Advisory Committee on Evidence Rules

Minutes of the Meeting of May 3, 2013

Miami, Florida

The Judicial Conference Advisory Committee on the Federal Rules of Evidence (the "Committee") met on May 3, 2013, at the University of Miami School of Law, Coral Gables, Florida.

The following members of the Committee were present:

Hon. Sidney A. Fitzwater, Chair
Hon. Brent R. Appel
Hon. Anita B. Brody
Hon. William K, Sessions, III
Hon. John A. Woodcock, Jr.
Edward C. DuMont, Esq.
Paul Shechtman, Esq.
Elizabeth J. Shapiro, Esq., Department of Justice
A.J. Kramer, Public Defender, by phone

Also present were:

Hon. Jeffrey S. Sutton, Chair of the Committee on Rules of Practice and Procedure
Hon. Judith Wizmur, Liaison from the Bankruptcy Committee, by phone
Hon. Paul Diamond, Liaison from the Civil Rules Committee
Hon. John F. Keenan, Liaison from the Criminal Rules Committee
Professor Daniel J. Capra, Reporter to the Committee
Professor Kenneth S. Broun, Consultant to the Committee
Professor Daniel Coquillette, Reporter to the Standing Committee
Timothy Reagan, Esq., Federal Judicial Center
Jonathan Rose, Chief, Rules Committee Support Office
Benjamin Robinson, Esq., Rules Committee Support Office
Andrea Kuperman, Rules Clerk for Judge Sutton, by phone.

I. Opening Business

Welcoming Remarks

Judge Fitzwater, the Chair of the Committee, greeted the members and thanked Dean Patricia

White and Professor Michael Graham of the University of Miami School of Law for hosting the Committee.

The Chair welcomed Judge Sutton, the Chair of the Standing Committee. Judge Sutton spoke briefly about the pace of rulemaking, a concern that has been addressed by the Standing Committee. He noted that ideally it would be best to correlate the efforts of the Rules Committees in promulgating amendments, so that the Supreme Court is not inundated at any particular time. The Standing Committee has found, however, that the pace of rulemaking is highly affected by outside forces, most prominently from Congressional and Supreme Court activity. Thus, coordination among the Committees in promulgating rule amendments is difficult if not impossible. That said, Judge Sutton stressed the need of the Committees to be sensitive to rule fatigue, i.e., to the notion that the rules are in a constant state of flux. One way to address rule fatigue is for an Advisory Committee to package a set of amendments rather than stagger them — thus some amendments might be held back or accelerated to be put on the same timetable as others. In fact the Evidence Rules Committee does group amendments whenever possible, as the package of amendments from 2006 indicates.

Judge Sutton noted that the Evidence Rules Committee proposed the least number of amendments of all the Rules Committees over the last 15 years. The Chair noted that the attitude of the Committee has always been that Evidence Rules are not to be amended unless there is a compelling reason, and the Committee continues its review of the rules on that principle.

Approval of Minutes

The minutes of the Fall 2012 Committee meeting were approved.

Changes to the Committee

The Chair noted with sadness that it was the last meeting for Judge Brody, a valued member of the Committee and the last remaining Committee member involved with the Restyling Project. He noted that Judge Brody was invited to the next meeting and would be getting a tribute at that time.

The Chair also noted that Dr. Tim Reagan was moving to the Standing Committee as the FJC representative. He thanked Dr. Reagan for all his fine service to the Evidence Rules Committee.

New Members

Judge Fitzwater introduced and welcomed two new Committee members: 1) Edward DuMont, Partner at Wilmer Hale, vice chair of the firm's appellate and Supreme Court practice; and 2) A.J. Kramer, Public Defender for the District of Columbia. He thanked the Chief Justice for

appointing members with such outstanding credentials.

June Meeting of the Standing Committee

The Chair reported on the January meeting of the Standing Committee. The Evidence Rules Committee presented no action items at the meeting. The Chair reported to the Standing Committee on the successful Rule 502 symposium that was recently published in the *Fordham Law Review*. He also reported on the Committee's plan for a symposium on technology and the rules of evidence, which is scheduled for October 11, 2013 at the University of Maine School of Law.

II. Proposed Amendment to Rule 801(d)(1)(B)

At the Spring 2012 meeting the Committee voted to recommend that a proposed amendment to Evidence Rule 801(d)(1)(B) — the hearsay exemption for certain prior consistent statements — be released for public comment. 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.

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. The proposed amendment sought to prevent unnecessary confusion by providing for identical treatment of all prior consistent statements that are found by the court to be admissible to rehabilitate a witness.

The public comment on the proposed amendment was sparse, but largely negative. The Committee found two concerns expressed in the public comment to be meritorious and to require some kind of adjustment to the rule as issued for public comment. First, there was a concern that the phrase "otherwise rehabilitates the declarant's credibility as a witness" was vague and could lead to courts admitting prior consistent statements that have heretofore been excluded for any purpose — while that technically would not be possible because the proposal requires that a prior consistent

statement must be admissible for rehabilitation under existing law in order to be admissible substantively, the expressed concern was that courts might somehow use the amendment as an excuse to admit more prior consistent statements. Second, there was a more specific concern that the language could lead courts to admit prior consistent statements to rebut a charge that the witness had a motive to falsify, even though the statement was made *after* the motive to falsify arose. If that were so, it would mean that the Supreme Court's ruling in *Tome v. United States,* 513 U.S. 150 (1995), would be undermined, as the Court in that case held that admissibility of prior consistent statements under Rule 801(d)(1)(B) was limited to those consistent statements that were made *before* a motive to falsify arose.

In response to these concerns, the Chair proposed a change to the amendment as proposed for public comment. That change was as follows (blacklined from the existing rule):

> **(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 is offered:
> (i) to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or
> (ii) to rehabilitate the declarant's credibility as a witness when attacked on another ground; * * *

Committee members praised the Chair's proposal as a solution to the concerns addressed in the public comment. They concluded that the proposal preserves the *Tome* pre-motive rule as to consistent statements offered to rebut a charge of bad motive, while properly expanding substantive admissibility to statements offered to rehabilitate on other grounds — such as to explain an inconsistency or to rebut a charge of bad memory. And the proposal does so without resorting to the potentially vague "otherwise rehabilitates" language. Committee members also generally agreed that the Committee's initial reason for proposing a change to Rule 801(d)(1)(B) was a sound one — it makes no sense to provide that some prior consistent statements are admissible substantively and some only for rehabilitation, thus the current rule invites confusion for no good reason.

The Public Defender objected to the proposal on the ground that it provided an open door for admitting prior consistent statements that are made after a motive to falsify. The DOJ representative spoke in favor of the amendment, noting specifically that it preserved the *Tome* pre-motive requirement for statements offered to rebut a charge of bad motive, and that preservation evidenced the limited nature of the amendment.

Discussion then shifted to the Committee Note. The Reporter had suggested changes to the Note that was submitted for public comment, in order to accommodate the changes to the text that were proposed. Committee members suggested minor changes that were added to the working draft. Professor Coquillette mentioned that the Committee Note contained a citation to *Tome* and that some past members of the Standing Committee have looked askance at citing case law in Committee Notes, on the ground that case law could be overruled and that subsequent overruling might diminish the Note. But members noted that the citation to *Tome* was not for the purpose of establishing the validity of the rule, but rather was to emphasize that the rule was not meant to change the existing limitation on admitting prior consistent statements to rehabilitate witnesses attacked for having a bad motive. Even if *Tome* were overruled, the validity of the amendment would be unimpaired. Moreover, it was noted that the citation to *Tome* was important because it would signal to the Supreme Court that the proposed amendment was *not* intended to overturn the Court's case law on the subject.

After discussion concluded, the Committee Note as proposed for approval read as follows:

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, for example, provide for substantive admissibility of consistent statements that are probative to explain what otherwise appears to be an inconsistency in the witness's testimony. Nor did it cover consistent statements that would be probative to rebut a charge of faulty memory. 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 retains the requirement set forth in *Tome v. United States,* 513 U.S. 150 (1995): that under Rule 801(d)(1)(B), a consistent statement offered to rebut a charge of recent fabrication of improper influence or motive must have been made before the alleged fabrication or improper inference or motive arose. The intent of the amendment is to extend substantive effect to consistent statements that rebut other attacks on a witness — such as the charges of inconsistency or faulty memory.

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 be brought before the factfinder only 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 are cumulative accounts of an event. The amendment does not make any consistent statement admissible that was not admissible previously — the only difference is that prior consistent statements otherwise admissible for rehabilitation are now admissible substantively as well.

A motion was made and seconded to approve the proposed amendment to Rule 801(d)(1)(B) and the accompanying Committee Note — both as set forth above. The Committee approved the motion with one dissent.

The Chair raised the question whether, given the changes to the proposal as issued for public comment, it would be necessary to submit the proposal for a new round of comment. Committee members concluded that a new round of public comment was not necessary, because the changes simply sharpened the proposal and did no more than effectuate the intent that the Committee had from the beginning: to retain the *Tome* pre-motive requirement for consistent statements offered to rebut a charge of bad motive, while expanding substantive admissibility to prior consistent statements that rehabilitated on other grounds. Accordingly, the Committee (with one dissent) voted to recommend the proposed amendment to Rule 801(d)(1)(B) and the accompanying Committee Note to the Standing Committee with the recommendation that it refer the proposal to the Judicial Conference.

In conclusion, Judge Sutton suggested that the supporting materials for the proposed amendment should include the famous statement by Judge Friendly that Rule 801(d)(1)(B) was problematic when enacted because it relied on an insubstantial distinction between substantive and rehabilitative use. *See United States v. Quinto*, 609 F.2d 66-67 (2d Cir. 1979) (Friendly, J., concurring) ("Before adoption of the Federal Rules of Evidence, there had been . . . little need to consider the use of prior consistent statements as affirmative evidence, since they were no more probative for that purpose than what the witness had said or could say on the stand.").

III. Proposed Amendment to Rules 803(6)-(8)

The Committee considered the proposed amendments to the trustworthiness clauses of Rules

Rules 803(6)-(8) — the hearsay exceptions for business records, absence of business records, and public records — that had been issued for public comment. Those exceptions in original form set forth admissibility requirements and then provided that a record meeting those requirements was admissible despite the fact it is hearsay "unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness." The restyling changed that language to "the opponent does not show" untrustworthiness. The rules do not specifically state which party has the burden of showing trustworthiness or untrustworthiness, and there is some conflict in the case law on which party has that burden.

The proposed amendments clarify that the *opponent* has the burden of showing that the proffered record is untrustworthy. The reasons espoused by the Committee for the amendment are: 1) to resolve a conflict in the case law by providing a uniform rule; 2) to clarify a possible ambiguity in the rule as it was originally adopted and as restyled; and 3) to provide a result that makes the most sense, as imposing a burden of proving trustworthiness on the proponent is unjustified given that the proponent must establish that all the other admissibility requirements of these rules are met — requirements that tend to guarantee trustworthiness in the first place.

There were only two public comments on the proposed amendments. Both approved of the text, but one comment suggested that the Committee Note used language that failed to track the text of the rule. The Reporter, while noting that the language of the proposed Committee Note was completely in accord with the case law, agreed with the public comment that it is always better to track the text where possible. The Reporter proposed a slight change to each of the three Committee Notes.

Committee members commented that the amendment would promote uniformity and that imposing an untrustworthiness burden on the opponent is appropriate — as requiring the proponent to prove trustworthiness along with all the other admissibility requirements would be inconsistent with the thrust of each of the rules and would improperly narrow their scope.

As to the Note, Committee members suggested minor changes that were implemented by the Reporter into the working draft.

A motion was made to approve the proposed amendments as issued for public comment, and also the accompanying Committee Notes as adjusted to respond to the public comment and with minor suggestions from Committee members. That motion was unanimously approved by the Committee. What follows are the rules and respective Committee Notes as approved by the Committee:

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 that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness. While most courts have imposed that burden on the opponent, some have not. It is appropriate to impose this burden on 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. For example, the opponent might argue that a record was prepared in anticipation of litigation and is favorable to the preparing party without needing to introduce evidence on the point. A determination of untrustworthiness necessarily depends on the circumstances.

(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 that the possible source of the information or other circumstances indicate a lack of trustworthiness. The amendment maintains consistency with the proposed amendment to the trustworthiness clause of Rule 803(6).

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(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 that the source of information or other circumstances indicate 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 opponent 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. For example, the opponent might argue that a record was prepared in anticipation of litigation and is favorable to the preparing party without needing to introduce evidence on the point. A determination of untrustworthiness necessarily depends on the circumstances.

IV. Self-Authentication of Documents Bearing the Seal of an Indian Tribe

In *United States v. Alvirez,* #11-10244 (March 14, 2013), the Ninth Circuit held that documents bearing the seal of a federally-recognized Indian tribe were not self-authenticating under Rule 902(1) of the Federal Rules of Evidence. That Rule provides as follows:

> **Rule 902. Evidence That Is Self-Authenticating**
> The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted:
>
> > **(1) Domestic Public Documents That Are Sealed and Signed.** A document that bears:
> >
> > (A) a seal purporting to be that of the United States; any state, district, commonwealth, territory, or insular possession of the United States; the former Panama Canal Zone; the Trust Territory of the Pacific Islands; a political subdivision of any of these entities; or a department, agency, or officer of any entity named above; and
> >
> > (B) a signature purporting to be an execution or attestation.

The Ninth Circuit used a plain meaning approach and found that because Indian tribes were not mentioned, the sealed documents of Indian tribes could not be self-authenticating under the rule.

Judge Hurwitz, a judge of the Ninth Circuit and a former member of the Committee, suggested that the Committee might consider whether federally-regulated Indian tribes should be included in the list of public entities that issue self-authenticating documents under Rule 902. He suggested that it is anomalous that self-authentication is granted to cities and, for example, the Trust Territory of the Pacific Islands, but not to Indian tribes.

The question for the Committee at the meeting was whether the Reporter should prepare materials on a proposed amendment to 902 for some future meeting. The Committee engaged in a wide-ranging discussion about the possible merits of an amendment and more broadly about whether treatment of Indian tribes warranted a systematic, trans-substantive inquiry over all of the Rules.

Judge Sutton informed the Committee of the experience of the Appellate Rules Committee in reviewing whether Indian tribes should have the right to file amicus briefs in the circuit courts. After much discussion over many meetings the Committee put the proposal in abeyance, in order to monitor the Ninth Circuit's work on a local rule. Members of the Evidence Rules Committee recognized, however, that there could not be a local rule solution to a rule on the authenticity of evidence.

Committee members exchanged a number of ideas in the course of the discussion, among them:

- It was possible that any attempt to amend the rule to affect Indian tribes could not proceed before a process of consultation.

- Indian tribes might vary in their degree of rigor in maintaining public documents, but no rule of evidence should attempt to distinguish among Indian tribes.[1]

- The absence of Indian tribes from the list in Rule 902(1) does not raise a significant problem in practice. All it means is that the proponent would have to: 1) provide an accompanying certificate by a custodian under Rule 902(4); 2) call a witness to authenticate; or 3) provide circumstantial evidence or other indication of authenticity under Rule 901.

- Because the problem for trial practice is not significant, the real issue is one of dignity — as was the case with the right to file amicus briefs. Though the contrary argument was also made that what was presented was a gap in the Rules and the Committee should consider whether to fill that gap as it would any other.

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[1] If the courts are considered departments or agencies of the United States, it would be illegal to promulgate a rule that would provide a different evidentiary result for records of some tribes and not others. *See* 25 USC 476 (f) ("Departments or agencies of the United States shall not promulgate any regulation or make any decision or determination . . . with respect to a federally recognized Indian tribe that classifies, enhances, or diminishes the privileges and immunities available to the Indian tribe relative to other federally recognized tribes by virtue of their status as Indian tribes.").

- If Indian tribes are added to the list in Rule 902(1), the Committee would also have to consider whether other public entities should be added to the list. That is, there should be a systematic inquiry.

- Any amendment would have to be limited to federally-recognized Indian tribes and the Committee would have to make sure that it crafted the right language to cover that classification.

- If there are issues of authenticity regarding tribal documents, a rule rendering all such documents self-authenticating might raise confrontation issues in criminal cases because the defendant may have difficulty in challenging such documents.

- There may well be many places in the national rules in which Indian tribes might be included, and it would be important to have uniform treatment across the rules. For example, Civil Rule 44, which parallels Rule 902 in many ways, makes no mention of Indian tribes.

- There may be other Evidence Rules that might warrant consideration of whether Indian tribal documents should be covered. One example is Rule 609, governing impeachment by prior convictions.

- The Committee might consider asking the FJC to do some research on the use of Indian tribal documents in federal litigation.

In the end, the Committee resolved unanimously that it would be unwise to proceed at this time with an amendment to Rule 902 that would cover tribal documents. The Committee unanimously determined that treatment of Indian tribal documents raised a question that spanned all the national rules, and therefore it would await the direction of the Standing Committee.

V. Proposed Amendment to the Bankruptcy Rules on Electronic Signatures.

The Bankruptcy Rules Committee asked the Evidence Rules Committee to review a proposed amendment to Bankruptcy Rule 5005, the rule on filing and signature. The proposal would add a new subdivision (3) to govern signatures on documents filed by electronic means. Proposed Subdivision (3)(A) provides that if a filer is registered with ECF, their username and password will serve as that filer's signature on any electronic document. Subdivision (3)(B) provides that if a document is signed by a person who is not registered on ECF, a scanned signature page can be filed with the document as a single filing, without any need for the filing user to retain the original document. Both subdivisions provide that a signature in accord with the rule "may be used with the same force and

effect as a written signature for the purpose of applying these rules and for any other purpose for which a signature is required in proceedings before the court."

Judge Wizmur, the liaison from the Bankruptcy Committee, made the presentation on the proposal. She noted that the use of electronic signatures has been a matter for local rulemaking. It is basically standard practice that the username and password of a filing user constitutes a valid electronic signature. Thus proposed (3)(A) thus does not appear to be controversial. With respect to non-filing users, however, the local rules diverge, most importantly with respect to retention requirements. While most courts require the filing attorney to retain the original, retention periods vary widely. Moreover, many local rules require the signer to execute a declaration that is filed separately, and the filing and retaining requirements for that declaration vary widely. Concerns have also been expressed that requiring the filing attorney to retain the original is burdensome and could lead to ethical issues when, for example, the government requires the attorney to turn over the original as part of a fraud investigation. Yet it would also be burdensome to shift the retention requirements to the courts — when a model local rule on the subject was first being drafted, court clerks from across the country objected to a proposal that would require the courts to retain the originals of documents signed by non-filing users. Thus, proposed (3)(B) is intended to provide needed uniformity and also to remediate the burdens and other problems that come with retaining the originals.

In a wide-ranging discussion, members of the Committee provided preliminary feedback on the proposed amendment to Bankruptcy Rule 5005. Comments included the following:

- There was consensus that the amendment would not require any kind of corresponding amendment to the Evidence Rules. Questions of authenticity will arise but they can be handled by existing Rule 901. The Bankruptcy amendment does have an effect on the best evidence rule (Rule 1002) because it treats the scanned signatures as originals rather than duplicates. But no amendment to the Evidence Rules is required for that to happen, and it would not appear that treatment of scanned signatures as originals rather than duplicates would have any effect on the operation of Rule 1002 in practice.

- Because the document is separate from the signature, the signer may not have read the document but simply signed a signature page. Thus there is room for abuse because the filing party may act without proper authorization.

- The DOJ representative noted concerns about the effect of the proposal on criminal fraud prosecutions when the original document is not retained. There are indications that it is more difficult for experts to examine and compare electronic signatures. It also may be difficult to prove that the signer actually saw the documents or knew which ones were covered by the declaration.

- The question of electronic signatures is one that goes beyond Bankruptcy, and probably affects all the Rules. In that regard, Judge Sutton noted that the Standing Committee has just

established a subcommittee on the effect of CM/ECF on the rules of practice and procedure — a subcommittee including members from each of the Advisory Committees, all the reporters, and a member of CACM. The Executive Office of the U.S. Attorney is also conducting a review of the impact of electronic signatures beyond bankruptcy cases.

In the end, Committee members agreed that any rule on electronic signatures by non-filing users should require some form of verification by the filing user that the scanned signature was part of the original document. That would not be a certification as to the truth of the contents of the original document, as such a certification would not necessarily be within the personal knowledge of the filing user. Rather it would be a certification only that the signature was a signature to the actual document that is filed. This could be done by a rule requiring either an actual certification, or verification by a notary public, to be filed with the document. Or the rule could state that the filing user's username and password is deemed to be a certification. Committee members thought that some kind of verification requirement was necessary to remediate the possibility of mischief inherent in filing a separate signature page.

Committee members expressed thanks to Judge Wizmur and to the Bankruptcy Rules Committee for the opportunity to comment on the proposal.

VI. *Crawford* Developments — Presentation on *Williams v. Illinois*

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 Reporter noted that one of the most important areas of dispute among the courts is whether autopsy reports are testimonial. The courts have split about equally on the subject after the Supreme Court's fractious set of opinions in *Williams v. Illinois.*

Committee members noted that the law of Confrontation was in flux, especially after *Williams*, and it was not appropriate at this point to consider any amendment to the Evidence Rules to deal with Confrontation issues. 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 Technology and the Federal Rules of Evidence

The Evidence Rules Committee is sponsoring a symposium on whether the Evidence Rules should be amended to accommodate technological advances in the presentation of evidence. This Symposium is intended to follow the same process as the previous symposia on the Restyling and Rule 502. The Committee has already invited a number of outstanding members of the bench, bar and legal academia to make presentations. The Committee also plans to invite some of the leading people in the area of electronic information management. This symposium will take place on the morning before the Fall 2013 meeting of the Committee, and the proceedings will be published in the Fordham Law Review. The Reporter and the Chair invited suggestions from the members for additional symposium panelists.

VIII. Privileges Report

Professor Broun, the Committee's consultant on privileges, presented his analysis of the clergy-penitent privilege and the trade secret privilege. This presentation was part of Professor Broun's continuing work to develop an article that he will publish 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 or implicit approval by the Standing Committee or the Advisory Committee.

Professor Broun noted that he would add to his analysis of the clergy-penitent privilege by discussing a possible crime-fraud exception. Committee members expressed gratitude to Professor Broun for keeping the Committee apprised of developments in the area of privileges.

IX. Next Meeting

The Fall 2013 meeting of the Committee is scheduled for Friday, October 11, in Portland, Maine.

Respectfully submitted,

Daniel J. Capra