COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

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MEMORANDUM

TO: Hon. John D. Bates, Chair
Committee on Rules of Practice and Procedure

FROM: Hon. Jesse M. Furman, Chair
Advisory Committee on Evidence Rules

RE: Report of the Advisory Committee on Evidence Rules

DATE: December 1, 2024

I. Introduction

The Advisory Committee on Evidence Rules (the "Committee") met on November 8, 2024 at New York University Law School. The Committee reviewed severable possible amendments, including amendments relating to Artificial Intelligence and machine learning and an amendment to Rule 609.

A full description of the Committee's discussion can be found in the draft minutes of the Committee meeting, attached to this Report.

II. Action Items

No action items.

III. Information Items

A. Rule 801(d)(1)(A)

At its Spring 2024 meeting, the Standing Committee approved, for publication for public comment, an amendment to Rule 801(d)(1)(A), which provides that all prior inconsistent statements of a testifying witness are admissible over a hearsay objection. Under the existing rule, only prior inconsistent statements made under oath at a formal proceeding are admissible over a hearsay objection. The arguments supporting the amendment are: 1) hearsay concerns are answered by the fact that the person who made the hearsay statement is at trial, under oath, and subject to cross-examination; and 2) the prior inconsistent statement is going to be admitted at any rate for impeachment, so the proposal eliminates the need to provide a potentially confusing limiting instruction.

The public comment period closes on February 15, 2025. The Committee will review and consider any public comments and determine whether to recommend the proposed amendment for final approval at its Spring 2025 meeting.

B. Rule 609(a)(1)(B)

The Committee discussed a possible amendment to Rule 609(a)(1)(B), which currently allows for impeachment of criminal defendant witnesses with convictions not involving dishonesty or false statement if the probative value of the conviction in proving the witness's character for truthfulness outweighs the prejudicial effect. The proposed amendment reviewed by the Committee would result in the provision becoming somewhat more exclusionary. To be admitted, the probative value of the conviction would have to *substantially* outweigh its prejudicial effect. The amendment is narrower than other suggestions for change made to, and rejected by, the Committee in the last two years, namely a proposal to eliminate Rule 609 entirely and a proposal to delete Rule 609(a)(1), which would have meant that all convictions not involving falsity would be inadmissible to impeach a witness's character for truthfulness. The proposal currently being considered by the Committee focuses on criminal defendant witnesses only.

The Committee appears to be divided about the proposal to add the word "substantially" to Rule 609(a)(1)(B). Most members agree that a fair number of courts have misapplied the existing test to admit convictions that are either similar to the crime charged or otherwise inflammatory. Those in favor of the change argue that these errant courts have not effectuated the Congressional intent to provide more protection to criminal defendants, so that they will not be deterred from exercising their right to testify, and thus a mildly more protective test should be

employed. Those who oppose the change are concerned that courts that currently correctly apply the rule might end up, under a slightly stricter test, excluding convictions that ought to be admitted.

The possible amendment to Rule 609(a)(1) will be further considered at the next meeting.

C. Artificial Intelligence and Deepfakes

For the past two years the Committee has been researching and investigating whether the existing Evidence Rules are sufficient to assure that evidence created by AI will be properly regulated for reliability and authenticity. The Committee has determined that there are two evidentiary challenges raised by AI: 1) audiovisual evidence that is not authentic because it is a difficult-to-detect deepfake; and 2) evidence that is a product of machine learning, which would be subject to Rule 702 if propounded by a human expert.

At its fall meeting, the Committee considered a number of proposals to amend the Evidence Rules to regulate deepfakes and machine learning. As to machine learning, the concern is that it might be unreliable, and yet the unreliability will be buried in the program and difficult to detect. The Committee tentatively agreed on an amendment that would simply apply the standards of Rule 702 to evidence that is the product of machine learning. The proposal — to be considered at the next meeting with the view to approve it for release for public comment — would create a new Rule 707. The current draft language for the new rule is as follows:

> **Rule 707. Machine-generated Evidence**
>
> Where the output of a process or system would be subject to Rule 702 if testified to by a human witness, the court must find that the output satisfies the requirements of Rule 702 (a)-(d). This rule does not apply to the output of basic scientific instruments or routinely relied upon commercial software.

The Committee agreed that disclosure issues relating to machine learning were better addressed in either the Civil or Criminal Rules, not the Evidence Rules, and that the issue should be brought to the attention of those respective Advisory Committees for their parallel consideration.

As to deepfakes, the Committee has tentatively determined that issuing a rule proposal would not be advisable at this early stage — that it would be prudent to wait to see how courts deal with deepfakes because it is quite possible that the existing rules on authenticity are flexible enough to handle the possibility that parties will be submitting manufactured audiovisual evidence. But the Committee believes it would be useful to agree on language for a possible amendment, so as to be able to respond if problems do arise. The proposal for consideration at the Spring 2025 meeting would add a new Rule 901(c). The language of the proposal is as follows:

Rule 901(c). Potentially Fabricated Evidence Created By Artificial Intelligence.

> If a party challenging the authenticity of computer-generated or other electronic evidence demonstrates to the court that a jury reasonably could find that the evidence has been fabricated, in whole or in part, by artificial intelligence, the evidence is admissible only if the proponent demonstrates to the court that it is more likely than not authentic.

The proposal protects against the possibility of an opponent demanding an inquiry by simply claiming that the item is a deepfake. The opponent has the burden of making an initial showing that there is something suspicious about the item — enough for a reasonable person to find that it is fabricated. At that point, the burden shifts to the proponent to show, by a preponderance of the evidence, that the item has not been fabricated. The preponderance standard is, of course, higher than the standard ordinarily required for establishing authenticity. That higher standard can be justified if deepfakes become prevalent and exceedingly difficult to detect.

D. False Accusations of Sexual Misconduct

The Committee considered whether the Evidence Rules should be amended to address false accusations of sexual misconduct, either by way of an amendment to Rule 412 or a freestanding new Rule 416. As between the alternatives, the Committee agreed that a new Rule 416 would be preferable. But after considerable research and review, the Committee decided not to pursue an amendment and to take the proposal off its agenda. False accusations in sexual assault cases arise more frequently in state and military courts, and research indicates that these courts have procedures and rules in place and are unlikely to adopt a Federal "model." Moreover, the Committee agreed that courts have adequate tools to address these issues under the existing Evidence Rules, including Rules 404, 412, and 608.

E. Rule 404(b)

At the Committee's fall 2023 symposium, a law professor made the argument that courts are admitting evidence of uncharged misconduct even where the probative value of the bad act is dependent on a propensity inference. He suggested an amendment to Rule 404(b) to prevent this practice. The Committee noted that the notice requirement of Rule 404(b) was amended in 2020 to require the prosecution to articulate a non-propensity purpose for bad act evidence, and it was resolved that the Committee should determine how that amendment was working before proposing another amendment to the rule. Ultimately, the Committee decided to table any proposed amendment to Rule 404(b). The Committee recognized that while some courts may have admitted propensity evidence, other instances raised by the professor as problematic were in fact proper applications of the Rule. Moreover, any attempt to amend Rule 404(b) would run into significant opposition by the Department of Justice, which had compromised on the Rule in 2020.

F. Rule 702 and Peer Review

Two attorneys submitted a proposal to the Committee to amend Rule 702 to address the "peer review" factor as set out in *Daubert* and the Committee Note to the 2000 amendment to Rule 702. Under *Daubert* and the Committee Note, the existence of peer review is relevant to a court's determination of the reliability of an expert's methodology. The attorneys argue that peer review is problematic because many peer-reviewed studies cannot be replicated.

The Committee decided not to proceed with an amendment on peer review. Rule 702 is general. It does not mention the *Daubert* factors. Thus, singling out one factor for caution, in text, would be awkward and a possible source of confusion. Moreover, courts currently have, and exercise, discretion to reject peer reviewed studies that have not been replicated. So an amendment to the text was found unnecessary and the issue was removed from the Committee's agenda.

G. Rule 704(b) and the Supreme Court's Decision in *Diaz v. United States*

Last Term, the Supreme Court decided *Diaz v. United States,* in which the defendant in a drug-smuggling case argued that Rule 704(b) prohibited testimony from an expert that "most people" who transport drugs across the border do so knowingly. The Court found no error because the expert's testimony was based on probability and not certainty. A question for the Committee is whether the Court's construction of Rule 704(b) counsels or mandates some amendment to the Rule. After discussion, the Committee determined that no amendment is warranted. The Court's result is consistent with the language and intent of Rule 704(b), which was directly enacted by Congress.

H. The Right to Confrontation, Rule 704(b), and the Supreme Court's Decision in *Smith v. Arizona*

Last Term, the Supreme Court decided *Smith v. Arizona,* in which a forensic expert testified to a positive drug test by relying on the testimonial hearsay of another analyst — and the other analyst's findings were disclosed to the jury. The Court held that an expert's disclosure to the jury of testimonial hearsay violated the defendant's right to confrontation, even if the purpose of the disclosure was purportedly to illustrate the basis of the testifying expert's opinion. At its Fall 2024 meeting, the Committee considered whether the Court's confrontation analysis counsels or mandates some amendment to Rule 703, which allows experts to rely on hearsay, but limits the disclosure of that hearsay to the jury. The Committee determined that, to the extent that the Court was concerned about *disclosure* of the report as the basis of the expert's testimony, there would be little to no impact on Federal practice because Rule 703 already limits disclosure of inadmissible hearsay as the basis of the expert's opinion. But if the Court's decision is construed to apply also to the expert's *reliance* on the lab report, it could have a substantial effect on Federal practice because Rule 703 specifically allows the expert to rely on inadmissible hearsay if it is the kind of information on which other experts in the field would reasonably. A constitutional bar on such

reliance would probably necessitate an amendment to Rule 703 to prohibit reliance on testimonial hearsay in a criminal case.

The Committee was of the view that *Smith* concerned disclosure, not reliance. But the Committee decided to monitor the post-*Smith* case law to determine whether and how the lower courts apply *Smith* to reliance as well.

I. Rule 902 and Tribal Certificates

Judge Frizzell submitted a suggestion to the Committee to consider whether federally recognized Indian tribes should be added to Rule 902(1) which provides that domestic public records that are sealed and signed are self-authenticating. Because Rule 902(1) does not list Indian tribes, the government must use another route to authenticate proof of a defendant's Indian status in federal prosecutions brought for crimes occurring in Indian country. There have been at least two recent cases in which the prosecution failed to prove Indian status by attempting, unsuccessfully, to meet the requirements of the business records exception and authentication under Rule 902(11). Moreover, the problem of authentication has arguably taken on more importance in light of the increase in federal cases resulting from the Supreme Court's decision in *McGirt v. Oklahoma.*

At its fall 2024 meeting, the Committee engaged in an initial discussion of the possibility of amending Rule 902(1) to include federally recognized Indian tribes. While the Committee was informed by the DOJ that many Indian tribes maintain records on a par with the government entities listed in Rule 902(1), it was also informed that many Indian tribes do not have the resources necessary to guarantee accurate recordkeeping. Other members noted that the problem is not with the rules, but rather with untrained prosecutors.

The Committee resolved that it would hear from the DOJ at the next meeting on two issues: 1) whether the problem is one of rulemaking or whether it can be solved by training prosecutors; and 2) whether tribal recordkeeping is sufficiently reliable across the board to warrant the same treatment as the other public bodies currently covered by Rule 902(1).

IV. Minutes of the Fall 2024 Meeting

The draft of the minutes of the Committee's fall 2024 meeting is attached to this report. These minutes have not yet been approved by the Committee.

Attachments:

Draft Minutes of the Fall 2024 meeting of the Advisory Committee on Evidence Rules.