Advisory Committee on Evidence Rules

Minutes of the Meeting of April 29, 2016

Alexandria, Virginia

The Judicial Conference Advisory Committee on the Federal Rules of Evidence (the "Committee") met on April 29, 2016 in Alexandria, Virginia.

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 (by telephone)
Hon. John A. Woodcock
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 Wesley, Liaison from the Standing Committee
Hon. Solomon Oliver, Liaison from the Civil Rules Committee
Hon. James Dever, 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 Lau, Federal Judicial Center
Rebecca A. Womeldorf, Chief, Rules Committee Support Office
Shelley Duncan, Rules Committee Support Office
Teresa Ohley, Esq., Liaison from the Joint Service Committee on Military Justice
Zoe Oreck, American Association for Justice
Susan Steinman, American Association for Justice
Michael Shepard, Hogan Lovells, American College of Trial Lawyers
Jayme Herschkopf, Supreme Court Fellow
Derek Webb, Law Clerk to Judge Sutton

I. Opening Business

Approval of Minutes

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

January Meeting of the Standing Committee

Judge Sessions reported on the January, 2016 meeting of the Standing Committee. The Evidence Rules Committee had no action items at the meeting. Judge Sessions reported to the Standing Committee about the Hearsay Symposium that the Committee had sponsored in the Fall of 2015. Ideas from that Symposium will be part of the Committee's agenda for the near future.

Departure of Committee Members

Judge Sessions and the entire Committee expressed regret that the terms of two valued Committee members --- Brent Appel and Paul Shechtman --- were ending. Both Brent and Paul were thanked for their stellar service to the Committee. Both stated their appreciation for the work of the Evidence Rules Committee, the quality of its decisionmaking, and the collegiality of the members.

II. 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, a statement in the document is admissible under the exception 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 proposed to eliminate Rule 803(16), with the expectation that old documents that are reliable could still be admitted as business records or under the residual exception, and also with the recognition that many documents currently offered under Rule 803(16) could be admitted as party-opponent statements or for the non-hearsay purpose of notice.

The Committee's proposal to abrogate Rule 803(16) was unanimously approved by the Standing Committee for release for public comment. Over 200 public comments were received, and a public hearing was held. Almost all the comment was negative. Most of the comments were to the effect that without the ancient documents exception, important documents in certain

specific types of litigation would no longer be admissible --- or would be admissible only by expending resources that are currently not necessary under Rule 803(16). Examples of litigation cited by the public comment included cases involving latent diseases; disputes over the existence of insurance; suits against churches alleged to condone sexual abuse by their clergy; cases involving environmental cleanups; and title disputes. Many of the comments concluded that the business records exception and the residual exception are not workable alternatives for ancient documents. The commenters contended that the business records exception requires a foundation witness that may be hard to find, and that the residual exception is supposed to be narrowly construed. Moreover, both these exceptions would require a statement-by-statement analysis, which is not necessary under Rule 803(16), and which would lead to more costs for proponents.

Many of the comments were duplicative, and some were mistaken about the consequences of the change proposed. For example, some of the commenters argued that the amendment would make it impossible to authenticate ancient documents --- but there is no proposal to amend the rules on authentication. Other commenters stated that the amendment would make it harder to prove that a defendant knew about the dangers of a product --- but if a document is offered for notice, it is not covered by the hearsay rule in the first place. Yet on the whole, the public comment established that the proposed amendment raises substantial concerns about the elimination of the ancient documents exception in certain important types of cases.

At the meeting, the Committee was presented with three basic alternatives for responding to the public comment: 1) continue to propose the elimination of Rule 803(16), while adding to the Committee Note the Committee's expectation that the reliable hearsay in ancient documents would be admissible under the business records exception or the residual exception; 2) propose a limitation on, rather than elimination of, Rule 803(16); or 3) withdraw the amendment and try to find some way to monitor whether and when ESI is being offered under the ancient documents exception.

The Committee first decided that it was not appropriate to continue with the proposal to eliminate Rule 803(16) --- the public comment did raise concerns about the effect of the amendment and the costs of prosecuting certain important claims that currently rely on ancient documents. (The public comment also showed that looking at the reported cases does not give a sense of how often the ancient documents exception is actually used --- in part because with ancient documents, there is nothing to report, because there is currently no basis for any objection to the admission of such documents.) The DOJ representative added that there are a number of types of actions in which the government routinely uses ancient documents --- such as CERCLA cases and cases involving title dispute in "rails to trails" litigation --- and that elimination of the ancient documents exception would impose substantial burdens in these cases, because the documents would be difficult to qualify under the residual exception, given the particularized notice requirements of Rule 807. The Committee was sympathetic to the concerns about the costs that would be imposed in particular kinds of existing cases if the ancient documents exception were eliminated.

The Committee next decided that the "do nothing" approach was not acceptable. The Committee unanimously believed that the ESI problem was real --- because ESI can be easily and permanently stored, there is a substantial risk that the terabytes of emails, web pages, and

texts generated in the last 20 or so years could inundate the courts by way of the ancient documents exception. Computer storage costs have dropped dramatically --- that greatly expands the universe of information that could be potentially offered under the ancient documents exception. Moreover, the presumption of the ancient documents exception was that a hardcopy document kept around for 20 years must have been thought to have some importance; but that presumption is no longer the case with easily stored ESI. The Committee remained convinced that it was appropriate and necessary to get out ahead of this problem --- especially because the use of the ancient documents exception is so difficult to monitor. (The FJC representative outlined to the Committee in detail how difficult it would be to conduct a targeted survey of judges and litigants on the use of ancient documents in litigation.) Moreover, the Committee adhered to its position that Rule 803(16) was simply a flawed rule; it is based on the fallacy that because a document is old and authentic, its contents are reliable.

The Committee then moved to drafting alternatives that would limit rather than eliminate Rule 803(16). The alternatives provided by the Reporter, in response to the public comment, were:

1) "Grandfathering" – limiting the ancient documents exception to documents prepared before a certain date;

2) Adding a necessity requirement --- applying the exception only if the proponent shows that there is no other equally probative evidence to prove the point for which the ancient document is offered;

3) Limiting the exception to hardcopy;

4) Adding a provision that ancient documents would not be admissible if the opponent could show they were untrustworthy;

5) Extending the time period for ancient documents from 20 to 30 years; and

6) Adding a requirement, as in the California rule, that a statement in an ancient document would be admissible only if it has been acted on as true by someone with an interest in the matter (often referred to as a "reliance" requirement).

The Committee thoroughly discussed these alternatives. Some were easily rejected. Thus, limiting the exception to hardcopy was rejected because hardcopy might well be derived from ESI, while on the other hand, an old hardcopy document might be digitized --- and it would be nonsensical to provide that the old hardcopy would be admissible while the same document in digitized form would not. Extending the time period for ancient documents from 20 to 30 years amounted to "kicking the can down the road" because it would simply delay the inevitable decision for ten years --- resulting in two amendments to the same rule (or more than two as the can gets kicked further) where one should do. And adding a reliance requirement would limit the use of ancient documents in the very cases where they are now found necessary, because in many of these cases the plaintiff is introducing an old document precisely to show that a party

ignored the document; moreover, in many cases, the fact of reliance might well have to be *shown* by ancient documents.

Most of the discussion was about the remaining alternatives --- grandfathering, necessity, and trustworthiness burden-shifting. Ultimately the Committee decided that adding either a necessity requirement or a trustworthiness burden-shifting requirement to the rule would not sufficiently address the public concerns about additional costs in proving up old hardcopy documents. Adding either of these requirements would lead to challenges, *in limine* hearings, and difficult factual determinations about documents that were prepared long ago. The Committee concluded that the best result would be to turn back to its original concern --- the explosion of ESI --- and to leave the current use of ancient documents where it found it. That could only be done by an amendment that would allow the use of hearsay in ancient documents in all the cases in which they were currently being used, but to eliminate the exception going forward in order to prevent the use of Rule 803(16) as a safe harbor for unreliable ESI.

In discussions about the appropriate date for ending the ancient documents exception, the Committee considered several alternatives, and finally --- and unanimously --- decided that 1998 was a fair date. The Committee recognized, of course, that any cutoff date would have a degree of arbitrariness, but it also recognized that the ancient documents exception itself set an arbitrary time period for its applicability. The Committee determined that the cut-off date of January 1, 1998 would mean that the rule would not affect the admissibility of ancient documents in any of the existing cases that were highlighted in the public comment; also, 1998 was a fair date for addressing the rise of ESI.

The Committee considered the possibility that in the future, cases involving latent diseases, CERCLA, etc. would arise. But the Committee concluded that in such future cases, the ancient documents exception was unlikely to be necessary because, going forward from 1998, there was likely to be preserved (reliable) ESI that could be used to prove the facts that are currently proved by scarce hardcopy. If the ESI is generated by a business, then it is likely to be easier to find a qualified witness who is familiar with the electronic recordkeeping than it is under current practice to find a records custodian familiar with hardcopy practices from the 1960's. Moreover, the Committee determined that it would be useful in the Committee Note to emphasize that the residual exception remains available to qualify old documents that are reliable, and to state the Committee's expectation that the residual exception not only could, but *should* be used by courts to admit reliable documents prepared after January 1, 1998 that would have previously been offered under the ancient documents exception.

After extensive discussion, the Evidence Rules Committee unanimously approved the following amendment to Rule 803(16), to be submitted to the Standing Committee with the recommendation that it be forwarded to the Judicial Conference:

(16) ***Statements in Ancient Documents***. A statement in a document ~~that is at least 20 years old~~ that was prepared before January 1, 1998 and whose authenticity is established.

The Committee determined that it was not necessary to send out the proposed amendment for a new round of public comment, as the amendment would not affect the application of the ancient documents exception in any of the cases discussed in any of the public comments. Moreover, a number of the public comments specifically suggested that a grandfathering provision would properly address the Committee's ESI-related concerns while not affecting the use of the exception in the cases in which it is needed and is currently being used.

Finally, the Committee reviewed and approved the proposed Committee Note, which emphasizes the following points:

● The amendment addresses the concern about ESI, and there is no effect on the current use of the exception for documents prepared before 1998.

● In cases involving matters such as latent diseases going forward --- i.e., using records prepared after January 1, 1998 --- the ancient documents exception should not be necessary because of the existence of reliable ESI, and the ability to admit the evidence under reliability-based exceptions such as Rules 803(6) and 807.

● The limitation of the ancient documents exception is not intended to provide a signal that old documents are somehow not to be admitted under other exceptions, particularly Rule 807.

● A document prepared before 1998 might subsequently be altered; to the extent that is so, the alterations would not qualify for admissibility under Rule 803(16).

The proposed Committee Note to the amendment to Rule 803(16), as unanimously approved by the Committee, reads as follows:

> The ancient documents exception to the rule against hearsay has been limited to statements in documents prepared before January 1, 1998. The Committee has determined that the ancient documents exception should be limited due to the risk that it will be used as a vehicle to admit vast amounts of unreliable electronically stored information (ESI). Given the exponential development and growth of electronic information around the year 1998, the hearsay exception for ancient documents has now become a possible open door for large amounts of unreliable ESI, as no showing of reliability needs to be made to qualify under the exception.

The Committee is aware that in certain cases --- such as cases involving latent diseases and environmental damage --- parties must rely on hardcopy documents from the past. The ancient documents exception remains available for such cases for documents prepared before 1998. Going forward, it is anticipated that any need to admit old hardcopy documents produced after January 1, 1998 will decrease, because reliable ESI is likely to be available and can be offered under a reliability-based hearsay exception. Rule 803(6) may be used for many of these ESI documents, especially given its flexible standards on which witnesses might be qualified to provide an adequate foundation. And Rule 807 can be used to admit old documents upon a showing of reliability --- which will often (though not always) be found by circumstances such as that the document was prepared with no litigation motive in mind, close in time to the relevant events. The limitation of the ancient documents exception is not intended to raise an inference that 20 year-old documents are, as a class, unreliable, or that they should somehow not qualify for admissibility under Rule 807. Finally, many old documents can be admitted for the non-hearsay purpose of proving notice, or as party-opponent statements.

The limitation of the ancient documents hearsay exception is not intended to have any effect on authentication of ancient documents. The possibility of authenticating an old document under Rule 901(b)(8) --- or under any ground available for any other document --- remains unchanged.

The Committee carefully considered, but ultimately rejected, an amendment that would preserve the ancient documents exception for hardcopy evidence only. A party will often offer hardcopy that is derived from ESI. Moreover, a good deal of old information in hardcopy has been digitized or will be so in the future. Thus, the line between ESI and hardcopy was determined to be one that could not be drawn usefully.

The Committee understands that the choice of a cut-off date has a degree of arbitrariness. But January 1, 1998 is a rational date for treating concerns about old and unreliable ESI. And the date is no more arbitrary than the 20-year cutoff date in the

original rule. See Committee Note to Rule 901(b)(8) ("Any time period selected is bound to be arbitrary.").

Under the amendment, a document is "prepared" when the statement proffered was recorded in that document. For example, if a hardcopy document is prepared in 1995, and a party seeks to admit a scanned copy of that document, the date of preparation is 1995 even though the scan was made long after that --- the subsequent scan does not alter the document. The relevant point is the date on which the information is recorded, not when the information is prepared for trial. However, if the content of the document is *itself* altered after the cut-off date, then the hearsay exception will not apply to statements that were added in the alteration.

III. Proposed Amendments to Rule 902 to Allow Certification of Authenticity of Certain Electronic Evidence

At its Spring 2015 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. The public comment was sparse, but generally favorable. A few of the comments provided suggestions for additions to the Committee Note. And one comment, by professors, made an argument that Rule 902(13) is in tension with the Confrontation Clause.

At the meeting, the Committee, in response to the public comments, unanimously agreed to three changes to the Committee Notes:

● A clarification, in both Committee Notes, that the reference to the certification requirements of Rule 902(11) was only to the procedural requirements for a valid certification, and not to the information being certified in that rule. Under Rule 902(11), the content of the certification is an attestation that the admissibility requirements of the business records exception have been met. But the new proposals do not require, or permit, the witness's certification to attest to any aspect of admissibility other than authenticity.

● A minor clarification of the description of "hash value" in the Committee Note to Rule 902(14).

● New language in both Committee Notes --- suggested by the Federal Magistrate Judges Association --- observing that a challenge to the authenticity of electronic evidence may require advance access to technical information and that the need for such access should inform the notice requirements.

The Committee then discussed the concern raised by some professors that a certification made pursuant to Rule 902(13) might violate the defendant's right to confrontation in criminal cases. 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 have uniformly held that certificates prepared under Rule 902(11) 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 --- a certification cannot render constitutional an underlying report that itself violates the Confrontation Clause.

The Committee noted that even the professors agreed that Rule 902(14) presented no constitutional issue, because the certificate would state only that the electronic data is a true copy --- a process clearly permitted by *Melendez-Diaz.* As to Rule 902(13), the certification is a bit more complicated, because the witness may be attesting that the process leads to an accurate result; but that is no different than certifications under Rule 902(11), under which the affiant states that the record meets the reliability requirements of the business records exception. And these certificates have been uniformly held to be constitutional by the lower courts. There is of course no intention or implication from the amendment that a certification could somehow be a means of bringing otherwise testimonial reports into court. But the Committee concluded that if

the underlying report is not testimonial, the certification of authenticity will not raise a constitutional issue under the current state of the law.

After full discussion, the Committee unanimously voted to approve proposed Rules 902(13) and (14), and their proposed Committee Notes, to be submitted to the Standing Committee with the recommendation that it be forwarded to the Judicial Conference. The proposed amendments and Committee Notes provide 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 of a qualified person that complies with the certification requirements of Rule 902(11) or (12). The proponent must also meet the notice requirements of Rule 902(11).

Committee Note

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 Rule specifically allows the authenticity foundation that satisfies Rule 901(b)(9) to be established by a certification rather than the testimony of a live witness.

The reference to the "certification requirements of Rule 902(11) or (12)" is only to the procedural requirements for a valid certification. There is no intent to require, or permit, a certification under this rule to prove the requirements of Rule 803(6). Rule 902(13) is solely limited to authentication and any attempt to satisfy a hearsay exception must be made independently.

A certification under this Rule can establish only that the proffered item has satisfied the admissibility requirements for authenticity. The opponent remains free to object to admissibility of the proffered item on other grounds --- including hearsay, relevance, or in criminal cases the right to confrontation. For example, assume that a plaintiff in a defamation case offers what purports to be a printout of a webpage on which a defamatory statement was made. Plaintiff offers a certification under this Rule in which a qualified person describes the process by which the webpage was retrieved. Even if that certification sufficiently establishes that the webpage is authentic, defendant remains free to object that the statement on the webpage was not placed there by defendant. Similarly, a certification authenticating a computer output, such as a spreadsheet, does not preclude an objection that the information produced is unreliable --- the authentication establishes only that the output came from the computer.

A challenge to the authenticity of electronic evidence may require technical information about the system or process at issue, including possibly retaining a forensic

technical expert; such factors will effect whether the opponent has a fair opportunity to challenge the evidence given the notice provided.

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

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 Medium, or File.* Data copied from an electronic device, storage medium, or file, if authenticated by a process of digital identification, as shown by a certification of a qualified person that complies with the certification requirements of Rule 902(11) or (12). The proponent also must meet the notice requirements of Rule 902(11).

Committee Note

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 number that is often represented as a sequence of characters and is produced by an algorithm based upon the digital contents of a drive, medium, or file. If the hash values for the original and copy are different, then the copy is not identical to the original. If the hash values for the original and copy are the same, it is highly improbable that the original and copy are not identical. 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.

The reference to the "certification requirements of Rule 902(11) or (12)" is only to the procedural requirements for a valid certification. There is no intent to require, or permit, a certification under this rule to prove the requirements of Rule 803(6). Rule 902(14) is solely limited to authentication and any attempt to satisfy a hearsay exception must be made independently.

A certification under this Rule can only establish that the proffered item is authentic. The opponent remains free to object to admissibility of the proffered item on other grounds --- including hearsay, relevance, or in criminal cases the right to confrontation. 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.

A challenge to the authenticity of electronic evidence may require technical information about the system or process at issue, including possibly retaining a forensic technical expert; such factors will effect whether the opponent has a fair opportunity to challenge the evidence given the notice provided.

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

IV. Best Practices Manual on Authentication of Electronic Evidence

The Committee has determined that it can 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 worked on preparing such a manual with Greg Joseph and Judge Paul Grimm. The pamphlet, in final form, was submitted to the Committee for its review and discussion.

The Committee reviewed the pamphlet and found that it would be very helpful to the bench and bar.

It was noted that there is still an issue as to whether the Advisory Committee should be listed as a co-author, or whether the attribution should be less direct --- such as some indication that it had been approved or supported by the Advisory Committee. Another possibility is that the Committee would not be referred to at all. The pamphlet will be submitted as an action item for the Standing Committee at its next meeting, so that the Standing Committee can determine how the Advisory Committee's role in the pamphlet should be described if at all.

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

For the past two meetings, the Committee has considered a project that would provide more uniformity to the notice provisions of the Evidence Rules, and that would also make relatively minor substantive changes to two of those rules.

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 especially important to allow for a good cause exception when it is a criminal defendant who fails to provide pretrial notice.

2) The request requirement in Rule 404(b) --- that the criminal defendant must request notice before the government is obligated to give it --- is 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.

With this much agreed upon, the Committee considered other suggestions for amendment to the notice provisions of Rules 404(b), 609(b), 807 and 902(11). One possibility was a template that would require a proponent to provide "reasonable written notice of an intent to offer evidence under" the specific rule, and to "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." For a number of reasons, however, the Committee concluded that such a template would not work as applied to all four rules.

For one thing, the template would result in a change to Rule 404(b) that would require the defendant to provide notice for "reverse 404(b)" evidence in a criminal case --- such a change should not be made simply for uniformity's sake. For another, the "substance" requirement would probably constitute a tightening of the government's disclosure obligations under Rule 404(b), which currently requires a disclosure of the "general nature" of the evidence --- again, such a change should not be made purely for uniformity's sake, especially given the fact that Rule 404(b) covers a different kind of evidence than Rule 807. Finally, 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." That difference is justified because the notice provisions in Rules 404(b) and 609(b) are likely to be invoked only

in the context of a trial, whereas Rules 807 and 902(11) might be invoked on summary judgment as well. It would be counterproductive to change two of these rules simply to provide uniformity.

After discarding the template, the Committee moved to consideration of individual changes that might be made to improve one or more of the notice provisions. Committee members were in favor written notice requirements. Rules 404(b) and 807 currently do not provide for written notice. **Committee members unanimously agreed that a written notice requirement should be added to Rule 807.** But the DOJ representative argued that there was no need to add a requirement of written notice to Rule 404(b), because the Department (the only litigant subject to the Rule 404(b) notice requirement) routinely provides notice in writing. The Committee agreed that there was no need to amend Rule 404(b) if that amendment would have no effect.

The Committee next discussed the Rule 807 requirement that the proponent disclose "the statement and its particulars, including the declarant's name and address." After discussion, the Committee determined that --- independent of any uniformity project --- this phrase should be amended. For one thing, the term "particulars" has led in some cases to petty disputes about the details of the notice provided. For another, the requirement that the proponent disclose the address of the declarant is nonsensical when the declarant is unavailable; it is unnecessary when the declarant is a person or entity whose address is known or can easily be determined; and it is problematic in cases in which disclosure of the address might raise security or privacy issues. **The Committee concluded unanimously that the requirement of disclosing an address should be deleted from Rule 807, and that the term "substance" should replace "particulars."**

The Chair then observed that the Committee has on its agenda the possibility of modest changes to Rule 807 that would make it somewhat easier to invoke. The Committee agreed that it would not be prudent to propose changes to the notice provisions of Rule 807 until the Committee has decided whether other changes to the rule, if any, should be proposed. In sum, it would be appropriate to propose all amendments to Rule 807 at one time.

The Committee further agreed that the proposed amendment to Rule 404(b) --- to delete the requirement that the defendant request notice --- should be held off until other amendments were ready for proposal. Holding off on that amendment is consistent with the intent of the Standing Committee --- that amendments should be packaged, in order to minimize disruption to the bench and bar. The change that would be made to Rule 404(b) is not so significant that it must be made immediately without regard to packaging.

The working proposal for amendment to the Rule 807 notice requirement, approved by the Committee, reads as follows:

(b) Notice. The statement is admissible only if~~, before the trial or hearing~~ the proponent gives an adverse party reasonable written notice of ~~the~~ an intent to offer the statement ~~and its particulars, including the declarant's name and address,~~ -- including its

substance and the declarant's name -- so that the party has a fair opportunity to meet it. The notice must be provided before the trial or hearing -- or during trial or hearing if the court, for good cause, excuses a lack of earlier notice.

The working draft of the Committee Note provides as follows:

The notice provision has been amended to make three changes in the operation of the Rule.

First, the Rule requires the proponent to disclose the "substance" of the statement. This term is intended to require a description that is sufficiently specific under the circumstances to allow the opponent a fair opportunity to meet the evidence. Cf. Rule 103(a)(2) (requiring the party making an offer of proof to inform the court of the "substance" of the evidence). Prior case law on the obligation to disclose the "particulars" of the hearsay statement may be instructive, but not dispositive, of the proponent's obligation to disclose the "substance" of the statement under the Rule as amended. The prior requirement that the declarant's address must be disclosed has been deleted; that requirement was nonsensical when the declarant was unavailable, and unnecessary in the many cases in which the declarant's address was known or easily obtainable. If prior disclosure of the declarant's address is critical and cannot be otherwise obtained by the opponent, then the opponent can seek relief from the court.

Second, the Rule now requires that the notice be in writing --- which includes notice in electronic form. See Rule 101(b)(6). Requiring the notice to be in writing provides certainty and reduces arguments about whether notice was actually made.

Finally, the pretrial notice provision has been amended to provide for a good cause exception --- the same exception found in Rule 404(b). Most courts have applied a good cause exception under Rule 807 even though it was not specifically provided in the original Rule, while some courts have not. Experience under the residual exception has

shown that a good cause exception is necessary in certain limited situations. For example, the proponent may not become aware of the existence of the hearsay statement until after the trial begins; or the proponent may plan to call a witness who without warning becomes unavailable during trial, and the proponent must then resort to residual hearsay. Where notice is made during the trial, the general requirement that notice must be in writing need not be met.

The Rule retains the requirement that the opponent receive notice in a way that provides a fair opportunity to meet the evidence. When notice is provided during trial after a finding of good cause, the court may need to consider protective measures, such as a continuance, to assure that the opponent has time to prepare for the particularized kind of argument that is necessary to counter hearsay offered under the residual exception.

VI. Proposal to Expand the Residual Exception

At previous meetings the Committee has had some preliminary discussion on whether Rule 807 --- the residual exception to the hearsay rule --- should be expanded to allow the admission of more hearsay, if it is reliable. Expansion of the residual exception might have the effect of providing more flexibility, and it could also be part of an effort to reassess some of the more controversial categorical hearsay exceptions, such as those for ancient documents, excited utterances and dying declarations. Limitations on those exceptions could be easier to implement if it could be assured that reliable hearsay currently fitting under those exceptions could be admitted under the residual exception. But currently, the residual exception is, by design, to be applied only in rare and exceptional circumstances.

The Committee discussed the possibilities of expanding the residual exception at the Spring meeting. The Committee recognized the challenge: the goal would be to allow the residual exception to be used somewhat more frequently, without broadening it so far that it would overtake the categorical exceptions entirely and lead to a hearsay system that was controlled by court discretion, with unpredictable outcomes. At the Hearsay Symposium, the Committee heard repeatedly from lawyers that they wanted predictable hearsay exceptions --- judicial discretion would lead to inconsistent results and lack of predictability would raise the costs of litigation and would make it difficult to settle cases.

Within these constraints, the Committee, after substantial discussion, preliminarily agreed on the following principles regarding Rule 807:

● The requirement that the court find trustworthiness "equivalent" to the circumstantial guarantees in the Rule 803 and 804 exceptions should be deleted. That standard is exceedingly difficult to apply, because there is no unitary standard of trustworthiness in the Rule 803 and 804 exceptions. It is common ground that statements falling within the Rule 804 exceptions are not as reliable as those admissible under Rule 803; and it is also clear that the bases of reliability differ from exception to exception. Moreover, one of the exceptions subject to "equivalence" review --- Rule 804(b)(6) forfeiture --- is not based on reliability at all. Given the difficulty of the "equivalence" standard, a better approach is simply to require the judge to find that the hearsay offered under Rule 807 is trustworthy.

● Trustworthiness can best be defined as a consideration of both circumstantial guarantees and corroborating evidence. Most courts find corroborating evidence to be relevant to the reliability enquiry, but some do not. An amendment would be useful to provide uniformity in the approach to evaluating trustworthiness under the residual exception --- and substantively, that amendment should specifically allow the court to consider corroborating evidence, as corroboration is a typical source for assuring that a statement is reliable.

● The requirements in Rule 807 that the residual hearsay must be proof of a "material fact" and that admission of residual hearsay be in "the interests of justice" have not served any purpose. The inclusion of the language "material fact" is in conflict with the studious avoidance of the term "materiality" in Rule 403 --- and that avoidance was well-reasoned, because the term "material" is so fuzzy. The courts have essentially held that "material" means "relevant" --- and so nothing is added to Rule 807 by including it there. Likewise nothing is added to Rule 807 by referring to the interests of justice because that guidance is already provided by Rule 102. These provisions were added to the residual exception to emphasize that the exception was to be used only in truly exceptional situations. Deleting them might change the tone a bit, to signal that while hearsay must still be reliable to be admitted under Rule 807, there is no longer a requirement that the use must be rare and exceptional.

● The requirement in the residual exception that the hearsay statement must be "more probative than any other evidence that the proponent can obtain through reasonable efforts" should be retained. This will preserve the rule that proponents cannot use the residual exception unless they need it. And it will send a signal that the changes proposed are modest --- there is no attempt to allow the residual exception to swallow the categorical exceptions, or even to permit the use the residual exception if the categorical exceptions are available.

What follows is the working draft of an amendment to Rule 807 that the Committee has tentatively approved and will be considered further at the next meeting (including the amendment to the notice provision discussed above).

Rule 807. Residual Exception

(a) In General. Under the following circumstances, a hearsay statement is not excluded by the rule against hearsay even if the statement is not specifically covered by a hearsay exception in Rule 803 or 804:

(1) ~~the statement has equivalent circumstantial guarantees of trustworthiness~~ the court determines, after considering the pertinent circumstances and any corroborating evidence, that the statement is trustworthy.; and

~~**(2)** it is offered as evidence of a material fact;~~

(~~3~~ 2) it is more probative on the point for which it is offered than ~~any~~ other evidence that the proponent can obtain through reasonable efforts~~; and~~

~~**(4)** admitting it will best serve the purposes of these rules and the interests of justice~~.

(b) Notice. **(b) Notice.** The statement is admissible only if~~, before the trial or hearing~~ the proponent gives an adverse party reasonable written notice of ~~the~~ an intent to offer the statement ~~and its particulars, including the declarant's name and address,~~ -- including its substance and the declarant's name -- so that the party has a fair opportunity to meet it. The notice must be provided before the trial or hearing -- or during trial or hearing if the court, for good cause, excuses a lack of earlier notice.

Finally, the Committee decided that it would be useful to convene a miniconference on the morning of the Fall 2016 meeting, to have judges, lawyers and academics provide commentary on the proposed changes to Rule 807.

VII. Proposal to Amend Rule 801(d)(1)(A)

Over the last few meetings, the Committee has been considering the possibility of expanding substantive admissibility of certain prior statements of testifying witnesses --- the rationale of that expansion being that unlike other forms of hearsay, the declarant is subject to cross-examination about the statement. At the Symposium on Hearsay in October, 2015, a panel was devoted to treatment of prior witness statements.

The Committee's discussions at the previous two meetings, and the presentations at the Symposium, have served to narrow the Committee's focus on any possible amendment that would expand admissibility of prior witness statements. Here is a synopsis of the Committee's prior determinations:

- While there is a good argument that prior witness statements should not be treated as hearsay at all, amending the hearsay rule itself (Rule 801(a)-(c)) is not justified. That rule is iconic, and amending it to exclude prior witness statements will be difficult and awkward. Therefore any amendment should focus on broadening the exemption provided by Rule 801(d)(1).

- The focus on Rule 801(d)(1) should be narrowed further to the subdivision on prior inconsistent statements: Rule 801(d)(1)(A). The current provision on prior consistent statements --- Rule 801(d)(1)(B) --- was only recently amended, and that amendment properly captures the statements that should be admissible for their truth. Any expansion of Rule 801(d)(1)(B) would untether the rule from its grounding in rehabilitating the witness, and would allow parties to strategically create evidence for trial. Likewise, the current provision of prior statements of identification --- Rule 801(d)(1)(C) --- has worked well and is not controversial; there is no reason, or even a supporting theory, to expand admissibility of such statements.

At the Spring meeting, the Committee considered two possible ways to amend Rule 801(d)(1)(A) to provide for broader substantive admissibility of prior inconsistent statements. The current provision provides substantive admissibility only in unusual cases --- where the declarant made the prior statement under oath at a formal proceeding. The two possibilities for expansion presented were: 1) allowing for substantive admissibility of *all* prior inconsistent statements, as is the case in California, Wisconsin, and a number of other states; and 2) allowing substantive admissibility only when there is proof --- other than a witness's statement --- that the prior statement was actually made, as is the procedure in Connecticut, Illinois, and several other states.

The Committee quickly determined that it would not propose an amendment that would provide for substantive admissibility of all prior inconsistent statements. The Committee was concerned about the possibility that a prior inconsistent statement could be used as critical substantive proof even if the witness denied ever making it and there was a substantial dispute that it was ever made. Several Committee members noted that it would often be costly and

distracting to seek to prove whether a prior inconsistent statement was made if there is no reliable record of it.

The Committee next turned its discussion to allowing substantive admissibility of prior inconsistent statements where there is in fact proof that it was made --- such as a statement that was recorded or was signed by the witness. Several members noted that where a statement is made at a police station, even if it is signed or audio recorded, the witness might have an argument that it was made under pressure --- and that many people who confess at the station do in fact repudiate their statements once they get a lawyer. Others responded that while audio recordings and signed statements are subject to argument as to how and perhaps even whether they were made, the same is not true for video recordings. A statement that is recorded on video might be explained away by the witness at trial --- which is perfectly suited to the trial context --- but it is all but impossible to deny that a statement was made when it has been video recorded. Moreover, any indication of police pressure or overreaching is likely to be presented in the video itself. Other members noted that allowing substantive admissibility of videotaped inconsistent statements could lead to more statements being videotaped in expectation that they might be useful substantively--- which is a good result even beyond its evidentiary consequences.

Finally, a number of Committee members noted that one of the major costs of the current rule is that a confounding limiting instruction must be given whenever a prior inconsistent statement is admissible for impeachment purposes but not for its substantive effect. That cost may be justified when there is doubt that a prior statement was fairly made, but it may well be unjustified when the prior statement is on video --- as there is easy proof of the statement and its circumstances if the witness denies making it or tries to explain it away.

The Committee took a straw vote and five members of the Committee voted in favor of an amendment to Rule 801(d)(1)(A) that would provide for substantive admissibility of a prior inconsistent statement if it was video recorded. Three members were opposed. The Committee resolved to take up the matter in the next two meetings to determine whether an amendment would be formally proposed for issuance for public comment in the Fall of 2017.

The working draft of an amendment that would allow substantive admissibility for videotaped prior inconsistent statements provides as follows:

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

* * *

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

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

(A) is inconsistent with the declarant's testimony and ~~was~~:

(i) was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition; or

(ii) was recorded on video and is available for presentation at trial; or

(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; or

(C) identifies a person as someone the declarant perceived earlier.

A working draft of the Committee Note provides as follows:

The amendment provides for greater substantive admissibility of inconsistent statements of a testifying witness, which is appropriate because the declarant is by definition testifying under oath and is subject to cross-examination about the statement. The requirement that the statement be made under oath at a former proceeding is unnecessarily narrow. That requirement stemmed mainly from a concern that it was necessary to regulate the possibility that the prior statement was never made. But as shown in the practice of some states, there are less onerous alternatives that can assure that what is introduced is exactly what the witness said. The best proof that the witness made the statement is that it is video recorded. That is the safeguard provided by the amendment.

While the amendment expands the substantive admissibility for prior inconsistent statements, it does not affect the use of any prior inconsistent statement for impeachment purposes. A party may wish to introduce an inconsistent statement not to show that the witness's testimony is false and prior statement is true, but rather to show that neither is true. Rule 801(d)(1)(A) does not apply if the proponent is not seeking to admit the prior inconsistent statement for its truth. If the proponent is offering the statement solely for impeachment, it does not fit the definition of hearsay under Rule 801(c), and so Rule 801(d)(1)(A) never comes into play.

VIII. Proposals to Amend Rule 803(2)

Four separate proposals have been made by academics for amending Rule 803(2), the hearsay exception for excited utterances (in addition to Judge Posner's suggestion that the exception be eliminated, which the Committee has previously considered and rejected). The Committee considered all four proposals at the Spring meeting.

One proposal was to add the word "continuous" to the rule --- requiring the declarant to be in a continuous state of excitement for the period between the startling event and the statement. The Committee found no need to make this change. The text and the case law already requires the statement to be made while under the continuous influence of the startling event. The single case cited as problematic – *United States v. Napier* --- is one in which there is a new startling event, and the declarant made a statement that related not only to that new event but also to a previous startling event. Adding the word "continuous" would not change the result in that case. More importantly, the case is correctly decided because the statement was in fact made while the declarant was under the effect of the second startling event. Finally, even if the case were problematic, the fact that it is the only federal case cited as raising the so-called problem, in 40 years of litigation under Federal Rule 803(2), is indicative that there is no serious problem worth addressing.

Other proposals were made in response to the allegation that the excited utterance exception does not provide a sufficient guarantee that evidence admitted under the exception will be reliable. One proposal was to add language --- derived from the 2014 amendment to Rule 803(6) --- that would allow the court to exclude the statement if the opponent could show that the excited utterance was in fact untrustworthy. Another proposal was to add language --- derived from Rule 804(b)(3) --- that would require the proponent to show corroborating circumstances

clearly indicating that the excited utterance was trustworthy. And a third proposal was to transfer the exception to Rule 804, so that excited utterances would not be admissible unless the declarant is shown to be unavailable to testify.

The Committee decided not to proceed on any of these proposals. For one thing, the proposals would have consequences beyond Rule 803(2) --- consideration would have to be given to similar treatment for other exceptions that have been found controversial, such as the exceptions for present sense impressions and state of mind. Thus, proposing an amendment to Rule 803(2) at this point would be contrary to a systematic approach to amending the Federal Rules of Evidence. Second, and more importantly, the Committee relied on a lengthy report prepared by the FJC representative, who analyzed the social science studies that have been conducted regarding the premises of Rules 803(1) (the present sense impression exception) and 803(2) --- specifically whether there is support for the propositions that immediacy and excitedness tend to guarantee reliability. The FJC representative concluded that there is significant empirical data supporting both of these premises. That is, social science data support the premises that 1) it takes time to make up a good lie, and 2) startlement makes it more difficult to make up a good lie. Consequently, the Committee determined that there was no need at this point to amend Rule 803(2) --- or Rule 803(1), for that matter --- due to any reliability concerns.

IX. Consideration of a Change from Categorical Hearsay Exceptions to Guidelines

At the Hearsay Symposium in Fall 2015, 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. Similarly, a 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). The Committee directed the Reporter to prepare a memorandum for the Spring meeting that would evaluate the viability of replacing the current rule-based system with a system of guided discretion that would include a list of standards or illustrations taken from the existing exceptions.

The Reporter prepared the report for the Spring meeting. The report suggested that at this point, 40 years into the Federal Rules of Evidence, any perceived advantages in switching to a guidelines system (in terms of adding flexibility) would be outweighed by the costs (including substantial disruption; the uncertainty created by greater judicial discretion in ruling on hearsay; increased motion practice; and increased discovery cost because virtually any hearsay statement would be potentially admissible). The Committee, after deliberation, agreed with this assessment.

In the memorandum for the Committee, the Reporter raised as a lesser alternative a system in which the categorical hearsay exceptions were retained, but two changes could be made: 1) add a safety valve applicable to all the exceptions allowing a judge to exclude

otherwise admissible hearsay if the opponent could show that it was untrustworthy; and 2) amend Rule 807 to allow for more frequent and easier use. Such a system would attempt to address two oft-stated critiques about the hearsay exceptions: 1) that many of them admit unreliable evidence; and 2) that the categorical system does not adapt well to hearsay that is reliable but doesn't fit into exceptions.

But the Committee unanimously rejected the proposed alternative, on the ground that it would inject too much discretion into the system. At the Hearsay Symposium, the Committee heard loud and clear from the lawyers that rules were needed to provide guidance, stability and consistency. Allowing more discretion for the court to admit or exclude hearsay which it happened to find reliable or unreliable would add substantial uncertainty and inconsistency, making it more difficult to settle, obtain summary judgment, and prepare for trial. Moreover, adding so much more discretion would provide a "home team advantage" in that local counsel would learn over time the personal inclinations of a local judge in treating a hearsay problem.

Instead of an across-the-board increase of discretion to exclude and admit hearsay, the Committee opted to consider modest changes to the residual exception, discussed above --- with the goal being to make that exception somewhat more useful, without injecting too much discretion into the system. Committee members recognized that the change to the residual exception would be in the nature of a tightrope walk, which is one of the reasons that a miniconference on the possible change would be so useful.

X. Consideration of a Possible Amendment to Rule 803(22)

Rule 803(22) is a hearsay exception that allows judgments of conviction to be offered to prove the truth of the facts essential to the conviction. The exception carves out two kinds of convictions that are not covered: 1) convictions resulting from a nolo contendere plea; and 2) misdemeanor convictions.

Judge Graber, a member of the Standing Committee, asked the Advisory Committee to consider whether these two limitations on the exception were justified --- if not, the proposal would be to eliminate those carve-outs and treat nolo contendere and misdemeanor convictions the same as other convictions under the Rule.

The Reporter prepared a memorandum, suggesting that the two limitations in Rule 803(22) were in fact justified. The Committee agreed with the Reporter's assessment as to both those limitations. The Committee's rationales were as follows:

> 1. The reason for the nolo contendere carve-out is that Rule 410 provides that evidence of a nolo *plea* is not admissible in a subsequent civil or criminal case. As the Ninth Circuit has stated, "Rule 410's exclusion of a nolo contendere plea would be meaningless if all it took to prove that the defendant committed the crime charged was a certified copy of the inevitable judgment of conviction resulting from the plea." *United States v. Nguyen,* 465 F.3d 1128, 1131 (9th Cir. 2006). It might be argued that allowing nolo pleas is bad policy, but consideration of that question is beyond the scope of

evidence rulemaking. Assuming that allowing nolo pleas is substantively correct, then the decision made to protect them as a means of encouraging compromise in Rule 410 is valid, and that policy should not be undermined by allowing admission of the facts supporting the conviction under Rule 803(22).

2. The reason for the misdemeanor carve-out is that misdemeanors, as a class, are less likely to be contested than felonies, and therefore there is less likely to be a reliable determination (or concession) that would justify admitting the underlying facts for their truth. One Committee member pointed out that in many jurisdictions, indigent defendants plead guilty to misdemeanors simply because they cannot make cash bail. Another member pointed out that if the defendant is indigent and a misdemeanor does not lead to jail time, the state is not required to provide counsel; thus a fair number of misdemeanor convictions are imposed without the defendant having a lawyer. Committee members recognized that some misdemeanor convictions might be highly contested, but noted that when that is so, courts have employed the residual exception to allow admission of the underlying facts for their truth. Thus, adding misdemeanor convictions to Rule 803(22) is not necessary to cover cases where the facts were truly contested, and would on the other hand lead to admission of facts that have clearly not been contested.

The Committee voted unanimously not to proceed with an amendment to Rule 803(22).

XI. Consideration of a Suggestion That Rule 704(b) Be Eliminated

The Reporter informed the Committee of a law review article that advocated elimination of Rule 704(b), which provides that in a criminal case, an expert may not testify that the defendant did or did not have the requisite mental state to commit the crime charged. The Reporter stated that before writing up a memorandum on the subject for the next meeting, he wished to get the Committee's preliminary reaction to eliminating the subdivision, as it presented a question of process: because Rule 704(b) was directly enacted by Congress, would it be appropriate to propose its elimination?

The Committee determined that two special circumstances applied that should counsel caution: 1) The proposal was to eliminate the exception entirely, as opposed to making changes that might improve the rule; and 2) Rule 704(b) was part of the Insanity Defense Reform Act --- a broad statutory overhaul of the insanity defense; because Rule 704 (b) was part of an integrated approach, it is possible that deleting the provision would have an effect on Congressional objectives beyond the Federal Rules of Evidence.

Consequently, the Committee unanimously concluded that it would not proceed with the proposal to eliminate Rule 704(b).

XII. 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. That decision received support from the study conducted by the FJC representative on social science research. The studies indicate that lies are more likely to be made when outside another person's presence --- for example, by a tweet or Facebook post.

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 Spring 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.

XIII. Consideration of a Possible Amendment to Rule 611(b)

A professor asked the Committee to consider an amendment to Rule 611(b) that would prohibit the government from cross-examining an accused about crimes that are different from the crime charged. The premise for the proposal is that there is a risk that a criminal defendant will be found to have made a full waiver of his Fifth Amendment right when testifying at a trial, even if the defendant's direct testimony is limited to a discrete issue in dispute. The professor recognized that Rule 611(b) already provides protection because it limits cross-examination to matters within the scope of direct. But he argued that protection of criminal defendants specifically might be necessary in case Rule 611(b) were changed in a way that would lift the limit on the scope of cross-examination.

The Advisory Committee unanimously agreed that it would not proceed with a proposal to amend Rule 611(b). The following points were made in Committee discussion:

1. Rule 611(b) already provides (together with Rule 608(b)) sufficient protection against an overbroad finding of waiver, and is consistent with the constitutional standards of relevance.

2. There is no reason to think that Rule 611(b) would ever be changed in such a way as to require a new rule to be implemented to protect testifying criminal defendants from overbroad waiver. In any case there is no reason to guard against such a possibility at this point.

3. The extent of a waiver is already governed by long-standing and uniform Supreme Court case law, and a new rule would do no more than codify that law --- which in any case is consistent with the existing Federal Rule 611(b).

4. The problem to which the proposal is directed is very unlikely to occur, because in most cases where a criminal defendant testifies, their denial of guilt on direct examination will in fact open the door to cross-examination about other charges, foundational issues, and the like.

XIV. *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 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. And the fact that a new appointment to the Court might affect the development of the law of confrontation is another reason for adopting a wait-and-see approach. The Committee resolved to continue monitoring developments on the relationship between the Federal Rules of Evidence and the accused's right to confrontation.

XV. Next Meeting

The Fall meeting of the Evidence Rules Committee will be held at Pepperdine Law School on October 21st.

Respectfully submitted,

Daniel J. Capra