Advisory Committee on Evidence Rules

Minutes of the Meeting of October 9, 2015

Chicago, Illinois

The Judicial Conference Advisory Committee on the Federal Rules of Evidence (the "Committee") met on October 9, 2015 at John Marshall School of Law.

The following members of the Committee were present:

Hon. William K. Sessions, Chair
Hon. Brent R. Appel
Hon. Debra Ann Livingston
Hon. John T. Marten
Daniel P. Collins, Esq.
Paul Shechtman, Esq.
Elizabeth J. Shapiro, Esq., Department of Justice
A.J. Kramer, Esq., Public Defender

Also present were:

Hon. Jeffrey S. Sutton, Chair of the Committee on Rules of Practice and Procedure
Hon. Milton I. Shadur, Former Chair of the Evidence 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 Lau, Federal Judicial Center
Rebecca A. Womeldorf, Chief, Rules Committee Support Office
Bridget Healy, Rules Committee Support Office
Shelley Duncan, Rules Committee Support Office
Teresa Ohley, Esq., Liaison from the Joint Service Committee on Military Justice
Professor Liesa Richter, University of Oklahoma School of Law

I. Opening Business

Approval of Minutes

The minutes of the Spring, 2015 Committee meeting were approved.

June Meeting of the Standing Committee

Judge Sessions reported on the June meeting of the Standing Committee. The Evidence Rules Committee proposed two amendments to the Evidence Rules: abrogation of Rule 803(16), and new provisions in Rule 902 to ease the burden of authenticating electronic evidence. Judge Sessions stated that the Standing Committee unanimously approved the proposed amendments to be issued for public comment.

II. Symposium on Hearsay Reform

The morning of the meeting was devoted to a symposium on hearsay reform. The Committee determined that a symposium would be useful to help it to determine whether the hearsay rule and its exceptions should be subject to major reform. The calls for reconsideration of the hearsay rule and its exceptions have fallen into two categories: 1) replace the current system of categorical exceptions with a single rule allowing judges to admit hearsay subject to a balancing process of probative value and prejudicial effect (or alternatively, a broadening of the discretionary standards set forth in the residual exception, Rule 807 of the Evidence Rules); and 2) eliminate or alleviate the hearsay rule's coverage of prior statements of testifying witnesses, on the ground that the declarant who made the statement is at trial subject to cross-examination.

Panelists at the symposium included judges (Posner, Schiltz and St. Eve), professors, and outstanding practitioners from the Chicago area. The proceedings will be published in the Fordham Law Review, along with accompanying articles by many of the panelists.

The afternoon session of the Advisory Committee meeting was devoted mostly to discussion among Committee members about the many ideas and arguments raised at the Symposium. The Committee generally concluded that the Symposium was excellent; that it gave the Committee plenty to think about in determining whether amendments to the current system of hearsay regulation should be proposed; and that it set an agenda for the Committee for a number of years to come. Among the specific points raised by Committee members were the following:

● In reviewing the continued validity of any hearsay exception, it should not be evaluated solely by whether the statements admissible under the exception are reliable. Reliability is one basis for a hearsay exception, but it might also be validly supported by a finding that statements under the exception can be corroborated by other evidence, or by the fact that the type of hearsay admitted can be evaluated and properly weighed by jurors using their common sense. And some exceptions, such as those for party-opponent statements, require no reliability at all but rather are based on the adversary system.

● Any argument that a particular exception allows admission of unreliable statements should not necessarily give rise to more judicial discretion to admit hearsay. Rather the solution should be to tighten the exception by including trustworthiness requirements, or by allowing the opponent to convince the judge that the particular hearsay proffered is unreliable.

● Members were struck by the uniform position of practitioners--- that the current rule-based system of hearsay regulation was far preferable to a system based solely on judicial discretion. Allowing judicial discretion over hearsay would --- in the practitioners' view --- lead to unpredictable results and, consequently, more difficulty in settling the case, fewer cases disposed on summary judgment, and more costs of pretrial motion practice.

● A member found it interesting that there was disagreement among the panelists at the symposium as to whether expanding judicial discretion with regard to hearsay would result in more or fewer trials. One member of the Committee thought that a system of judicial discretion would not lead to more trials, but rather to more pretrial motion practice to seek advance rulings on evidentiary admissibility. But because those advance rulings are themselves discretionary with the trial judge, it would seem that more trials would end up occurring in a discretionary system --- because much more information is in play as being possibly admissible, and the trial judge might wait to decide admissibility until trial.

● One member noted that a discretionary system would be an especially ill fit for the coconspirator exception. That exception is not grounded in trustworthiness; it is simply based on the proponent establishing a ground for attribution. The exception is relatively easy to apply under current law. What factors would be relevant to determining admissibility under a discretionary system? And why would it be an advantage to discard the law on the subject that has been developed for over 40 years?

● One member stated that the best way to understand the hearsay rule is as a way to require the party to produce the best person to testify about a matter, in order to be fair to the adversary by allowing that adversary to test the witness who actually knows something about the event. It is difficult to see how a discretionary system of loose standards would lead to the judge choosing the best person to present the evidence.

● One member argued that the biggest problem with a discretionary system is that application of the hearsay rule would vary from judge to judge. For example, one judge may require empirical support for arguments about trustworthiness while other judges might not. The fact that some of the existing exceptions may not be empirically supported is a problem, but it is not apparent that the problem is solved if judges decide hearsay admissibility on whatever basis is personal to them.

● Judge Shadur argued that the hearsay rule might be usefully changed to parallel the sentencing guidelines --- i.e., a list of factors, which guide discretion, but which allow the judge to depart in various circumstances. The existing hearsay exceptions might be reconstituted as standards or guidelines rather than hard rules. This would allow some discretion but yet would be likely to provide some consistency from judge to judge. Another Committee member suggested that the rule might be structured as allowing for discretion to admit hearsay, with the existing exceptions set forth as illustrations --- that is, it could be structured in the same way as Rule 901(a).

● One member suggested that if the concern is that some of the hearsay exceptions do not in fact guarantee reliability, it would be useful to review whatever empirical evidence exists. The FJC representative agreed to undertake a review of published data pertinent to contemporaneous and excited statements --- i.e., the purported guarantees for the hearsay exceptions criticized as being without empirical support by Judge Posner.

● Committee members discussed a proposal made at the Symposium that would substitute Rule 403 balancing for a system of categorical exceptions. Presumably this would mean that in assessing "unfair prejudice" under Rule 403, the judge would take into account the possibility that (and the degree to which) the jury would be unable to discount or properly weigh the hearsay statement. Members suggested that it might be difficult to make such an assessment with any particular piece of hearsay, and it would be difficult for such an analysis to be consistently applied from judge to judge.

● Committee members agreed that it would be worthwhile to explore possible compromise alternatives for hearsay reform --- i.e., something not as radical as removing all the exceptions in favor of a Rule 403-type balancing, and yet something more than retaining the current system of categorical rules. One possibility is to expand the applicability of Rule 807, the residual exception. This might be accomplished by removing the "more probative" requirement of that rule, so that it could be invoked without the showing of necessity that is currently required. The trustworthiness requirement might also be changed from one requiring "equivalence" with the other exceptions to something more freestanding and discretionary.

● As to prior statements of testifying witnesses, the Committee learned in the Symposium that the current Rule 801(d)(1)(A) encourages the practice of bringing "wobbler" witnesses before the grand jury --- in that way, the statement they provide would be substantively admissible should they decide to change their story at trial. Committee members observed that as a policy matter, this appears to be a good practice, albeit not an evidence-related result. Another collateral consequence is that the existing rule expands discovery in criminal cases, because the government must disclose grand jury materials, but need give no advance notice of prior witness statements outside the grand jury.

● At the Symposium, a speaker noted that the premise of excusing prior witness statements from the hearsay rule --- that the witness is available for cross-examination --- does not apply if the witness denies making the statement. A Committee member observed that such a denial would be unlikely if the statement were recorded, but another member stated that even if recorded, the witness could say something like, "they put the statement before me and I just signed it." But another member responded that the increasing use of videorecording for statements would belie that argument, because the circumstances of the preparation and signing of the statement could not be disputed.

● At the Symposium, a speaker stated that one possible problem with broadening substantive admissibility of prior inconsistent statements could arise at the summary judgment stage. A party who could suffer summary judgment due to witness statements by the party or agents might simply make an inconsistent statement for purposes of summary judgment, thereby creating a triable issue of fact. Committee members asked the Reporter to consider this problem.

It might be that the impact of a change on summary judgment practice would warrant retaining the existing rule in civil cases, even if it were expanded in criminal cases. The Reporter and Professor Broun will conduct research into the practice in states with broader substantive admissibility of prior inconsistent statements to see if there has been an impact on summary judgment practice in those states.

● One member noted that even if the Committee makes no changes to the existing rules on hearsay, the Committee's review of the suggestions made at the Symposium would be a good thing because it would show the public that the Committee continues to monitor and review calls for change.

At the end of the discussion, the Committee asked the Reporter to prepare materials on the following topics:

1. Replacing the current rule-based system with a system of guided discretion, which would include a list of standards or illustrations taken from the existing exceptions.

2. Replacing the current system with Rule 403 balancing.

3. Retaining the current structure but expanding the residual exception to allow easier and more frequent use.

4. Broadening Rule 801(d)(1)(A) to allow substantive use of prior inconsistent statements if the statement has been recorded.

5. Considering whether the impact of an expanded Rule 801(d)(1)(A) would have a negative impact on summary judgment cases, and if so whether that would warrant having a different rule in civil and criminal cases.

III. Proposed Amendment to Rule 803(16)

Rule 803(16) provides a hearsay exception for "ancient documents." If a document is more than 20 years old and appears authentic, it is admissible for the truth of its contents. At the Spring 2015 meeting, Committee members unanimously agreed that Rule 803(16) was problematic, as it was based on the false premise that authenticity of a document means that the assertions in the document are reliable. The Committee also unanimously agreed that an amendment would be necessary to prevent the ancient documents exception from providing a loophole to admit large amounts of old, unreliable ESI. The Committee concluded that the problems presented by the ancient documents exception could not be fixed by tinkering with it --

- the appropriate remedy is to abrogate the exception and leave the field to other hearsay exceptions such as the residual exception and the business records exception.

The Committee's proposal to abrogate Rule 803(16) was approved by the Standing Committee for release for public comment. At the Fall meeting, the Reporter provided information on the public comment to date. He noted that there have been objections to the proposal by plaintiffs' lawyers in environmental, insurance and asbestos cases. However, most of the objections were about the difficulty of *authenticating* ancient documents --- and the Committee has not proposed any change to the existing authentication rules. Moreover, none of the objections address the possibility that ancient documents, if actually reliable, can still be admitted as business records or under the residual exception. The Reporter will provide a memo on other public comments as they are received, and all of the comments will be reviewed in detail at the next meeting.

IV. Proposed Amendment to Rule 902 to Allow Certification of Authenticity of Certain Electronic Evidence

At its last meeting, the Committee approved changes that would allow certain electronic evidence to be authenticated by a certification of a qualified person --- in lieu of that person's testimony at trial. The changes would be implemented by two new provisions added to Rule 902. The first provision would allow self-authentication of machine-generated information, upon a submission of a certificate prepared by a qualified person. The second proposal would provide a similar certification procedure for a copy of data taken from an electronic device, medium or file. These proposals are analogous to Rules 902(11) and (12) of the Federal Rules of Evidence, which permit a foundation witness to establish the authenticity of business records by way of certification.

The proposals have a common goal of making authentication easier for certain kinds of electronic evidence that are, under current law, likely to be authenticated under Rule 901 but only by calling a witness to testify to authenticity. The Committee found that the types of electronic evidence covered by the two proposed rules are rarely the subject of a legitimate authenticity dispute, but it is often the case that the proponent is nonetheless forced to produce an authentication witness, incurring expense and inconvenience --- and often, at the last minute, opposing counsel ends up stipulating to authenticity in any event. The self-authentication proposals, by following the approach taken in Rule 902(11) and (12) regarding business records, essentially leave the burden of going forward on authenticity questions to the opponent of the evidence.

The Committee's proposal for an amendment adding new Rules 902(13) and (14) was unanimously approved at the June meeting of the Standing Committee, and the proposed amendment was issued for public comment. At the Fall meeting the Reporter notified the Committee that no meaningful comment on the proposal had yet been received. He did note, though, that some law professors had made inquiries to him about whether the proposal might raise an issue in criminal cases due to the Confrontation Clause. He reported to these professors

that the Committee has carefully considered whether the self-authentication proposals would raise a Confrontation Clause concern when the certificate of authenticity is offered against a criminal defendant. The Committee was satisfied that there would be no constitutional issue, because the Supreme Court has stated in *Melendez-Diaz v. Massachusetts* that even when a certificate is prepared for litigation, the admission of that certificate is consistent with the right to confrontation if it does nothing more than authenticate another document or item of evidence. That is all that these certificates would be doing under the Rule 902(13) and (14) proposals. The Committee also relied on the fact that the lower courts had uniformly held that certificates prepared under Rules 902(11) and (12) do not violate the right to confrontation --- those courts have relied on the Supreme Court's statement in *Melendez-Diaz.* The Committee determined that the problem with the affidavit found testimonial in *Melendez-Diaz* was that it certified the accuracy of a drug test that was itself prepared for purposes of litigation. The certificates that would be prepared under proposed Rules 902(13) and (14) would not be certifying the accuracy of any contents or any factual assertions. They would only be certifying that the evidence to be introduced was generated by the machine (Rule 902(13)) or is data copied from the original (Rule 902(14)). Nonetheless the Reporter notified the Committee that it could expect that some public comment will raise the Confrontation issue. The Reporter will provide a memo on other public comments as they are received, and all of the comments will be reviewed in detail at the next meeting.

V. Possible Amendments to the Notice Provisions in the Federal Rules of Evidence

At the Spring 2015 meeting the Committee considered a memo prepared by the Reporter on the inconsistencies in the notice provisions of the Federal Rules of Evidence. The Reporter's memo indicated that some notice provisions require notice by the time of trial, others require notice a certain number of days before trial, and some provide the flexible standard of enough time to allow the opponent to challenge the evidence. Moreover, while most of the notice provisions with a specific timing requirement provide an exception for good cause, the residual exception (Rule 807) does not. Other inconsistencies include the fact that Rule 404(b) requires the defendant to request notice from the government, while no such requirement is imposed in any other notice provision. Moreover, the particulars of what must be provided in the notice vary from rule to rule; and the rules also differ as to whether written notice is required.

The Committee at the Spring meeting agreed upon the following points:

1) The absence of a good cause exception in Rule 807 was problematic and had led to a dispute in the courts about whether that exception should be read into the rule. A good cause exception is particularly necessary in Rule 807 for cases where a witness becomes unavailable after the trial starts and the proponent may need to introduce a hearsay statement from that witness. And it is particularly important to allow for good cause when it is a criminal defendant who fails to provide pretrial notice. On the merits, Committee members approved in principle the suggestion that a good cause requirement

should be added to Rule 807, with or without any attempt to provide uniformity to the notice provisions.

2) The request requirement in Rule 404(b) --- that the criminal defendant must request notice before the government is obligated to give it --- was an unnecessary limitation that serves as a trap for the unwary. Most local rules require the government to provide notice as to Rule 404(b) material without regard to whether it has been requested. In many cases, notice is inevitably provided anyway when the government moves in limine for an advance ruling on admissibility of Rule 404(b) evidence. In other cases the request is little more than a boilerplate addition to a Rule 16 request. Committee members therefore determined that there was no compelling reason to retain the Rule 404(b) request requirement --- and that an amendment to Rule 404(b) to eliminate that requirement should be considered even independently of any effort to provide uniformity to the notice provisions.

3) The notice provisions in Rules 412-415 should not be changed. These rules could be justifiably excluded from a uniformity project because they were all congressionally-enacted, are rarely used, and raise policy questions on what procedural requirements should apply in cases involving sexual assaults.

At the Fall meeting, the Committee reviewed the Reporter's memorandum that focused on deleting the request requirement of Rule 404(b) and altering the notice requirement of Rule 807. The Reporter added an issue not raised in the previous meeting --- whether Rule 807 should be amended to require the proponent to give not just notice of intent to use the hearsay but more specifically notice of intent to use the evidence *as residual hearsay*. He noted that some courts have required this more specific notice while others had not. While no vote was taken on the specific proposal, some Committee members observed that the requirement of a more specific notice would probably provide little benefit, because it would essentially become boilerplate in every case --- the proponent would provide such notice in an excess of caution, even if it was unlikely to offer the evidence as residual hearsay. Another member noted that adding procedural requirements to Rule 807 would be inconsistent with any future attempt to make the exception broader and more easily-used, which is a subject on the Committee's agenda, as discussed above.

Before the meeting, Paul Shechtman had submitted an alternative proposal to provide for a uniform approach to the notice provisions in Rules 404(b), 609(b), 807, and 902(11) --- i.e., all the notice provisions except those found in Rules 412-415. Under Paul's proposal, each of the notice provisions would be structured to provide as follows:

The proponent must give an adverse party reasonable [written] notice of an intent to offer

evidence under this Rule -- and must make the substance of the evidence available to the

party -- so that the party has a fair opportunity to meet it. The notice must be provided before trial -- or during trial if the court, for good cause, excuses lack of notice.[1]

Paul's proposal would make a number of substantive changes in addition to the two that have been preliminarily approved by the Committee (i.e., eliminating the request requirement of Rule 404(b) and adding a good cause exception to Rule 807). The additional substantive changes would be: 1) the Rule 404(b) notice requirement would extend to civil cases, and to the defendant in criminal cases; 2) the provisions on the "particulars" of notice in each provision would be eliminated, in place of the phrase "substance of the evidence"; and 3) each of the rules would require the notifier to identify the rule under which the evidence would be proffered --- effectively that is an extension of the Reporter's proposal to amend Rule 807 to require notice of intent to offer the evidence as residual hearsay.

In a preliminary discussion of Paul's uniformity proposal, the DOJ representative objected to extending the Rule 404(b) notice requirement to civil cases. She argued that this would be a major change, and questioned its necessity given the breadth of civil discovery. Other members noted that the proposal, currently in brackets, to require notice in writing was a good idea. That is the best way to know that notice has been provided --- eliminating the possibility of a dispute over whether notice was ever given.

One member noted that two of the notice provisions (404(b) and 609(b)) require notice to be provided "before trial" while the other two (807 and 902(11)) require notice to be provided "before the trial or hearing." The Reporter stated that he would look into whether there would be any substantive change if the reference to a "hearing" would be dropped from one set or added to the other set.

The Committee resolved to further consider the possible substantive changes to Rules 404(b) and 807, as well as Paul Shechtman's proposal for uniform notice provisions, at the next meeting.

VI. Best Practices Manual on Authentication of Electronic Evidence

The Committee has determined that it could provide significant assistance to courts and litigants, in negotiating the difficulties of authenticating electronic evidence, by preparing and publishing a best practices manual. The Reporter has been working on preparing such a manual with Greg Joseph and Judge Paul Grimm. The goal is to produce a pamphlet to be issued by the FJC. For the Fall meeting, the Reporter submitted drafts on best practices for authenticating email, texts, and social media postings. He informed the Committee that a draft had been

[1] Rule 902(11) would retain an existing provision requiring the proponent to make the record and certificate available for inspection.

recently prepared for authentication of YouTube and other videos. The next steps are: 1) preparing best practices for authenticating web pages, search engines, and chatroom conversations; 2) revising the draft on judicial notice; and 3) adding an introduction on the applicable standards of proof that Judge Grimm has already prepared. The Reporter estimated that the final product should be ready for approval no later than the Fall 2016 meeting.

VII. Recent Perceptions (eHearsay)

The Committee has decided not to proceed on a proposal that would add a hearsay exception intended to address the phenomenon of electronic communication by way of text message, tweet, Facebook post, etc. The primary reason stated for the proposed exception is that these kinds of electronic communications are an ill-fit for the standard hearsay exceptions, and that without the exception reliable electronic communications will be either 1) excluded, or 2) admitted but only by improper application of the existing exceptions. The exception proposed was for "recent perceptions" of an unavailable declarant.

The Committee's decision not to proceed with the recent perceptions exception was mainly out of the concern that the exception would lead to the admission of unreliable evidence. The Committee did, however, resolve to continue to monitor the practice and case law on electronic evidence and the hearsay rule, in order to determine whether there is a real problem of reliable hearsay either being excluded or improperly admitted by misapplying the existing exceptions.

For the Fall meeting, the Reporter submitted, for the Committee's information, a short outline on federal case law involving eHearsay. Nothing in the outline to date indicates that reliable eHearsay is being routinely excluded, nor that it is being admitted by misapplying the existing exceptions. Most eHearsay seems to be properly admitted as party-opponent statements, excited utterances, or state of mind statements. And many statements that are texted or tweeted are properly found to be not hearsay at all. At most there was only one or two reported cases in which hearsay was excluded that might have been admitted under a recent perceptions exception.

The reporter will continue to monitor cases involving eHearsay and will keep the Committee apprised of developments.

VIII. *Crawford* Developments

The Reporter provided the Committee with a case digest and commentary on all federal circuit cases discussing *Crawford v. Washington* and its progeny. The cases are 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's memorandum noted that the law of Confrontation continued to remain in flux. The Supreme Court has denied certiorari in a number of cases raising the question about the meaning of the Supreme Court's muddled decision in *Williams v. Illinois*: meaning that courts are still trying to work through how and when it is permissible for an expert to testify on the basis of testimonial hearsay. Moreover, the Supreme Court in the last term decided *Ohio v. Clark*, in which statements made by a child his teachers --- about a beating he received from the defendant --- were found not testimonial, even though the teacher was statutorily required to report such statements to law enforcement. The new decision in *Clark*, together with the uncertainty created by *Williams* and other decisions, suggests that it is 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.

IX. Next Meeting

The next meeting of the Committee is scheduled for Friday, April 29, 2016, in Washington, D.C.

Respectfully submitted,

Daniel J. Capra