Advisory Committee on Evidence Rules

Minutes of the Meeting of April 17, 2015

New York, New York

The Judicial Conference Advisory Committee on the Federal Rules of Evidence (the "Committee") met on April 17, 2015 at Fordham University School of Law.

The following members of the Committee were present:

Hon. William K. Sessions, Chair
Hon. Brent R. Appel (by phone)
Hon. Debra Ann Livingston
Hon. John T. Marten
Hon. John A. Woodcock, Jr.
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. Richard C. Wesley, Liaison from the Committee on Rules of Practice and Procedure
Hon. Paul S. Diamond, Liaison from the Civil Rules Committee
Professor Daniel J. Capra, Reporter to the Committee
Professor Kenneth S. Broun, Consultant to the Committee
James C. Duff, Director of the Administrative Office
Professor Daniel Coquillette, Reporter to the Standing Committee
Catherine R. Borden, Esq., Federal Judicial Center
Timothy Lau, Federal Judicial Center
Rebecca A. Womeldorf, Chief, Rules Committee Support Office
Professor Stephen A. Saltzburg, Representative of ABA Section of Criminal Justice
John Haried, Esq., Attorney, Department of Justice
Frances Skilling, Rules Committee Support Office

I. Opening Business

Welcoming Remarks

Judge Sessions welcomed everyone to the Committee meeting. He thanked Director Duff for attending the meeting and expressed the pleasure of everyone that Director Duff has returned to the Directorship of the Administrative Office. Director Duff stated that he was honored to be back at the AO and to work with the Committee.

Approval of Minutes

The minutes of the Fall, 2014 Committee meeting were approved.

January Meeting of the Standing Committee

Judge Sessions reported on the January meeting of the Standing Committee. The Evidence Rules Committee presented no action items at the meeting. Judge Sessions stated that he reported to the Standing Committee on the Committee's agenda on electronic evidence. He noted the positive response of Committee members on the proposals regarding ancient documents (Rule 803(16)) and self-authentication of certain electronic evidence (Rules 902(13) and (14)). He also noted support for the Committee's undertaking a project on the hearsay rule and admissibility of prior statements of testifying witnesses.

Judge Sessions and Judge Sutton reported on some of the pilot projects that were presented at the Standing Committee meeting. These pilot projects include voluntary disclosure, rocket dockets, and streamlined procedures in simpler cases.

FJC Video

The FJC has determined that a good way to instruct judges on rule amendments is to produce videos in which the Chair and Reporter of an Advisory Committee would discuss a recent amendment. The FJC asked Judge Sessions and Professor Capra to be the first to prepare such a video. The video covered the 2014 amendments to Evidence Rules 801(d)(1)(B) and Rules 803(6)-(8). That video is now accessible to judges on the FJC website. The video was played for members at the Committee meeting.

II. Possible 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 Fall, 2014 meeting the Committee considered the Reporter's memorandum raising the possibility that Rule 803(16) should be abrogated or amended because of the development of electronically stored information. The rationale for the exception has always been questionable, because a document does not become reliable just because it is old; and a document does not magically become reliable enough to escape the rule against hearsay on the day it turns 20. The Reporter's memorandum noted that the exception has been tolerated because it has been used so infrequently, and usually because there is no other evidence on point. But because electronically stored information can be retained for more than 20 years, it is possible that the ancient documents exception will be used much more frequently in the coming years. And it could be used to admit only unreliable hearsay, because if the hearsay is in fact reliable it will probably be admissible under other reliability-based exceptions, such as the business records exception or the residual exception. Moreover, the need for an ancient documents exception is questionable as applied to ESI, for the very reason that there may well be a lot of *reliable* electronic data available to prove any dispute of fact.

At the Fall 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. But the Committee was divided on two matters: 1) whether an amendment was necessary at this point, given the fact that no reported cases have been found in which old ESI has been admitted under the ancient documents exception; and 2) which alternative for amendment should be chosen.

At the Committee's direction, the Reporter prepared a memorandum for the Spring meeting that provided four formal proposals for amending the rule. The proposals were: 1) abrogation; 2) limiting the exception to hardcopy; 3) adding the necessity requirement from the residual exception (Rule 807); and 4) adding the Rule 803(6) requirement that the document would be excluded if the opponent could show that the document was untrustworthy under the circumstances.

Committee discussion indicated that some members who had thought it unnecessary to amend Rule 803(16) at this time had changed their mind. Committee members raised the following arguments against retaining the current Rule 803(16):

● The exception, which is based on necessity, is in fact unnecessary because an ancient document that is reliable can be admitted under other hearsay exceptions, such as Rule 807 or Rule 803(6). In fact, the only case that the original Advisory Committee relied upon in support of the ancient documents exception was one in which the court found an old document admissible because it was reliable --- an analysis which today would have rendered it admissible as residual hearsay. So the only real "use" for the exception is to admit unreliable hearsay --- as has happened in several reported cases.

● The exception can be especially problematic in criminal cases where statutes of limitations are not applicable, such as cases involving sexual abuse and conspiracy.

● Many forms of ESI have just become or are about to become more than 20 years old, and there is a real risk that substantial amounts of unreliable ESI will be stockpiled and subject to essentially automatic admissibility under the existing exception.

● The ancient documents exception is not a venerated exception under the common law. While the common law has traditionally provided for *authenticity* of documents based on age, the hearsay exception is of relatively recent vintage. Moreover, it was originally intended to cover property-related cases to ease proof of title. It was subsequently expanded, without significant consideration, to every kind of case in which an old document would be relevant. Thus, abrogating the exception would not present the kind of serious uprooting as might exist with other rules in the Federal Rules of Evidence.

● The ancient documents exception is based on necessity (lack of other proof), but where the document is necessary it will likely satisfy at least one of the admissibility requirements of the residual exception --- i.e., that the hearsay is more probative than any other evidence reasonably available. So if the document is reliable it will be admissible as residual hearsay --- and if it is unreliable it should be excluded no matter how "necessary" it is.

The discussion indicated general agreement that the Committee should act now to propose a change to Rule 803(16). The question then turned to which of the four proposals to adopt. There was no support for the proposal that would limit the exception to hardcopy, as the distinction between ESI and hardcopy would be fraught with questions and difficult to draw. For example, is a scanned copy of an old document, or a digitized version of an old book, ESI or hardcopy? As to the proposals to import either necessity or reliability requirements into the rule, Committee members generally agreed that they would be problematic because they would draw the ancient documents exception closer to the residual exception, thus raising questions about how to distinguish those exceptions.

The Committee concluded that the problems presented by the ancient documents exception could not be fixed by tinkering with it --- the appropriate remedy would be to abrogate the exception and leave the field to other hearsay exceptions such as the residual exception and the business records exception.

A motion was made and seconded to recommend to the Standing Committee that a proposal to abrogate Rule 803(16) be issued for public comment. That motion was approved unanimously.

The Committee approved the Committee Note prepared by the Reporter, with an additional suggestion that the Note emphasize that other hearsay exceptions (particularly Rules 807 and 803(6)) would be available to provide for admissibility of ancient documents that are reliable.

The Committee Note approved by the Committee provides as follows:

The ancient documents exception to the rule against hearsay has been abrogated. The exception was based on the flawed premise that the contents of a document are reliable merely because the document is old. While it is appropriate to conclude that a document is *genuine* when it is old and located in a place where it would likely be — *see* Rule 901(b)(8) — it simply does not follow that the contents of such a document are truthful.

The ancient documents exception could once have been thought tolerable out of necessity (unavailability of other proof for old disputes) and by the fact that the exception has been so rarely invoked. But given the development and growth of electronically stored information, the exception has become even less justifiable and more subject to abuse. The need for an ancient document that does not qualify under any other hearsay exception has been diminished by the fact that reliable electronic information is likely to be available and will likely satisfy a reliability-based hearsay exception – such as Rule 807 or Rule 803(6). Thus the ancient documents exception is not necessary to qualify dated information that is reliable. And abuse of the ancient document exception is possible because unreliable electronic information could be easily accessible, and would be admissible under the exception simply because it has been preserved electronically for 20 years.

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

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 Reporter's memo suggested that more uniformity could be provided in two ways: 1) structure the notice provisions to require notice to be given before trial (or a number of days before trial) and include a good cause exception; or 2) structure the notice provisions to provide the more flexible standard that the proponent must provide reasonable notice so that the opponent would have enough time to challenge the evidence. The Reporter's memo also suggested that any attempt to provide uniformity to the notice provisions should not include Rule 412 (the rape shield rule) because the detailed notice and motion requirements in that rule are

designed to protect privacy interests of rape victims, whereas none of the other notice provisions raise that sensitive issue.

The Committee extensively discussed the Reporter's memorandum, and the following points among others were made:

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 absence of a good cause exception in the text of Rule 807 may be due to the fact that Congress wanted the residual exception to be used only rarely, and so imposed strict procedural requirements on its invocation. But perhaps it is now time to consider whether the strictures of the residual exception --- both procedural and substantive --- should be loosened. Judge Posner has argued for an expansion of the coverage of the residual exception, so it might be a good idea to break out the residual exception from the rest of the rules with notice provisions, and to consider not only whether to add a good cause exception but also whether to loosen the standards of reliability and necessity found in the current Rule 807.

3) Judge Sutton contended that rules should not be changed simply for the purposes of uniformity, if substantive changes must be made to do so. Rather, the Committee should proceed rule by rule and determine whether the substantive requirements in any particular rule make sense and are working. He argued, for example, that the requirement of 15 days' notice in Rules 413-415 (which were directly enacted by Congress) may have been the result of a substantive decision that should not be changed simply to make those provisions uniform with other notice provisions. A member of the Committee speculated that the length of the notice provisions in Rules 413-15 may have been due to the fact that those rules are applicable mostly to litigation arising in Indian country, and so the specified time period may have been intended to account for special considerations in those locations. (Unfortunately there is no legislative history to indicate why Congress opted for the 15-day notice provision).

4) The DOJ representative stated that the Department is opposed to any attempt to provide uniformity in the notice provisions. She suggested that Congress might be concerned about changes to the Rules that it enacted directly --- i.e., Rules 413-415 --- and that any changes to those rules would not be worth the cost because they are so seldom used. She noted that local rules provide notice requirements and that there would be transaction costs if the national rules are changed. And she stated that any change to the notice rules could come with other unintended consequences.

5) A few Committee members objected to the proposal that the requirement of written notice should be deleted from the two rules that impose that requirement --- Rules 609(b) and 902(11). They noted that the requirement of a writing was a way of avoiding disputes as to whether notice was actually given. The Reporter responded that in those cases in which the opponent received actual notice but not written notice, the courts have excused the writing requirement anyway, so it is questionable whether having a requirement of written notice in a rule does anything more than impose litigation costs and a trap for the unwary. In any case, the Committee determined that the question that should be considered is whether written notice should be required in all the notice rules or none, and that this was a difficult question that required further consideration.

6) Committee members were in agreement that 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 requirement that serves as a trap for the unwary. The DOJ representative noted that 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 limit that requirement should be considered even independently of any effort to provide uniformity to the notice provisions.

In the end, the Committee agreed that amendments that would make the notice provisions more uniform raised a number of difficult questions that required further consideration. The Committee did determine, however, that any further consideration of uniformity in the notice provisions should exclude Rules 412-15. 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.

The Reporter was directed to provide a memorandum to the Committee for the next meeting that would explore possible amendments to the remaining Rules that contained notice provisions --- Rules 404(b), 609(b), 807, and 902(11). Three of the proposals for possible amendment are independent from any interest in uniformity. They are:

- Deleting the requirement that notice be requested under Rule 404(b);

- Adding a good cause exception to Rule 807; and

- Broadening Rule 807 to admit more hearsay not covered by other exceptions.

Two of the proposals are grounded in uniformity. They are:

● Either adding a written notice requirement to Rules 404(b) and 807, or deleting the written notice requirement in Rules 609(b) and 807; and

● Amending Rules 609(b) and 902(11) to provide that notice must be provided before trial, but that pretrial notice can be excused for good cause --- i.e., to follow the same approach currently taken in Rule 404(b).

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

At its last meeting, the Committee approved in principle 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, media 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. Under those rules a business record is authenticated by a certificate, but the opponent is given "a fair opportunity" to challenge both the certificate and the underlying record. The proposals for new Rules 902(13) and 902(14) would have the same effect of shifting to the opponent the burden of going forward (not the burden of proof) on authenticity disputes.

At the previous meeting, the Committee 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 litigation 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)).

At the Committee's direction, the Reporter prepared formal proposals for amending Rule 902. The Committee reviewed the proposals at the meeting and provided a number of suggestions for improvement. Among them were:

● Clarifying, in proposed Rule 902(14) that what will be admitted through the certification is not a copy of an electronic device, but rather a copy of data taken from an electronic device.

● Streamlining the draft by tying the requirements of notice to those already set forth in Rule 902(11). This change had the added advantage that, if the notice provisions of Rule 902(11) were to be amended as part of a uniformity project, Rules 902(13) and (14) would not have to be changed.

● Streamlining the draft by tying the certification requirements to those already set forth in Rule 902(11) as to domestic certifications and Rule 902(12) as to foreign certifications.

● Adding material to the proposed Committee Note to Rule 902(13) to clarify that the goal of the amendment was a narrow one: to allow electronic information that would otherwise be established by a witness under Rule 901(b)(9) to be established through a certification by that same witness.

A motion was made and seconded to recommend to the Standing Committee that the proposed amendments to Rule 902, together with the proposed Committee Notes, be issued for public comment. The motion was unanimously approved by the Committee.

Proposed Rule 902(13) as sent to the Standing Committee 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:

* * *

(13) ***Certified Records Generated by an Electronic Process or System.*** A record generated by an electronic process or system that produces an accurate result, as shown by a certification by a qualified person that complies with the certification requirements of Rule 902(11) or Rule 902(12). The proponent must meet the notice requirements of Rule 902(11).

Proposed Committee Note to Rule 902(13)

The amendment sets forth a procedure by which parties can authenticate certain electronic evidence other than through the testimony of a foundation witness. As with the provisions on business records in Rules 902(11) and (12), the Committee has found that the expense and inconvenience of producing a witness to authenticate an item of electronic evidence is often unnecessary. It is often the case that a party goes to the expense of producing an authentication witness and then the adversary either stipulates authenticity before the witness is called or fails to challenge the authentication testimony once it is presented. The amendment provides a procedure under which the parties can determine in advance of trial whether a real challenge to authenticity will be made, and can then plan accordingly.

Nothing in the amendment is intended to limit a party from establishing authenticity of electronic evidence on any ground provided in these Rules, including through judicial notice where appropriate.

A proponent establishing authenticity under this Rule must present a certification containing information that would be sufficient to establish authenticity were that information provided by a witness at trial. If the certification provides information that would be insufficient to authenticate the record if the certifying person testified, then authenticity is not established under this Rule. The intent of the Rule is to allow the authenticity foundation that satisfies Rule 901(b)(9) to be established by a certification rather than the testimony of a live witness.

A certification under this Rule can only establish that the proffered item has satisfied the admissibility requirements for authenticity. The opponent remains free to object to admissibility of the item on other grounds. For example, if a webpage is authenticated by a certificate under this rule, that authentication does not mean that the

assertions on the webpage are admissible for their truth. It means only that the item is what the proponent says it is, i.e., a particular web page that was posted at a particular time. Likewise, the certification of a process or system of testing means only that the system described in the certification produced the item that is being authenticated.

The reference to Rule 902(12) is intended to cover certifications that are made in a foreign country.

Proposed Rule 902(13) as sent to the Standing Committee 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:

* * *

(14) ***Certified Data Copied From an Electronic Device, Storage Media or File.*** Data copied from an electronic device, storage media, or electronic file, if authenticated by a process of digital identification, as shown by a certification by a qualified person that complies with the certification requirements of Rule 902(11) or Rule 902(12). The proponent must meet the notice requirements of Rule 902(11).

Proposed Committee Note to Rule 902(14)

The amendment sets forth a procedure by which parties can authenticate data copied from an electronic device, storage medium, or an electronic file, other than through the testimony of a foundation witness. As with the provisions on business records in Rules 902(11) and (12), the Committee has found that the expense and inconvenience of producing an authenticating witness for this evidence is often unnecessary. It is often the case that a party goes to the expense of producing an authentication witness, and then the adversary either stipulates authenticity before the witness is called or fails to challenge the authentication testimony once it is presented. The amendment provides a procedure in which the parties can determine in advance of trial whether a real challenge to authenticity will be made, and can then plan accordingly.

Today, data copied from electronic devices, storage media, and electronic files are ordinarily authenticated by "hash value." A hash value is a unique alpha-numeric sequence of approximately 30 characters that an algorithm determines based upon the digital contents of a drive, media, or file. Thus, identical hash values for the original and copy reliably attest to the fact that they are exact duplicates. This amendment allows self-

authentication by a certification of a qualified person that she checked the hash value of the proffered item and that it was identical to the original. The rule is flexible enough to allow certifications through processes other than comparison of hash value, including by other reliable means of identification provided by future technology.

Nothing in the amendment is intended to limit a party from establishing authenticity of electronic evidence on any ground provided in these Rules, including through judicial notice where appropriate.

A proponent establishing authenticity under this Rule must present a certification containing information that would be sufficient to establish authenticity were that information provided by a witness at trial. If the certification provides information that would be insufficient to authenticate the record if the certifying person testified, then authenticity is not established under this Rule.

A certification under this Rule can only establish that the proffered item is authentic. The opponent remains free to object to admissibility of the item on other grounds. For example, in a criminal case in which data copied from a hard drive is proffered, the defendant can still challenge hearsay found in the hard drive, and can still challenge whether the information on the hard drive was placed there by the defendant.

The reference to Rule 902(12) is intended to cover certifications that are made in a foreign country.

V. Consideration of Prior Statements of Testifying Witnesses and the Rule Against Hearsay

For many years there has been a dispute over whether prior statements of testifying witnesses should be treated as hearsay when they are offered for their truth. The Federal Rules of Evidence treat such statements as hearsay, and provide for relatively narrow hearsay exceptions. The argument against treating prior witness statements as hearsay is that the declarant is on the stand testifying under oath and subject to cross-examination. Moreover, the prior statement is nearer in time to the event and so likely to be more reliable than trial testimony. And finally, admitting prior witness statements for substantive effect dispenses with the need to give a nonsensical instruction that the prior statement is admissible only for credibility purposes and not for its truth.

The Reporter prepared a memorandum for the Committee that raised the arguments both in favor of the current federal treatment and against it. The memorandum also described different approaches taken in some of the states. Finally, the memorandum discussed whether, if prior statements are to continue to be treated as hearsay, the current exceptions to the rule should be broadened . The most important question on this sub-question is whether the Congressional

limitation on substantive admissibility of prior inconsistent statements --- that they must have been made under oath at a former proceeding --- should be retained, limited, or abrogated.

At the meeting, the Reporter emphasized that there was no proposed amendment currently on the table. The treatment of prior statements of testifying witnesses under the hearsay rule is a complex question that has been debated for many years, and any proposed change would require significant study. The question for the Committee was whether a project to consider broader substantive admissibility of prior witness statements was worth undertaking. The Chair stated that the first step in that project would be to hold a symposium on the morning of the Fall 2015 Committee meeting in Chicago, at which scholars, judges and practitioners in the Chicago area could discuss these matters for the benefit of the Committee.

In discussion of the project, the Committee raised the following points among others:

● Most of the focus should be on prior inconsistent statements. The Committee has already expanded the substantive admissibility of prior consistent statements in the 2014 amendment to Rule 801(d)(1)(B). That amendment provides that a prior consistent statement is admissible when --- but only when – it properly rehabilitates the witness. Tying substantive admissibility to rehabilitation imposes an important limitation: that prior consistent statements should not be admissible if all they do is bolster the witness's credibility. That limitation also assures that parties will not try to generate prior consistent statements for trial. Thus, any further expansion of prior consistent statements will be problematic.

● The Committee should look at the practice in the states that did not adopt the Congressional limitation, i.e., where prior inconsistent statements are broadly admissible for substantive effect. The Reporter noted that Wisconsin is such a state and experts about the practice in Wisconsin can be invited to a symposium in Chicago. The Reporter also stated that he would provide information on the practice in the other states that admit prior inconsistent statements substantively without limitation.

● One concern with broader substantive admissibility of prior inconsistent statements is that they potentially could be found to provide sufficient evidence to convict a criminal defendant. The Committee should explore whether there might be limits on sufficiency that could be placed on substantively admissible prior inconsistent statements. Another possibility would be to expand substantive admissibility of prior inconsistent statements in civil cases only.

● Another concern from the criminal defense side is that if counsel impeaches a government witness with an inconsistent statement, there may be other assertions in that statement that could be used substantively. So any rule should take account of that risk.

● An oft-stated concern about admitting prior inconsistent statements is that the witness rendering the statement may just be making it up. That was at least one reason why Congress required that the prior statement be made at a formal hearing --- as there would then be no doubt that the statement was made. The Reporter noted, however, that the concern about fabricating the statement is not a hearsay concern, because the alleged fabricator is in court testifying under oath and subject to cross-examination that the statement was made. The Reporter also noted that

several states have rules with less stringent requirements than the Congressional limitation, designed to assure that the statement was actually made. For example, some states limit substantive admissibility to prior statements that are written or recorded. Illinois is one such state, and someone familiar with the Illinois practice could be invited to a symposium in Chicago.

● A project to consider expanding admissibility of prior witness statements might usefully be paired with a project that was discussed earlier in the meeting --- whether the residual exception should be amended to provide an easier road to admissibility for reliable statements that do not fit under standard hearsay exceptions. One Committee member noted that Judge Posner has advocated for a revision of the Federal Rules of Evidence that would scrap most or all of the hearsay exceptions in favor of a broadened version of the residual exception. The Chair remarked that if the Committee approved the idea of a symposium, there could be two panels --- one on prior witness statements and the other on the residual exception --- and that Judge Posner would be invited to make a presentation on his proposal.

The Committee approved the proposal that a symposium be held in Chicago on the morning of the Fall 2015 meeting. That symposium would contain two panels. Panel one would consider expansion of substantive admissibility of prior witness statements, with an emphasis on prior inconsistent statements. Panel Two would consider expansion of the residual exception.

VI. Best Practices Manual on Authentication of Electronic Evidence

At the Electronic Evidence Symposium in 2014, Greg Joseph made a presentation intended to generate discussion about whether standards could be added to Rules 901 to 902 that would specifically treat authentication of electronic evidence. There are dozens of reported cases that set forth standards for authenticating electronic evidence. These cases apply the existing, flexible provisions on authenticity currently found in Federal Rules 901 and 902 and their state counterparts. Greg crafted specialized authenticity rules to cover email, website evidence and texts; these draft rules were intended to codify the case law, as indicated by the extensive footnoted authority that Greg provided. At the Fall meeting, the Committee reviewed the draft rules to determine whether to propose them, along with any revisions, as amendments to Rule 901 and 902. The Committee decided that it would not propose extensive amendments to the authenticity rule to cover electronic evidence. Such proposals would end up being too detailed for the text of a rule; they could not account for how a court can and should balance all the factors relevant to authenticating electronic evidence in every case; and there was a risk that any factors listed would become outmoded by technological advances.

The Committee did, however, unanimously agree 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 —along the lines of the work done by Greg Joseph in footnoting the support for his draft amendments. A best practices manual could be amended as necessary, avoiding the problem of having to amend rules to keep up with

technological changes. It could include copious citations, which a rule could not. And it could be set forth in any number of formats, such as draft rules with comments, or all text with no rule.

At the Spring meeting, the Reporter submitted two preliminary drafts of best practices: authenticating email, and use of judicial notice. He informed the Committee that the FJC had already commissioned a best practices manual to be prepared by Greg Joseph and Judge Paul Grimm --- and they had both enthusiastically agreed to include the Committee on this project. When the project is completed, the Committee and the Standing Committee would then have to decide whether it should be designated as a Committee project or described in some other way.

The Reporter informed the Committee that the next drafts would cover social media postings, and would be submitted to the Committee for its next meeting. He also noted that Judge Grimm is preparing an introductory chapter that would discuss how Rules 104(a) and 104(b) interact when electronic evidence is authenticated.

VII. Recent Perceptions (eHearsay)

At the Fall meeting, the Committee decided not to approve 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 be 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 at the Fall meeting decided not to proceed with the recent perceptions exception, 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. The Committee also expressed interest in determining how the recent perceptions exception was being applied in those few states that have adopted that exception.

At the Spring meeting, the Reporter submitted an extensive report that was graciously prepared by Professor Dan Blinka, an expert on evidence at Marquette Law School. Wisconsin is one of the states that applies the recent perceptions exception. Professor Blinka provided detailed analysis of how that exception was being applied in Wisconsin, and he also reported on a survey that he conducted in which Wisconsin state judges provided their input on the recent perceptions exception in particular and on treatment of electronic evidence more generally. Professor Blinka concluded that there was not much controversy over the application of the recent perceptions exception in Wisconsin; that it can and has been used to admit reliable electronic evidence; and that state Wisconsin state judges were generally satisfied with the application of the recent perceptions exception and its application to eHearsay.

The Reporter also 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 excluded, nor that it is being improperly admitted under other 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.

The Committee expressed its profound thanks to Professor Blinka. And the Committee asked the Reporter and Professor Broun to continue to monitor both federal and state case law to monitor how personal electronic communications are being treated in the courts.

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 has recently heard arguments on a case involving whether statements made by a victim of abuse to a teacher are testimonial, when the teacher is statutorily required to report such statements. This forthcoming decision, 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.

VI. Next Meeting

The Fall 2015 meeting of the Committee is scheduled for Friday, October 9 in Chicago.

Respectfully submitted,

Daniel J. Capra