to its logical conclusion. As commentators have stated, "[d]istinctions between the substantive and nonsubstantive use of prior consistent statements are normally distinctions without practical meaning," because "[j]uries have a very difficult time understanding an instruction about the difference between substantive and nonsubstantive use." Hon. Frank W. Bullock, Jr. and Steven Gardner, *Prior Consistent Statements and the Premotive Rule*, 24 Fla.St. L.Rev. 509, 540 (1997). *See also United States v. Simonelli,* 237 F.3d 19, 27 (1st Cir. 2001) ("the line between substantive use of prior statements and their use to buttress credibility on rehabilitation is one which lawyers and judges draw but which may well be meaningless to jurors").

The amendment does not change the traditional and well-accepted limits on bringing prior consistent statements before the factfinder for credibility purposes. It does not allow impermissible bolstering of a witness. As before, prior consistent statements under the amendment may only be brought before the factfinder if they properly rehabilitate a witness whose credibility has been attacked. As before, to be admissible for rehabilitation, a prior consistent statement must satisfy the strictures of Rule 403. As before, the trial court has ample discretion to exclude prior consistent statements that do no more than provide cumulative accounts of the witness's prior statements. The amendment does not make any consistent statement admissible that was not admissible previously — the only difference is that all prior consistent statements otherwise admissible for rehabilitation are now admissible substantively as well.

IV. Possible Amendment to Rules 803(6)-(8)

The restyling project uncovered an ambiguity in Rules 803(6)-(8), the hearsay exceptions

for business records, absence of business records, and public records. Those exceptions in original form set forth admissibility requirements and then provide that a record meeting those requirements is admissible despite the fact it is hearsay "unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness." The rules do not specifically state which party has the burden of showing trustworthiness or untrustworthiness.

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

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

But at the Spring 2011 Advisory Committee meeting, a majority of Committee members was opposed to any amendment to the trustworthiness language of Rules 803(6)-(8). Members stated that any problem in the application of the rule was caused by a few wayward cases; that parties understand that the burden of proving untrustworthiness is on the opponent; and that the restyling did nothing to change that basic understanding.

At the Spring 2012 meeting, the Reporter informed the Committee that the Texas restyling committee was unanimously of the view that the restyled Rule 803(6) and (8) could be interpreted as making a substantive change to the Rule: by putting the burden on the *proponent* of the evidence to show trustworthiness. In light of this report from the Texas restyling committee, the Reporter suggested that the Committee might wish to discuss whether the previously proposed amendment to Rules 803(6) and (8) should be reconsidered.

At the meeting, several members expressed support for the amendments to clarify that the opponent has the burden of showing that the proffered record is untrustworthy. The Public Defender expressed concern that it may be difficult to access the information needed to demonstrate that the record at issue is untrustworthy. But other members responded that the restyled rule may be read to constitute a substantive change even where none was intended. Several members dismissed the suggestion that the restyling worked a substantive change upon these rules, but they agreed that a

clarifying amendment would be helpful.

The Committee unanimously decided by voice vote, with one abstention, to recommend to the Standing Committee that the proposed amendments to Rules 803(6)-(8) be published for public comment.

What follows are the proposed amendments to Rules 803(6)-(8), together with the Committee Notes, as approved by the Committee with the recommendation that they be released for public comment.

Rule 803. Exceptions to the Rule Against Hearsay— Regardless of Whether the Declarant is Available as a Witness

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness.

* * *

(6) ***Records of a Regularly Conducted Activity.*** A record of an act, event, condition, opinion, or diagnosis if:

(A) the record was made at or near the time by - or from information transmitted by - someone with knowledge;

(B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;

(C) making the record was a regular practice of that activity;

(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and

(E) ~~neither~~ the opponent does not show that the source of information ~~nor~~ or the method or circumstances of preparation indicate a lack of trustworthiness.

* * *

Committee Note

The Rule has been amended to clarify that if the proponent has established the stated requirements of the exception — regular business with regularly kept record, source with personal knowledge, record made timely, and foundation testimony or certification — then the burden is on the opponent to show a lack of trustworthiness. While most courts have imposed that burden on the opponent, some have not. It is appropriate to impose the burden of proving untrustworthiness on the opponent, as the basic admissibility requirements are sufficient to establish a presumption that the record is reliable.

The opponent, in meeting its burden, is not necessarily required to introduce affirmative evidence of untrustworthiness. A determination of untrustworthiness necessarily depends on the circumstances.

Rule 803. Exceptions to the Rule Against Hearsay— Regardless of Whether the Declarant is Available as a Witness

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness.

* * *

(7) ***Absence of a Record of a Regularly Conducted Activity.*** Evidence that a matter is not included in a record described in paragraph (6) if:

(A) the evidence is admitted to prove that the matter did not occur or exist;

(B) a record was regularly kept for a matter of that kind; and

(C) ~~neither~~ the opponent does not show that the possible source of the information ~~nor~~ or other circumstances indicate a lack of trustworthiness.

* * *

Committee Note

The Rule has been amended to clarify that if the proponent has established the stated requirements of the exception — set forth in Rule 803(6) — then the burden is on the opponent to show a lack of trustworthiness. The amendment maintains consistency with the proposed amendment to the trustworthiness clause of Rule 803(6).

Rule 803. Exceptions to the Rule Against Hearsay— Regardless of Whether the Declarant is Available as a Witness

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness.

* * *

(8) ***Public Records.*** A record or statement of a public office if:

(A) it sets out:

(i) the office's activities;

(ii) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or

(iii) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and

(B) ~~neither~~ the opponent does not show that the source of information ~~nor~~ or other circumstances indicate a lack of trustworthiness.

* * *

Committee Note

The Rule has been amended to clarify that if the proponent has established that the record meets the stated requirements of the exception — prepared by a public office and setting out information as specified in the Rule — then the burden is on the opponent to show a lack of trustworthiness. While most courts have imposed that burden on the opponent, some have not. Public records have justifiably carried a presumption of reliability and it should be up to the proponent to "demonstrate why a time-tested and carefully considered presumption is not appropriate." *Ellis v. International Playtex, Inc.*, 745 F.2d 292, 301 (4th Cir. 1984). The amendment maintains consistency with the proposed amendment to the trustworthiness clause of Rule 803(6).

The opponent, in meeting its burden, is not necessarily required to introduce affirmative evidence of untrustworthiness. A determination of untrustworthiness necessarily depends on the circumstances.

V. "Continuous Study" of the Evidence Rules

The Procedures for the Standing Committee require the Evidence Rules Committee to engage in a "continuous study" of the need for any amendment to the Rules. At the Chair's request, the Reporter prepared a memorandum setting forth the history of the studies that have already been undertaken by the Advisory Committee, and providing some suggestions of possible amendments for consideration by the Committee. The grounds for a possible amendment included: 1) a split in authority about the meaning of an Evidence Rule; 2) a disparity between the text of a rule and the way that the rule is actually being applied in courts; 3) difficulties in applying a rule, as indicated by courts, practitioners, or academic commentators.

Possible amendments raised by the Reporter included: 1) amending Rule 106 to provide that statements may be used for completion even if they are hearsay; 2) clarifying that Rule 607 does not permit a party to impeach its own witness if the only reason for calling the witness is to present otherwise inadmissible evidence to the jury; 3) clarifying that Rule 803(5) can be used to admit statements made by one person and recorded by another; 4) clarifying the business duty requirement in Rule 803(6); and 5) resolving the dispute in the courts over whether prior testimony in a civil case may be admitted against one who was not a party at the time the testimony was given.

At the meeting, the Reporter introduced one additional area of emerging difficulties in applying the evidence rules. Professor Jeffrey Bellin's recent article, *Facebook, Twitter, and the Uncertain Future of Present Sense Impressions*, contends that the increasing admission of electronic present sense impressions based on social media communications signals a departure from the traditional rationale for the present sense impression exception. Professor Bellin proposes that Rule 803(1) be amended to explicitly require corroboration from an equally percipient witness. The Reporter stated that Professor Liesa Ricter has published a rebuttal that rejects Professor Bellin's proposal and encourages the Committee to abstain from tinkering with the evidence rules while social media communications remain nascent.

The Committee resolved to continue its continuous study of the Evidence Rules without recommending action on any particular possible amendment. The Chair suggested that the Committee hold a symposium in the Fall of 2013 to consider the intersection of the evidence rules and emerging technologies. The members expressed strong support and briefly discussed prospective panelists and topics.

VI. *Crawford* Developments

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

The Committee reviewed the memo and the Reporter noted that — with the exception of Rule 803(10), the proposed amendment published for public comment in August 2011 — nothing in the developing case law mandated an amendment to the Evidence Rules at this time. The Reporter observed that the Supreme Court is currently considering the case of *Williams v. Illinois*, in which it will address whether an expert witness can testify to the results of a lab test where the certificate of the test is not itself admitted at trial. The Court's decision in *Williams* may have an effect on the application of Rule 703. Currently the lower courts are allowing experts to testify on the basis of testimonial hearsay where 1) the hearsay itself is not admitted into evidence, and 2) the expert is testifying to her own opinion and is not just testifying to the opinion of the underlying expert who rendered the testimonial hearsay.

At the meeting, the Reporter also noted that some recent lower court decisions have found autopsy reports to be testimonial when prepared with the participation of law enforcement — though this might not raise a rulemaking problem because, if a law enforcement report is prepared for purposes of litigation, it is inadmissible under Rule 803(8)(A).

The Committee resolved to continue monitoring developments on the relationship between the Federal Rules of Evidence and the accused's right to confrontation.

VII. Symposium on Rule 502

The Committee is planning a symposium on Rule 502. The goal of the symposium is to review the current use of Rule 502 by courts and litigants, and to discuss ways in which Rule 502 can be better known and understood, so that it can fulfil its original promise — to reduce the cost of preproduction privilege review. The symposium will take place on October 5, 2012 before the Committee's Fall meeting in Charleston. The Committee has already invited a number of distinguished judges, practitioners and academics to make presentations at the symposium. The proceedings of the symposium will be published in Fordham Law Review.

At the Spring 2012 meeting the Committee discussed the goals of the symposium and whether other participants should be invited. A member noted the need to energize the application of Rule 502. The Reporter observed that the developing case law tended to focus on the reasonableness of steps taken to prevent inadvertent disclosure and subject matter waiver.

The Reporter noted that Judge John M. Facciola plans to participate and he invited suggestions from the members for other symposium panelists. One member suggested Arizona Vice Chief Justice Andrew D. Hurwitz. The Committee resolved to continue discussion of potential panelists leading up to the symposium.

VIII. Privilege Project

At the Spring meeting Professor Broun, the Committee's consultant on privileges, submitted materials on the marital testimonial privileges and described the limited and conflicting federal case law on the subject. This submission is part of Professor Broun's continuing project to develop an article on the federal common law of privileges. Professor Broun's work, when it is published, will neither represent the work of the Committee nor suggest explicit nor implicit approval by the Standing Committee or the Advisory Committee. Committee members expressed gratitude to Professor Broun for keeping the Committee apprised of developments in the area of privileges.

Professor Broun stated that he planned to continue his research with a focus on cases concerning the journalists' privilege and related shield laws.

VII. Next Meeting

The Fall 2012 meeting of the Committee is scheduled for Friday October 5 in Charleston — to take place after the Symposium on Rule 502.

Respectfully submitted,

Benjamin Robinson
Daniel J. Capra