MEMORANDUM

TO: Hon. David G. Campbell, Chair
Committee on Rules of Practice and Procedure

FROM: Hon. William K. Sessions, III, Chair
Advisory Committee on Evidence Rules

RE: Report of the Advisory Committee on Evidence Rules

DATE: May 7, 2017

I. Introduction

The Advisory Committee on Evidence Rules (the "Committee") met on April 21, 2017 in Washington D.C.

The Committee recommends that a proposed amendment to Evidence Rule 807 be issued for public comment.

The Committee also reports on several information items concerning, among other things, an ongoing review of Rules 801(d)(1)(A) and Rule 404(b).

II. Action Item—Proposed Amendment to Rule 807

The Committee has been considering possible changes to Rule 807—the residual exception to the hearsay rule—for the last two years. The project began with exploring the possibility of expanding the residual exception to allow admissibility of more hearsay and to grant trial courts somewhat more discretion in admitting hearsay on a case-by-case basis. After extensive deliberation—including discussion with a panel of experts at a Conference held at Pepperdine Law School—the Committee determined that the risks of expanding the residual exception would outweigh the rewards. In particular, the Committee was cognizant of concerns in the practicing bar about increasing judicial discretion to admit hearsay that was not covered by existing exceptions, as well as concerns by academics that expanding the residual exception would result in undermining the standard exceptions.

But in conducting its review of cases decided under the residual exception, and in discussions with experts at the Pepperdine Conference, the Committee determined that there are a number of problems in the application of the exception that could be improved by rule amendment. The problems that are addressed by the proposed amendment to Rule 807 are as follows:

- The requirement that the court find trustworthiness "equivalent" to the circumstantial guarantees in the Rule 803 and 804 exceptions is exceedingly difficult to apply, because there is no unitary standard of trustworthiness in the Rule 803 and 804 exceptions. Statements falling within the Rule 804 exceptions are not as reliable as those admissible under Rule 803 and yet both sets are considered possible points of comparison for any statement offered as residual hearsay. And 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. A review of the case law indicates that the "equivalence" standard has not fulfilled the intent of the drafters to limit the discretion of the trial court. Given the wide spectrum of reliability found in the hearsay exceptions, it is not difficult to find a statement reliable by comparing it to a weak exception, or to find it unreliable by comparing it to a strong one. Given the difficulty and disutility of the "equivalence" standard, the Committee has determined that a better, more user-friendly approach is simply to require the judge to find that the hearsay offered under Rule 807 is trustworthy.

- Courts are in dispute about whether to consider corroborating evidence in determining whether a statement is trustworthy. The Committee has determined that 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, because corroboration is a typical source for assuring that a statement is reliable. Thus, trustworthiness can best be defined in the rule as requiring an evaluation of two factors: 1) circumstantial guarantees surrounding the making of the statement, and 2) corroborating evidence. Adding a requirement that the court consider corroboration is an improvement to the rule independent of any decision to expand the residual exception.

- 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" and consistent with the "purpose of the rules" have not served any good purpose. The inclusion of the language "material fact" is in conflict with the drafters' avoidance of the term "materiality" in Rule 403—and that avoidance was well-reasoned, because the term "material" is used in so many different contexts. 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 and the purpose of the rules because that guidance is already provided by Rule 102. Moreover, the interests of justice language could be—and has been—used as an invitation to judicial discretion to admit or exclude hearsay under Rule 807 simply because it leads to a "just" result. The Committee has determined that the rule will be improved by deleting the references to "material fact" and "interest of justice" and "purpose of the rules."

- The current notice requirement is problematic in at least four respects:

  1. Most importantly, there is no provision for allowing untimely notice upon a showing of good cause. This absence has led to a conflict in the courts on whether a court even has the power to excuse notice no matter how good the cause. Other notice provisions in the Evidence Rules (e.g., Rule 404(b)) contain good cause provisions, so adding such a provision to Rule 807 will promote uniformity.

  2. The requirement that the proponent disclose "particulars" has led to unproductive arguments and unnecessary case law.

  3. There is no requirement that notice be in writing, which leads to disputes about whether notice was ever provided.

  4. The requirement that the proponent disclose the declarant's address is nonsensical when the witness is unavailable—which is usually the situation in which residual hearsay is offered.

  The proposed amendments to the notice requirements solve all these problems.

Finally, it is important to note that the Committee has retained the requirement from the original rule that the proponent must establish that the proffered hearsay is more probative than any other evidence that the proponent can reasonably obtain to prove the point. Retaining the "more probative" requirement indicates that there is no intent to expand the residual exception, only to improve it. The "more probative" requirement ensures that the rule will only be invoked when it is necessary to do so. Furthermore, the Committee has made it clear in the amendment that the proponent cannot invoke the residual exception unless the court finds that the proffered hearsay is not admissible under any of the Rule 803 or 804 exceptions. This assures, again, that parties will be able to invoke the exception only when they can establish the need to do so.

The Committee unanimously recommends that the Standing Committee issue the following proposed amendments to Rule, and accompanying Committee Note, for public comment:

Rule 807. Residual Exception

(a) In General. Under the following ~~circumstances~~conditions, a hearsay statement is not excluded by the rule against hearsay~~:~~: ~~even if~~

(1) the statement is not specifically covered by a hearsay exception in Rule 803 or 804~~:~~;

(~~1~~ 2) ~~the statement has equivalent circumstantial guarantees of trustworthiness~~ the court determines that it is supported by sufficient guarantees of trustworthiness—after considering the totality of circumstances under which it was made and any evidence corroborating the statement; and

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

(3) 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. The statement is admissible only if~~, before the trial or hearing,~~ the proponent gives an adverse party reasonable 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 in writing before the trial or hearing—or in any form during the trial or hearing if the court, for good cause, excuses a lack of earlier notice.

Committee Note

Rule 807 has been amended to fix a number of problems that the courts have encountered in applying it.

Courts have had difficulty with the requirement that the proffered hearsay carry "equivalent" circumstantial guarantees of trustworthiness. The "equivalence" standard is difficult to apply, given the different types of guarantees of reliability, of varying strength, found among the categorical exceptions (as well as the fact that some hearsay exceptions, e.g., Rule 804(b)(6), are not based on reliability at all). The "equivalence" standard has not served to limit a court's discretion to admit hearsay, because the court is free to choose among a spectrum of exceptions for comparison. Moreover, experience has shown that some statements offered as residual hearsay cannot be compared usefully to any of the categorical exceptions and yet might well be trustworthy. Thus the requirement of an equivalence analysis has been eliminated. Under the amendment, the court is to proceed directly to a determination of whether the hearsay is supported by guarantees of trustworthiness.

The amendment specifically allows the court to consider corroborating evidence in the trustworthiness enquiry. Most courts have required the consideration of corroborating evidence, though some courts have disagreed. The rule now provides for a uniform approach, and recognizes that the existence or absence of corroboration is in fact relevant to whether a statement is accurate. Of course, the court must not only consider the existence of corroborating evidence but also the strength and quality of that evidence.

The change to the trustworthiness clause does not at all mean that parties may proceed directly to the residual exception, without considering admissibility of the hearsay under Rules 803 and 804. Indeed Rule 807(a)(1) now requires the proponent to establish that the proffered hearsay is a statement that "is not specifically covered by a hearsay exception in Rule 803 or 804." Thus Rule 807 remains an exception to be invoked only when necessary.

In deciding whether the statement is supported by sufficient guarantees of trustworthiness, the court should not consider the credibility of any witness who relates the declarant's hearsay statement in court. The credibility of an in-court witness does not present a hearsay question. To base admission or exclusion of a hearsay statement on the witness's credibility would usurp the jury's role of determining the credibility of testifying witnesses. The rule provides that the focus for trustworthiness is on circumstantial guarantees surrounding the making of the statement itself, as well as any independent evidence corroborating the statement. The credibility of the witness relating the statement is not a part of either enquiry.

The Committee decided to retain the requirement that the proponent must show that the hearsay statement is more probative than any other evidence that the proponent can reasonably obtain. This necessity requirement will continue to serve to prevent the residual exception from being used as a device to erode the categorical exceptions

The requirements that residual hearsay must be evidence of a material fact and that its admission will best serve the purposes of these rules and the interests of justice have been deleted. These requirements have proved to be superfluous in that they are already found in other rules (*see,* Rules 102, 401).

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 obtained by the opponent through other means, then the opponent can seek relief from the court.

- Second, the rule now requires that the pretrial notice be in writing—which is satisfied by 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 provided.

- 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 for in the original rule, while some courts have read the original rule as it was written. 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 might then need to resort to residual hearsay. Where notice is provided 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 is not prejudiced.

III. Information Items

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

Over the last five 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. The Committee's discussions are now focused on whether Rule 801(d)(1)(A) should be amended to provide for greater substantive admissibility of prior inconsistent statements. Currently the rule is very narrow—prior inconsistent statements are admissible substantively only if they were made under oath at a formal proceeding. The two possibilities for expansion presented are: 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 ever made, as is the procedure in Connecticut, Illinois, and several other states.

The Committee has concluded that it will not propose an amendment that would provide for substantive admissibility of all prior inconsistent statements. The Committee is 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 is a substantial dispute that it was ever made. Cross-examination of a declarant as to the prior statement might be difficult if she denies ever making it. And it might well be costly and distracting to take evidence and to determine whether a prior inconsistent statement was made, if there is no reliable record of it.

The Committee is primarily considering whether to amend the rule to allow for substantive admissibility if the prior inconsistent statement has been recorded by audiovisual means. If the statement is audiovisually recorded, any denial that it was made becomes implausible, and the proof of its making is a fact easily determined. Any dispute about the circumstances under which it is made—for example, whether police officers induced the statement—probably can be straightforwardly evaluated by the factfinder, who can watch the recording. Moreover, allowing substantive admissibility of audiovisually recorded inconsistent statements could lead to more statements being recorded in the expectation that they might be useful substantively—which is a good result even beyond its evidentiary consequences.

The Committee is also considering a proposal from the Justice Department to add another ground of substantive admissibility—for statements that the witness acknowledges having made. The reasoning is that when a witness concedes that she made the statement, there is obviously no question that the statement was made. But practice in one state that has an acknowledgement

provision shows some practical difficulty, and litigation costs, in determining whether the witness has in fact acknowledged a whole statement a part of a statement, or any statement at all.

The Committee is being cautious in deciding whether to expand substantive admissibility for audiovisually recorded inconsistent statements. It is concerned about whether a change might lead to a proliferation of recorded statements, or to strategic recording of statements that may not be reliable. The Committee will be engaged in interviewing and seeking information from interested parties to get their thoughts on the consequences of a rule change. And the Committee is working with the FJC to prepare a survey on the subject.

B. Consideration of a Possible Amendment to Rule 606(b)

Federal Rule of Evidence 606(b) generally prohibits juror testimony concerning juror deliberations when offered to attack the validity of a verdict. The Supreme Court recently held, in *Pena-Rodriguez v. Colorado*, 137 S.Ct. 855 (2017), that the Colorado counterpart to Rule 606(b) violated a criminal defendant's Sixth Amendment rights when it was applied to bar testimony about statements demonstrating clear racial bias by a juror during deliberations. The scope of the constitutional right remains to be developed. It is likely that counsel will seek to expand the *Pena-Rodriguez* holding to other constitutional violations in the jury room, such as jurors drawing an unconstitutional adverse inference as a result of defendant's failure to testify; and it is likely that parties will seek to extend the decision to civil cases, especially in light of the Supreme Court's 2014 decision in *Warger v. Shauers*, 135 S.Ct. 521 (2016), in which the Court intimated that racist statements of jurors in civil cases might demand a constitutional exception to the Rule 606(b) exclusion.

The Committee recognizes that after *Pena-Rodriguez*, Rule 606(b) is unconstitutional as applied at least to racist statements made by jurors while deliberating in criminal cases. The Committee has always sought to remedy situations in which an Evidence Rule could foreseeably be applied in an unconstitutional manner, and has responded to Supreme Court decisions that raise constitutional questions about an Evidence Rule.

At its Spring meeting, the Committee discussed whether to propose an amendment to Rule 606(b) to eliminate the possibility of an unconstitutional application. The Committee considered three potential amendments:

- The Committee could amend Rule 606(b) to codify the specific holding of *Pena-Rodriguez*, creating an exception to the prohibition on juror testimony to impeach a verdict in cases involving statements of racial bias only. But while there was some sympathy in the Committee for this solution, other members were opposed on the ground that if *Pena-Rodriguez* ends up be extended to other types of juror conduct or to civil cases, another amendment would then be needed.

- The Committee could amend Rule 606(b) to expand on the *Pena-Rodriguez* holding and to permit juror testimony about the full range of conduct and statements that may implicate a defendant's constitutional rights. The Committee rejected this option, because it would raise difficult policy issues and could end up undermining Rule 606(b) itself—a rule that

is essential to preserve the finality of verdicts, the privacy interests of jurors, and the integrity of jury deliberations.

- The Committee could include a generic exception to the Rule 606(b) prohibition of juror testimony, allowing such testimony whenever it is "required by the Constitution." This potential amendment would be intended to capture only the right announced in *Pena-Rodriguez* for now, but would adapt to any future expansion of that right in later cases. The possible downside to this option is that the amendment could be interpreted to permit juror testimony about any type of juror misconduct or statement that could be argued to violate the Constitution. It could be read as a suggestion that *Pena-Rodriguez should* be expanded, at least at this point, given the recency of the decision.

The Committee resolved to postpone consideration of an amendment to Rule 606(b) in favor of monitoring the cases following *Pena-Rodriguez*.

C. Consideration of Possible Changes to Rule 404(b)

The Committee has been monitoring significant developments in the case law on Rule 404(b), governing admissibility of other crimes, wrongs, or acts. Several Circuit courts have suggested that the rule needs to be more carefully applied, and have set forth criteria for that more careful application. The focus has been on three areas:

1) Requiring the prosecutor not only to articulate a proper purpose but to explain how the bad act evidence proves that purpose without relying on a propensity inference.

2) Limiting admissibility of bad acts offered to prove intent or knowledge where the defendant has not actively contested those elements.

3) Limiting the "inextricably intertwined" doctrine, under which bad act evidence is not covered by Rule 404(b) because it proves a fact that is inextricably intertwined with the charged crime.

The Committee has considered several textual changes to address these case law developments, but is also still discussing and debating whether: 1) there is actually a problem that needs to be addressed; and 2) whether any textual changes will actually solve a problem without creating another one. The Department of Justice has taken the position that no changes to Rule 404(b) are justified (other than a minor change that dispenses with the requirement that a defendant must request notice). Other members of the Committee believe that there are significant problems, and conflict in the case law, that can be remedied by an amendment to Rule 404(b).

Part of the Committee's review focuses on possible changes to the notice provision of Rule 404(b). The Committee is considering specifically whether the problem of bad acts being admitted for propensity purposes might be addressed by requiring the prosecutor to articulate in the notice the chain of non-propensity inferences that justify admissibility for the proper purpose. Other possible changes to the notice provision include a requirement for earlier notice (so that

the parties and the court can be attuned to the need to assess whether there are non-propensity inferences that support admissibility); and a requirement that the government provided something more specific than the "general nature" of the evidence, as is currently all that is required,

One alternative that is being considered by the Committee is to amend Rule 404(b) to require a more exclusionary balancing test for bad act evidence offered against a criminal defendant—more protective than the Rule 403 test, under which the prejudicial effect must substantially outweigh the probative value. The test could require the probative value of the other crime, wrong, or act to "substantially outweigh" (or to "outweigh") the unfair prejudice to the defendant from a potential propensity use. This solution might have an advantage of providing protection against misuse of bad act evidence, without adding possibly problematic new language and standards to Rule 404(b) regarding "propensity" and "active contest."

The Committee will continue to study Rule 404(b) and the developing case law. The Reporter will provide the Committee with a Rule 404(b) case outline for its Fall meeting, including district court opinions, to help determine the level of care applied to Rule 404(b) rulings in criminal cases. It is possible that the Committee's research might be used to formulate a best practices manual for Rule 404(b) evidence, should the Committee decide not to proceed with amendments to the Rule.

D. Conference on Rule 702

The Committee is preparing a Conference on Rule 702—specifically on developments regarding expert testimony that might justify an amendment to Rule 702. The major development to be addressed is the challenges raised in the last few years to forensic expert evidence. In 2009, the National Academy of Sciences issued an important report, concluding that many forensic techniques were not scientific. This report has led to many new challenges to such forensic testimony as ballistics, bite mark identification, and handwriting identification. Then a few months ago the President's Council of Scientific and Technical Advisors (PCAST) issued a detailed report challenging the reliability of various forms of forensic testimony and providing suggestions for how these forensic inquiries can be validated. The Chair of PCAST contacted the Committee to discuss how the PCAST suggestions might be implemented as "best practices" under Rule 702. The Conference on Rule 702 is the first step in that process.

Besides the new challenges to forensic expert testimony, there are a number of other issues regarding expert testimony that judges and members of the public have asked the Committee to review. Among them are:

- Are courts accurately applying the admissibility factors established in the 2000 amendment to Rule 702—specifically that the expert must have a sufficient basis and the methodology must be reliably applied?

- How should a court assess the reliability of non-scientific or "soft science" experts?

- What special problems in evaluating challenges to expert testimony arise in criminal cases?

The Conference will be convened to discuss all of the above issues, though the major focus will be on forensic experts. The Conference will take place before the Fall Committee meeting on Friday, October 27, 2017 at Boston College Law School. A transcript of the Conference will be published in the Fordham Law Review. The Committee invites and would appreciate input and participation from the members of the Standing Committee.

E. Possible eHearsay (Recent Perceptions) Exception

At a previous 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's decision not to proceed with the exception was mainly grounded in the concern that it would lead to the admission of unreliable evidence. The Committee has, however, continued 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 eHearsay either being excluded or improperly admitted by misapplying the existing exceptions.

The review on recent federal case law involving eHearsay indicates that there are few if any instances of reliable eHearsay being excluded, nor is it being improperly admitted under misinterpretations of 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. Moreover, the study conducted by the Committee's FJC representative on social science research counsels caution in adopting an eHearsay exception. The social science 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 will continue to monitor the treatment of eHearsay in the federal courts, and will also continue to review the practice in the states that employ a recent perception exception.

F. *Crawford v. Washington* and the Hearsay Exceptions in the Evidence Rules

As previous reports have noted, the Committee continues to monitor case law developments after the Supreme Court's decision in *Crawford v. Washington*, in which the Court held that the admission of "testimonial" hearsay violates the accused's right to confrontation unless the accused has an opportunity to confront and cross-examine the declarant.

The Reporter regularly provides the Committee a case digest of all federal circuit cases discussing *Crawford* and its progeny. The goal of the digest is to enable the Committee to keep current on developments in the law of confrontation as they might affect the constitutionality of the Federal Rules hearsay exceptions. If the Committee determines that it is appropriate to propose amendments to prevent one or more of the Evidence Rules from being applied in violation of the Confrontation Clause, it will propose them for the Standing Committee's consideration.

IV. Minutes of the Spring 2017 Meeting

The draft minutes of the Committee's Spring 2017 meeting is attached to this report. These minutes have not yet been approved by the Committee.

Appendix: Proposed Amendment to Fed.R.Evid. 807.

TAB 6B

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PROPOSED AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE*

Rule 807. Residual Exception

(a) In General. Under the following ~~circumstances~~ conditions, a hearsay statement is not excluded by the rule against hearsay: ~~even if~~

(1) the statement is not specifically covered by a hearsay exception in Rule 803 or 804~~:~~;

(1~~2~~) ~~the statement has equivalent circumstantial guarantees of trustworthiness~~the court determines that it is supported by sufficient guarantees of trustworthiness—after considering the totality of circumstances under which it was made and any evidence corroborating the statement; and

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

* New material is underlined in red; matter to be omitted is lined through.

(3) 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. The statement is admissible only if~~, before the trial or hearing,~~ the proponent gives an adverse party reasonable 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 in writing before the trial or hearing—or in any form during the trial or hearing if the court, for good cause, excuses a lack of earlier notice.

Committee Note

Rule 807 has been amended to fix a number of problems that the courts have encountered in applying it.

Courts have had difficulty with the requirement that the proffered hearsay carry "equivalent" circumstantial guarantees of trustworthiness. The "equivalence" standard is difficult to apply, given the different types of guarantees of reliability, of varying strength, found among the categorical exceptions (as well as the fact that some hearsay exceptions, e.g., Rule 804(b)(6), are not based on reliability at all). The "equivalence" standard has not served to limit a court's discretion to admit hearsay, because the court is free to choose among a spectrum of exceptions for comparison. Moreover, experience has shown that some statements offered as residual hearsay cannot be compared usefully to any of the categorical exceptions and yet might well be trustworthy. Thus the requirement of an equivalence analysis has been eliminated. Under the amendment, the court is to proceed directly to a determination of whether the hearsay is supported by guarantees of trustworthiness.

The amendment specifically allows the court to consider corroborating evidence in the trustworthiness enquiry. Most courts have required the consideration of corroborating evidence, though some courts have disagreed. The rule now provides for a uniform approach, and recognizes that the existence or absence of corroboration is in fact relevant to whether a statement is accurate. Of course, the court must not only consider the existence of corroborating evidence but also the strength and quality of that evidence.

The change to the trustworthiness clause does not at all mean that parties may proceed directly to the residual exception, without considering admissibility of the hearsay under Rules 803 and 804. Indeed Rule 807(a)(1) now requires the proponent to establish that the proffered hearsay is a statement that "is not specifically covered by a hearsay exception in Rule 803 or 804." Thus Rule 807 remains an exception to be invoked only when necessary.

In deciding whether the statement is supported by sufficient guarantees of trustworthiness, the court should not consider the credibility of any witness who relates the declarant's hearsay statement in court. The credibility of an in-court witness does not present a hearsay question. To base admission or exclusion of a hearsay statement on the witness's credibility would usurp the jury's role of determining the credibility of testifying witnesses. The rule provides that the focus for trustworthiness is on circumstantial guarantees surrounding the making of the statement itself, as well as any independent evidence corroborating the statement. The credibility of the witness relating the statement is not a part of either enquiry.

The Committee decided to retain the requirement that the proponent must show that the hearsay statement is more probative than any other evidence that the proponent can reasonably obtain. This necessity requirement will continue to serve to prevent the residual exception from being used as a device to erode the categorical exceptions.

The requirements that residual hearsay must be evidence of a material fact and that its admission will best serve the purposes of these rules and the interests of justice have been deleted. These requirements have proved to be

superfluous in that they are already found in other rules (*see,* Rules 102, 401).

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 obtained by the opponent through other means, then the opponent can seek relief from the court.

· Second, the rule now requires that the pretrial notice be in writing—which is satisfied by 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 provided.

· 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 for in the original rule, while some courts have read the original rule as it was written. 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 might then need to resort to residual hearsay. Where notice is provided 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 is not prejudiced.

TAB 6C

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Advisory Committee on Evidence Rules

Minutes of the Meeting of April 21, 2017

Washington, D.C

The Judicial Conference Advisory Committee on the Federal Rules of Evidence (the "Committee") met on April 21, 2017 at the Thurgood Marshall Building in Washington, D.C.

The following members of the Committee were present:

Hon. William K. Sessions, III, Chair
Hon. James P. Bassett
Hon. Debra Ann Livingston
Hon. John T. Marten (by phone)
Hon. John A. Woodcock, Jr.
Daniel P. Collins, Esq.
Traci Lovitt, Esq.
A.J. Kramer, Esq., Public Defender
Elizabeth J. Shapiro, Esq., Department of Justice

Also present were:

Hon. David G. Campbell, Chair of the Committee on Rules of Practice and Procedure
Hon. Solomon Oliver, Liaison from the Civil Rules Committee
Hon. James C. Deaver, III, Liaison from the Criminal Rules Committee
Professor Daniel J. Capra, Reporter to the Committee
Professor Daniel Coquillette, Reporter to the Standing Committee
Professor Liesa Richter, Consultant to the Committee
Professor Kenneth Broun, Former Consultant to the Committee
Timothy Lau, Federal Judicial Center
Rebecca A. Womeldorf, Chief, Rules Committee Support Office
Shelly Cox , Rules Committee Support Office
Bridget Healy, Rules Committee Support Office
Lauren Gailey, Rules Committee Law Clerk
Michael Shepard, Hogan Lovells, American College of Trial Lawyers
Susan Steinman, American Association of Justice

I. Opening Business

Announcements

Judge Sessions welcomed attendees to the meeting and announced that the Fall Advisory Committee meeting will be held at Boston College on October 27, at which the Committee will sponsor a Conference on Rule 702, which would be discussed later in the meeting. Judge Sessions also announced that Professor Liesa Richter will serve as the academic consultant to the Advisory Committee with the departure of Professor Ken Broun. Judge Sessions reported that Judge Woodcock will be leaving the Committee and acknowledged his invaluable service to the Committee.

Judge Sessions also informed the Committee that Judge Livingston has been selected to be the Chair of the Advisory Committee. He noted that it had been an honor to serve as Chair and that he was grateful for the support he has received from the Reporter, from Judge Campbell, and from the Rules Committee Support Office. Judge Sessions remarked that Judge Livingston is a thoughtful, experienced evidence expert whose supportive style will make her a perfect Chair. Judge Livingston noted her appreciation for Judge Sessions' incredible service to the Committee.

The Reporter announced that Professor Ken Broun had asked to step down as academic consultant to the Committee after more than 20 years of service to the Committee. The Reporter noted that Professor Broun was a Committee member for several years before becoming the academic consultant, and that Professor Broun had performed invaluable research for the Advisory Committee --- particularly in connection with the extensive privilege project, and with the development of Rule 502. The Reporter stated that Professor Broun has been a loyal and supportive member of the Committee and that all are sad to see him depart. Judge Sessions stated that Professor Broun had been an incredible contributor to the Committee, who brought a stable and thoughtful perspective that helped the Committee navigate difficult issues. Professor Broun stated that serving the Advisory Committee was the highlight of his professional career and that he was grateful to his many incredible Chairs, especially Judge Sessions. He also expressed his gratitude to the Reporter for his work on behalf of the Committee.

Approval of Minutes

The minutes of the October 2016 meeting at Pepperdine Law School were approved.

January Meeting of the Standing Committee

The Reporter made a short presentation on the January, 2017 meeting of the Standing Committee. There were no action items from the Evidence Committee for the January meeting. The Reporter informed the Standing Committee of ongoing projects, including potential amendments to the Rule 807 residual exception to the hearsay rule; proposals to amend Rule 801(d)(1)(A) governing prior inconsistent statements by testifying witnesses; and a review of the operation of Rule 404(b) governing prior bad acts and potential proposals to improve the Rule. He noted that the Standing Committee was very enthusiastic about the upcoming fall conference on forensic evidence and Federal Rule of Evidence 702. In addition, the Standing Committee

was interested in Rule 404(b) proposals and thought it was important to review the Rule whether or not amendments are proposed.

II. Proposal to Amend 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 amended. Part of the original motivation for an amendment was to consider expanding its coverage, because a comprehensive review of the case law over the last ten years provides some indication that reliable hearsay has been excluded. But another reason for an amendment was the Committee's determination that the Rule could be improved to make the court's task of assessing trustworthiness easier and more uniform; to eliminate confusion and unnecessary effort by deleting superfluous language; and to provide improvements to the notice provision.

Amendments to the notice provision were unanimously approved at the Spring 2016 meeting, but have been held back while the Committee has been considering changes to the substantive provisions of Rule 807. With regard to substantive changes, the Committee, after substantial discussion at prior meetings, has 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 --- without regard to expansion of the residual exception. 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. This is especially so because a review of the case law indicates that the "equivalence" standard has not fulfilled the intent of the drafters to limit the discretion of the trial court. Given the wide spectrum of reliability found in the hearsay exceptions, it is not difficult to find a statement reliable by comparing it to a weak exception, or to find it unreliable by comparing it to a strong one.

● Trustworthiness can best be defined in the Rule as requiring an evaluation of both 1) circumstantial guarantees surrounding the making of the statement, and 2) 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. Adding a requirement that the court consider corroboration is an improvement to the rule independent of any decision to expand the residual exception.

● 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" and consistent with the "purpose of the rules" have not served any good 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 and the purpose of the rules because that guidance is already provided by Rule 102.

● 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 principle 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.

At the Spring meeting, Judge Sessions noted that the question before the Committee was whether to forward a proposed amendment to Rule 807 to the Standing Committee with a recommendation that it be published for public comment. The Reporter presented the following working draft of proposed changes to Rule 807 for the Committee's consideration:

Rule 807. Residual Exception

(a) In General. Under the following conditions, ~~circumstances,~~ a hearsay statement is not excluded by the rule against hearsay: ~~even if~~

(1) the statement is not specifically covered by a hearsay exception in Rule 803 or 804~~:~~;

(1 2) ~~the statement has equivalent circumstantial guarantees of trustworthiness~~ the court determines that it is trustworthy, after considering the totality of circumstances under which it was made, [the presence or absence of] any corroborating evidence, [and the opponent's ability or inability to cross-examine the declarant]; and

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

(3) 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. 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 Reporter noted that the objective of the proposed amendment to Rule 807 had changed over the course of the Committee's research into Rule 807 and as a result of the Fall 2016 conference at the Pepperdine University School of Law, that brought together noted experts and litigators to discuss potential amendments to Rule 807. Although the Committee originally considered amendments to Rule 807 in order to expand the scope of the Rule and permit more liberal admission of hearsay through the residual exception, the Committee's current working draft is not intended to expand the coverage of the Rule. Instead, the goal of the working draft is to engage in good rulemaking that assists courts in applying the trustworthiness standard and resolves conflicts among the courts with respect to the evidence to be considered in evaluating admissibility. The Reporter emphasized that sound rulemaking based on exhaustive research and broad input often results in changed goals over time.

The Reporter stated that a slight expansion of the residual exception might occur through a Committee Note, if the Note were written to express an intent that the changes be read in a manner that would expand judicial discretion; or the Note might state that the original legislative history of the Rule --- which emphasized that it could be used only in "rare and exceptional" cases --- cannot be found in the text of the Rule as amended. To that end, the Reporter prepared two Committee Notes for the Committee to consider: the first describing the changes as simply good rulemaking, resolving conflicts and making the Rule more user-friendly; the second expressing an intent to apply the amended Rule somewhat more broadly.

The Committee's discussion of the working draft and of the two versions of the proposed Notes proceeded as follows:

- The DOJ representative questioned whether the Committee wanted to abandon the objective of expanding Rule 807. She noted that consideration of the amendment began in connection with public comment on the proposal to abrogate the Ancient Documents exception to the hearsay rule, in response to comments suggesting that courts are extremely reluctant to utilize Rule 807 to admit even highly reliable hearsay. She noted that the Department prefers a Committee Note to the proposed amendment that would signal expansion of Rule 807. Several Committee members, however, expressed a preference for a good rulemaking proposal that foregoes expansion of the Rule. Other Committee members articulated concern about a Committee Note that could be construed to alter the meaning of the rule text. The Committee ultimately concluded that any proposed amendment would be accompanied by a Committee Note emphasizing that the

intent of the amendment is to clarify the trustworthiness analysis, resolve conflicts, and make other minor improvements --- and not to expand the residual exception.

Ÿ One Committee member suggested that the removal of the "materiality" and "interests of justice" requirements in existing Rule 807 could be construed to expand admissibility under Rule 807 if indeed those requirements served as "tone-setters" that cautioned against frequent resort to Rule 807. Courts might interpret their abrogation as a signal to admit hearsay more freely under an amended Rule 807. Judge Sessions and Professor Capra both noted that the proposed Committee Note that would accompany the proposal expressly provides that the "materiality" and "interests of justice" requirements were removed only because they were "superfluous" and not with the intent of expanding access to Rule 807. Moreover, there is plenty in the amendment that cautions against frequent resort to Rule 807 --- including retention of the "more probative" requirement, and the required finding that the hearsay is not admissible under any other exception before the residual exception may be invoked.

Ÿ Another Committee member expressed concern about the language in Rule 807 that permits admission of hearsay through Rule 807 only if "it is not specifically covered by a hearsay exception in Rule 803 or 804." That Committee member feared that this language could be interpreted to exclude any hearsay within subject areas covered by the Rule 803 and Rule 804 exceptions, thus making Rule 807 more restrictive than it is currently. The Reporter noted that this language is in the original Rule --- the amendment just places that language as a specific admissibility requirement rather than a description in an opening clause, as it is currently. The Reporter conceded that under the current Rule, there is some dispute concerning what to do about "near-misses" --- hearsay that fails to meet all the admissibility requirements for a particular exception, but is nonetheless reliable enough to qualify as residual hearsay. He stated that a minority of courts have opted to exclude "near-misses" that approach too closely to an established exception, but that most courts are loathe to exclude such a statement if it is actually found to be trustworthy. He further explained that the "near-miss" issue would be difficult to resolve through rulemaking and that the working draft of the proposed amendment to Rule 807 did not intend to address that issue. He noted that the public comment process might provide valuable insights into how best to tackle the "near-miss" issue. One Committee member suggested that good rulemaking should aim to resolve ambiguities in the case law and proposed that the language in the draft rule could be changed from hearsay "not specifically covered" by a Rule 803 or 804 exception to hearsay "not specifically admissible through a Rule 803 or 804 exception" --- in order to avoid any suggestion of a "near-miss" prohibition and to codify the approach of the majority of courts. Although Committee members agreed that this language could work, the consensus was to retain the "covered" language through the comment period to see what input might be forthcoming from the public on the issue. The Committee did resolve to delete a sentence in the Committee note accompanying the proposed Rule that read: "It [the amendment] is not intended to be a device to erode or evade the standard exceptions" to avoid any suggestion that the amendment intends to disqualify "near-miss" hearsay from being admitted pursuant to Rule 807.

- One Committee member concluded that courts do have trouble with the equivalence standard, and that there is a demonstrated conflict on whether corroborating evidence is to be considered in the trustworthiness inquiry. So these are good, rulemaking-based reasons for the change. The member expressed concern, however, about language in the draft Rule allowing hearsay to be admitted through Rule 807 "if the court determines that it is trustworthy." This Committee member observed that other evidence rules reference indicia of trustworthiness or circumstantial guarantees of trustworthiness, focusing a trial judge more on the presence of factors and circumstances that add trustworthiness, rather than on the trial judge's inherent belief in the trustworthiness of the evidence. Concern was expressed that this instruction to determine whether the hearsay "is trustworthy" could be viewed as a higher standard that could restrict admissibility more than current Rule 807. Judge Campbell noted that the trial judge should focus on whether the hearsay is trustworthy enough to be admitted more than on his or her own view of the evidence. The Committee unanimously agreed to modify the language in the working draft to provide that a hearsay statement may be admitted if: "the court determines that it is supported by sufficient guarantees of trustworthiness --- after considering the totality of the circumstances under which it was made and any evidence corroborating the statement." The draft Committee Note was changed to hew to the change in the Rule's text.

- The Committee also discussed amendments to the notice provisions of Rule 807. Judge Campbell noted that the draft Rule required "written" notice, but that the Committee Note explained that notice need not be written if provided at trial after a finding of good cause. Judge Campbell suggested that the Rule text ought to excuse the writing requirement in good cause circumstances rather than leaving that to the Note. The Committee agreed with these comments, and modified the working draft to clarify that the notice could be in "any form" during the trial or hearing where the judge excuses pretrial notice for good cause. Changes were also made to the Committee Note to conform to the added rule text. Judge Campbell also expressed concern about language in the Committee Note suggesting that courts excusing pretrial notice should consider protective measures, such as a continuance, "to assure that the opponent has time to prepare for the particularized argument that is necessary to counter hearsay offered under the residual exception." Judge Campbell noted that there could be other reasons that an opponent of a hearsay statement offered pursuant to Rule 807 might need protective measures. After discussion, the Committee agreed that there could be many reasons to consider protective measures and that seeking to spell them out in the Note could risk being under-inclusive. Therefore, Committee members agreed to delete the language in the Note describing the reasons justifying protective measures, leaving such considerations to the discretion of the trial judge.

- Committee members all agreed that requiring the court to consider corroborating evidence was useful to resolve a split in the courts, and that it was important to include corroboration in the trustworthiness inquiry because its presence or absence is highly relevant to a consideration of whether the hearsay statement is accurate. One Committee member suggested adding language instructing courts to consider evidence corroborating "the statement" to avoid any suggestion that the credibility of a witness relating a hearsay

statement should be considered. Committee members agreed with that change, and with language in the Committee Note instructing that the reliability of the in-court witness is not to be considered in the trustworthiness inquiry.

Ÿ All Committee members agreed that it was unnecessary to direct a trial court to consider both the presence or absence of corroboration, noting that courts will appreciate the importance of both, as well as of the quality of the corroboration without any express language to that effect.

Ÿ One Committee member described a state residual exception allowing admissibility of hearsay so trustworthy "that adversarial testing would add little." Some members noted that, while the ability to cross-examine a declarant-witness at trial might militate in favor of admissibility, the absence of cross-examination should in no way counsel against admissibility because it is the hearsay of absent and unavailable declarants that is most often admitted through Rule 807. The Committee agreed to delete any express reference in the text to cross-examination, given that trial judges will understand the importance of cross in considering the admissibility of hearsay statements through Rule 807.

After further discussion, a motion was made and seconded to approve the proposed amendments to Rule 807 and a Committee Note, both as revised at the meeting, with the recommendation to the Standing Committee that the Rule and Note be released for public comment. The Rule and Note, as sent to the Standing Committee, provide as follows:

Rule 807. Residual Exception

(a) In General. Under the following conditions, ~~circumstances,~~ a hearsay statement is not excluded by the rule against hearsay: ~~even if~~

(1) the statement is not specifically covered by a hearsay exception in Rule 803 or 804~~:~~;

(~~1~~ 2) ~~the statement has equivalent circumstantial guarantees of trustworthiness~~ the court determines that it is supported by sufficient guarantees of trustworthiness --- after considering the totality of circumstances under which it was made and any evidence corroborating the statement; and

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

(3) 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. The statement is admissible only if ~~before the trial or hearing~~ the proponent gives an adverse party reasonable 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 in writing before the trial or hearing -- or in any form during the trial or hearing if the court, for good cause, excuses a lack of earlier notice.

Committee Note

Rule 807 has been amended to fix a number of problems that the courts have encountered in applying it.

Courts have had difficulty with the requirement that the proffered hearsay carry "equivalent" circumstantial guarantees of trustworthiness. The "equivalence" standard is difficult to apply, given the different types of guarantees of reliability, of varying strength, found among the categorical exceptions (as well as the fact that some hearsay exceptions, e.g., Rule 804(b)(6), are not based on reliability at all). The "equivalence" standard has not served to limit a court's discretion to admit hearsay, because the court is free to choose among a spectrum of exceptions for comparison. Moreover, experience has shown that some statements offered as residual hearsay cannot be compared usefully to any of the categorical exceptions and yet might well be trustworthy. Thus the requirement of an equivalence analysis has been eliminated. Under the amendment, the court is to proceed directly to a determination of whether the hearsay is supported by guarantees making it more likely than not that the statement is trustworthy.

The amendment specifically allows the court to consider corroborating evidence in the trustworthiness enquiry. Most courts have required the consideration of corroborating evidence, though some courts have disagreed. The rule now provides for a uniform approach, and recognizes that the existence or absence of corroboration is in fact relevant to whether a statement is accurate. Of course, the court must not only consider the existence of corroborating evidence but also the strength and quality of that evidence.

The change to the trustworthiness clause does not at all mean that parties may proceed directly to the residual exception, without considering admissibility of the hearsay under Rules 803 and 804. Indeed Rule 807(a)(1) now requires the proponent to establish that the proffered hearsay is a statement that "is not specifically covered by a hearsay exception in Rule 803 or 804." Thus Rule 807 remains an exception to be invoked only when necessary.

In deciding whether the statement is supported by sufficient guarantees of trustworthiness, the court should not consider the credibility of any witness who relates the declarant's hearsay statement in court. The credibility of an in-court witness does not present a hearsay question. To base admission or exclusion of a hearsay statement on the

witness's credibility would usurp the jury's role of determining the credibility of testifying witnesses. The rule provides that the focus for trustworthiness is on circumstantial guarantees surrounding the making of the statement itself, as well as any independent evidence corroborating the statement. The credibility of the witness relating the statement is not a part of either enquiry.

The Committee decided to retain the requirement that the proponent must show that the hearsay statement is more probative than any other evidence that the proponent can reasonably obtain. This necessity requirement will continue to serve to prevent the residual exception from being used as a device to erode the categorical exceptions.

The requirements that residual hearsay must be evidence of a material fact and that its admission will best serve the purposes of these rules and the interests of justice have been deleted. These requirements have proved to be superfluous in that they are already found in other rules (*see*, Rules 102, 401).

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 obtained by the opponent through other means, then the opponent can seek relief from the court.

- Second, the rule now requires that the pretrial notice be in writing --- which is satisfied by 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 provided.

- 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 for in the original rule, while some courts have read the original rule as it was written. 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 might then need to resort to residual hearsay. Where notice is provided 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 is not prejudiced.

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

Over the last several meetings, the Committee has been considering the possibility of expanding substantive admissibility of certain prior statements of testifying witnesses under Rule 801(d)(1) --- the rationale of that expansion being that unlike other forms of hearsay, the declarant who made the statement is subject to cross-examination about that statement. Since beginning its review of Rule 801(d)(1), the Committee has narrowed its focus. 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.

● Currently Rule 801(d)(1)(A) provides for substantive admissibility only in unusual cases --- where the declarant made the prior statement under oath at a formal proceeding. Two possibilities for expansion are: 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 about

whether it was ever made. In such circumstances, it would be difficult to cross-examine the witness about a statement he denies making; and it would often be costly and distracting to have to prove whether a prior inconsistent statement was made if there is no reliable record of it.

● Addressing the basic concern about whether the statement was ever made, a majority of Committee members have concluded that this concern could be answered by a requirement that the statement be recorded by audiovisual means. That expansion 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. Moreover, expansion of substantive admissibility would ameliorate one of the major costs of the current rule --- which 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 audiovisually recorded --- as there is easy proof of the statement and its circumstances if the witness denies making it or tries to explain it away. Finally, beyond assuring that a witness could not deny the statement, audiovisual recording would promote an effective opportunity for cross-examination and a meaningful evaluation of the prior statement by the jury.

The Committee developed a tentative working draft of an amendment that would allow substantive admissibility for audiovisually-recorded prior inconsistent statements --- but the Committee is not in agreement on whether substantive admissibility under Rule 801(d)(1)(A) should be expanded.

In light of discussion at the previous meeting, the working draft was modified for the Spring meeting to adopt a further ground for substantive admissibility --- if the witness acknowledges having made the prior inconsistent statement. This additional ground of admissibility was proposed by the Justice Department, the reason being that acknowledgment of the witness eliminates any concern that the prior statement was never made. The Committee was made aware, however, of research that Professor Richter conducted on the Illinois evidence rule that allows acknowledged prior inconsistent statements to be admitted for their truth. This research suggests that providing for substantive admissibility for acknowledged statements can raise difficult questions of whether the statement is truly acknowledged by the witness --- the witness might waffle, or acknowledge reluctantly, or provide only a partial acknowledgment, etc. The Reporter suggested that it would be best to forward any proposed amendment with an acknowledgement provision in brackets that could be considered a subject of separate comment.

Thus, the working draft of Rule 801(d)(1)(B) and a Committee Note, reviewed by the Committee at the Spring meeting provided as follows:

(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;

(ii) was recorded by audiovisual means, and the recording is available for presentation at trial; or

[(iii) is acknowledged by the declarant, while testifying at the trial or hearing, as the declarant's own statement; or]

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 restrictive. That requirement stemmed mainly from a concern that it was necessary to regulate the possibility that the prior statement was never made or that its presentation in court is inaccurate --- because it may be difficult to cross-examine a declarant about a prior statement that the declarant plausibly denies making. But as shown in the practice of some states, there is a less onerous alternative --- not widely available at the time the rule was drafted --- to assure that what is introduced is what the witness actually said. The best proof of what the witness said, and that the witness said it, is when the statement is made in an audiovisual record. That is the safeguard provided by the amendment. Given this important safeguard, there is good reason to dispense with the confusing jury instruction that seeks to distinguish between substantive and impeachment uses for prior inconsistent statements.

The amendment expands substantive admissibility for prior inconsistent statements only if there is no dispute that the witness actually made the statement. Subdivision (A)(ii) requires a statement to be recorded by "audiovisual" means. So to be substantively admissible, it must be clear that the witness made the statement on both audio and video. "Off-camera" statements are not substantively admissible under the amendment.

It may arise that a prior inconsistent statement, even though made in an audiovisual record, is challenged for being unreliable --- for example that the witness was subject to undue influence, or impaired by alcohol at the time the statement was made. These reliability questions are generally for the trier of fact, and they will be relatively easy to assess given the existence of an audiovisual recording and testimony at trial by the person who made the statement.

Questions may arise when the recording is partial, or subject to technical glitches. Courts in deciding the analogous question of authenticity under Rule 901 have held that deficiencies in the recording process do not bar admissibility unless they "render the recording as a whole untrustworthy." *United States v. Adams,* 722 F.3d 788, 822 (6th Cir. 2013). *See also United States v. Cejas,* 761 F.3d 717 (7th Cir. 2014) (intermittent skips in video recording did not render recordings untrustworthy). Courts can usefully apply that standard in assessing the witness's prior statement for substantive admissibility.

There is overlap between subdivisions (A)(i) and (A)(ii). For example, audiovisual recording of a deposition is potentially admissible under both provisions. But the Committee decided to retain the longstanding original provision, as it has been the subject of extensive case law that should not be discarded. Rather than replace the original ground of substantive admissibility, the decision has been made to add a new, if somewhat overlapping, ground.

[New Subdivision (A)(iii) provides for an additional, limited ground of substantive admissibility: where the declarant acknowledges having made the prior statement while testifying at the trial or hearing. Acknowledgment by the witness eliminates the concern that the statement was never made, so the acknowledging witness can be fairly cross-examined about the statement. It is for the court in its discretion to determine under the circumstances whether the witness has, in testifying, sufficiently acknowledged making the statement that is offered as inconsistent. There is no requirement that the court undertake a line-by-line assessment.]

While the amendment allows for somewhat broader substantive admissibility of 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) is inapplicable if the proponent is not offering the prior inconsistent statement for its truth. If the proponent is offering the statement solely for impeachment and because it was false, it does not fit the definition of hearsay under Rule 801(c), and so Rule 801(d)(1)(A) never comes into play.

At the Spring meeting, the Committee engaged in a substantial and detailed discussion of the proposed amendment to Rule 801(d)(1)(A). The Committee recognized the potential benefits and costs of the proposal, which could be summarized as follows:

Potential Benefits

- Admissibility of audiovisually recorded statements could incentivize law enforcement officers and others to record more interrogations and interviews, which could be an improvement on current practices and a net positive in the creation of additional available evidence to ascertain the truth.
- Prosecutors and plaintiffs could get to a jury in additional cases with the help of audiovisual statements by waffling and turncoat witnesses.
- Incomprehensible limiting instructions cautioning the jury against substantive use of audio-visually recorded statements would be eliminated.
- Summary judgment practice on the civil side could be impacted by the availability of audio-visually recorded statements, which could be a net positive to the extent that there is additional evidence for the court to consider.

Potential Costs

- The substantive admissibility of audio-visually recorded statements could lead to manipulation and gamesmanship in videos for tactical use, both by law enforcement officers and by civil parties who could now make audiovisual recordings of witnesses likely to turn against them at trial. In addition, corporations could be motivated to make audiovisual recordings in anticipation of litigation for fear of witnesses giving unfavorable testimony at trial. Many of these statements may be made without reflection, or subject to persuasion, and so may not be reliable.
- An amendment that permits substantive admissibility of audiovisual recordings that are inconsistent with a witness's trial testimony could serve to advantage the powerful, such as prosecutors and corporations with incentives to record and a systemized approach to the creation of evidence.
- The proliferation of video recording outside an interrogation or interview setting, such as by police body or dash cameras, could raise difficult questions about the admissibility of off-camera statements or of on-camera statements completed and contextualized by statements made off-camera in a chaotic and rapidly evolving situation.
- Audiovisual recordings on Facebook or YouTube could present difficult issues of reliability.
- Admitting "acknowledged" witness statements could require a laborious and inefficient process of acknowledgment that could hinder trial efficiency.
- Summary judgment practice could be negatively affected if possibly unreliable recorded statements are generated after an event and then the declarant testifies inconsistently (but accurately) at a deposition. If the recorded statement can be used substantively, then summary judgment may be denied in some case where perhaps it should be, and would otherwise be, granted.

Two Committee members posed the question whether audiovisually recorded statements will enjoy the same reliability possessed by prior statements under oath in a trial, hearing proceeding or deposition, noting the necessary involvement of lawyers and potential perjury consequences that may make witnesses in that environment think twice about lying. The Reporter noted that Rule 801(d)(1)(A) is not primarily about the reliability of a statement at the time it is made, but is rather about the fact that the witness who made the statement is on the stand, subject to cross-examination --- and that audiovisual recording will ensure that the fact-finder will be able to view and weigh the circumstances surrounding the statement, in addition to observing in-court cross-examination. One Committee member emphasized that any amendment to Rule 801(d)(1)(A) should avoid inefficient reliability hearings prevalent in some state jurisdictions with more expansive admissibility of prior inconsistent statements. Another Committee member remarked that practices under the current rule do aim to ensure reliability through the oath and prior proceeding requirements and that the availability of cross at trial does not fully capture the purpose of the current rule. Conversely, the Department of Justice representative noted that it would be irrational to restrict the amendment to audiovisual statements, because acknowledged statements carry the same guarantee that the statement was made.

Finally, one Committee member noted the possibly problematic timing of a rule providing for more admissibility of recorded statements, especially given the increase in recordings of police-citizen interactions, and the more prevalent use of police body cameras. The suggestion was made that the Committee should seek to insure that a broadened rule would not have unintended consequences with regard to such recordings.

As a result of the extensive discussion, the Committee resolved that more research should be conducted into the consequences of a rule change that would grant substantive admissibility to audiovisual recordings that are inconsistent with a witness's testimony. The Reporter noted that he could inquire with the ABA, the AAJ and other groups prior to publication of the proposal for formal comment. Another Committee member suggested consultation with the Innocence Project concerning potential consequences of such an amendment, because it has been exploring improvement of police practices through measures like increased audiovisual recording. Another suggestion was to solicit feedback from lawyers and judges in states that currently allow recorded prior inconsistent statements to be admitted for their truth. The Reporter also noted that the Committee had previously conducted a survey in conjunction with the Federal Judicial Center prior to publishing a proposed amendment to Rule 801(d)(1)(B) governing prior consistent statements, and that such a survey could be crafted and circulated prior to recommending publication of a proposed amendment to Rule 801(d)(1)(A). The FJC representative agreed to work on preparing such a survey. Judge Campbell noted that recent changes to the Federal Rules of Civil Procedure were criticized for a lack of sufficient study and foundation, and that additional research could demonstrate that the Committee has done its due diligence before issuing the amendment for public comment.

At the end of the discussion, the Chair asked the Committee to vote on what next step should be taken. Two options were presented: 1. Hold back the rule proposal and conduct more research; and 2. Recommend that the working draft and Committee Note be released for public

comment. The Committee voted 5-4 in favor of gathering additional information and in favor of conducting a survey about proposed changes to Rule 801(d)(1)(A), before sending any proposal to the Standing Committee for release for public comment.

IV. Possible Amendment to Rule 606(b)

Federal Rule of Evidence 606(b) prohibits juror testimony concerning juror deliberations when offered to attack the validity of a verdict, but permits proof of outside influence or extraneous prejudicial information. The Supreme Court recently held, in *Pena-Rodriguez v. Colorado*, 137 S.Ct. 855 (2017), that the Colorado counterpart to Rule 606(b) violated a criminal defendant's Sixth Amendment rights to the extent that it excluded testimony about statements demonstrating clear racial bias by a juror during deliberations. The Reporter noted the likelihood that counsel will seek to expand the *Pena-Rodriguez* holding to other constitutional violations in the jury room, such as jurors drawing an unconstitutional adverse inference as a result of defendant's failure to testify. He also noted that the holding could impact civil cases through the Due Process Clause, as signaled by the Supreme Court's 2014 decision in *Warger v. Shauers*, 135 S.Ct. 521 (2016), in which the Court intimated that racist statements of jurors in civil cases might demand a constitutional exception to the Rule 606(b) exclusion.

The Committee recognized that after *Pena-Rodriguez,* Rule 606(b) is unconstitutional as applied at least to racist statements made by jurors while deliberating in criminal cases. The Reporter observed that the Evidence Rules Committee has always strived to ensure that the Evidence Rules will not be subject to unconstitutional application. Although it is conceivable that an evidence rule might violate the constitution in an unusual case, the practice of the Committee has been to amend a rule where an unconstitutional application is specifically foreseeable as a result of a Supreme Court case. Both Rules 412 and 803(10) were amended to account for constitutional concerns.

The Committee discussed whether to propose an amendment to Rule 606(b) to eliminate the possibility of an unconstitutional application. The Reporter outlined three potential amendments:

- The Committee could amend Rule 606(b) to codify the specific holding of *Pena-Rodriguez*, creating an exception to the prohibition on juror testimony to impeach a verdict in cases involving statements of racial bias only. The problem with this potential amendment would be that expansion of the *Pena-Rodriguez* holding to other types of juror conduct would necessitate yet another amendment to the Rule.

- The Committee could amend Rule 606(b) to expand on the *Pena-Rodriguez* holding and to permit juror testimony about the full range of conduct and statements that may implicate a defendant's constitutional rights. An expansive amendment obviously would involve the Committee in significant policy decisions and would require extensive time and research, and could end up undermining Rule 606(b) itself --- a rule that is essential to preserve the finality of verdicts, the privacy interests of jurors, and the integrity of jury deliberations.

Ÿ The Committee could include a generic exception to the Rule 606(b) prohibition of juror testimony, allowing such testimony whenever it is "required by the constitution." This potential amendment would be intended to capture only the right announced in *Pena-Rodriguez* for now, but would adapt to any future expansion of that right in later cases. While this amendment would not alter the status quo (in that Rule 606(b) is necessarily already displaced to the extent of *Pena-Rodriguez*), it would avoid a trap for the unwary and provide a signal in rule text for lawyers that juror testimony may be constitutionally mandated. This approach is consistent with the approach taken in other evidence rules like Rule 412 that conditions exclusion on satisfaction of a defendant's constitutional rights.

The Reporter suggested that an amendment employing a generic reference to constitutional rights was likely the best option for responding to the *Pena-Rodriguez* holding, if any response is to be made. Such an amendment would not extend beyond the Supreme Court's holding, but would allow for potential future expansion by the Supreme Court. Some Committee members in support of such a rule change favored a Committee Note emphasizing that an amendment was not intended to retreat from the important policies underlying the general rule prohibiting juror testimony. Several Committee members, however, expressed concern that an amendment to Rule 606(b) adding a generic reference to allowing juror testimony "required by the Constitution" could be interpreted to permit juror testimony about any type of juror misconduct or statement that could be argued to violate the Constitution. One member of the Committee advocated the first alternative, codifying the specific holding of *Pena-Rodriguez.*

Ultimately, the consensus of the Committee was that any amendment at this time could suggest expected expansion and potentially contribute to it. Therefore, the Committee resolved to postpone consideration of an amendment to Rule 606(b) in favor of monitoring the cases following *Pena-Rodriguez*. The Reporter agreed to monitor the cases and to keep the Committee apprised.

V. Consideration of Possible Changes to Rule 404(b)

The next topic for discussion was Rule 404(b), governing admissibility of other crimes, wrongs, or acts. The Reporter began the discussion of Rule 404(b) by noting that there was no action item concerning the Rule before the Committee, but that the Rule was the subject of intensive discussion at the Pepperdine Conference and the Committee has expressed an interest in, at the very least, monitoring developments in the case law on Rule 404(b). The Committee's review, and discussion at the Pepperdine Conference, has shown problems in the application of the Rule. In some cases, it seems that the prosecutor is allowed to admit other act evidence against a criminal defendant simply by reciting the list of permissible purposes from Rule 404(b)(2), without demonstrating how the other act evidence is relevant for a non-propensity purpose. In other cases, courts seem to be abusing the "inextricably intertwined" doctrine, admitting other acts as part of a charged offense exempt from the limits of Rule 404(b) altogether. Recently a few Circuits have issued opinions seeking to eliminate propensity uses and the overly broad application of the "inextricably intertwined" doctrine permitted in other Circuits. Over the past two meetings, the Committee has been exploring whether the problems

in the application of Rule 404(b) revealed by the cases can be resolved or ameliorated by an amendment to Rule 404(b).

The Reporter noted that there are several possibilities for amending the Rule. First, the Reporter prepared a draft for the Committee's consideration that would:

● Change the placement of "other" to modify crimes and wrongs.

● Specify that the rule applies to all evidence that indirectly proves the disputed event and so is fairly characterized as "other act" evidence.

● Add a requirement that the proper purpose articulated for the evidence must be an issue that is actively contested by the opponent.

● Include a substantive provision requiring the probative value for the articulated proper purpose to proceed through a non-propensity inference.

● Eliminate the requirement that the criminal defendant request notice before it must be provided --- a proposal that has already been unanimously accepted by the Committee, but is being held back while the Committee is considering other amendments to Rule 404(b).

● Delete from the notice requirement the provision that the notice need only provide the "general nature" of the Rule 404(b) evidence, and replacing it either with nothing or with "substance of".

● Require articulation in the notice of the proper purpose for which the evidence is offered, and the chain of reasoning supporting the proper purpose.

● Rearrange the notice provision so that the good cause exception applies not only to providing notice about the evidence but also to the articulation requirements.

● Require notice to be provided at least 14 days before trial.

Second, the Reporter presented an amendment proposed by another Committee member that would eliminate the list of permitted purposes currently in Rule 404(b)(2) in favor of a four-step test that would require: 1) an other crime, wrong or act to be relevant to "a specific purpose other than propensity;"2) the proponent to establish that the relevance of the act does not rely on a character inference; 3) a Rule 403 analysis taking into account the extent to which the non-propensity purpose is "in issue;" and 4) a limiting instruction upon request. The Committee member who proposed this amendment noted that eliminating the time-honored Rule 404(b)(2) list of purposes would cause consternation, but opined that rewriting the Rule to set forth a step-by-step analysis would ensure that any possible propensity use for the evidence would be miniscule.

Third, the Reporter outlined a proposal to amend Rule 404(b) by requiring a more exclusionary balancing test for other crimes, wrongs, or acts offered against a criminal defendant --- more protective than the Rule 403 test, under which the prejudicial effect must substantially outweigh the probative value. The test could require the probative value of the other crime, wrong, or act to "substantially outweigh" (or to "outweigh") the unfair prejudice to the defendant from a potential propensity use. Such an amendment would ensure admissibility of other act evidence when the point for which it is offered is actively contested, but would not foreclose the government's ability to argue for admissibility in the absence of such an active contest. There is precedent for providing such protection to a criminal defendant in Rule 609, governing impeachment of testifying witnesses with prior convictions. All witnesses other than a criminal defendant are protected by a Rule 403 balancing test, but a criminal defendant may be impeached with a prior felony conviction only if its probative value outweighs the propensity prejudice to the defendant. The Reporter suggested that this proposal would be an elegant solution that would parallel Rule 609 and that would avoid adding significant and possibly problematic new language and standards to Rule 404(b) regarding "propensity" and "active contest." This amendment could be accompanied by changes to the Notice provision if the Committee so desired. This potential amendment would make the "inextricably intertwined" issue more meaningful because other acts offered against a criminal defendant would have to survive a heightened balancing, whereas inextricably intertwined acts would need to clear only the lower Rule 403 balancing. Additional amendments could be explored to resolve this concern.

Thereafter, the Department of Justice representative addressed the Committee's concerns about the use of Rule 404(b) in criminal cases and discussed potential amendments. First, the representative explained that the Department of Justice does not accept that there is a problem in the application of Rule 404(b) in criminal cases. While many appellate cases may seem to give superficial treatment to Rule 404(b) evidence, examination of trial court records reveals careful and thorough consideration of these issues. To the extent that there are concerns about the application of Rule 404(b), Circuits like the Third and Seventh are taking a closer look to ensure that the Rule is operating properly. Second, the Department of Justice representative opined that adding an "active contest" requirement to Rule 404(b) would be unworkable and unfair. She first noted that the requirement would contradict the Supreme Court's statement in *Old Chief v. United States* that the government has a right to seek admission of Rule 404(b) evidence regardless of active contest by the defendant. Further, the Department believes that such a requirement would invite gamesmanship by the defense in seeking to avoid other act evidence that should properly be admitted. The Department representative opined that a "reverse 403 balancing" amendment would result in fewer other acts admitted, would be contrary to legislative history favoring admissibility of Rule 404(b) evidence, and could attract Congressional attention. Finally, the Department opposed any amendment to require specificity in a Rule 404(b) pre-trial notice because such a requirement would not account for the fluidity of trial and the need for a trial judge to manage such evidence as the case progresses. The Department of Justice does not oppose an amendment that would eliminate a defendant's obligation to demand notice of Rule 404(b) evidence, however.

The representative for the Federal Public Defender expressed a different view of Rule 404(b) practice at the trial level, noting that prosecutors offer such evidence in almost every criminal case. He explained that the government's Rule 404(b) notice often simply lists all the

"permitted purposes" authorized by Rule 404(b)(2) and often seeks to admit four or five other crimes, wrongs, or acts by the defendant. Trial judges may take a "split the baby" approach to the multiple other acts, allowing two or three and excluding others, almost assuring affirmance under the forgiving Rule 403 test and abuse of discretion review. The defense often receives no report or other description to assist in identifying the alleged other act evidence the government seeks to offer. The representative of the Federal Public Defender argued that everyone understands that the prosecution wants to admit this evidence because it is so prejudicial, and that the government is often overt in arguing that a defendant "did it before" so he probably had "intent" this time. When the evidence is admitted, the jury instructions seeking to protect the defendant from a propensity inference are incomprehensible to jurors. According to the representative for the Federal Public Defender, Rule 404(b)(2) needs to be rewritten to resolve these problems, and amending the notice provision alone cannot offer a complete solution.

Other Committee members weighed in on the many potential amendments to Rule 404(b). One member suggested that the notice provisions could be improved by requiring more specificity to assist the trial judge in determining admissibility in advance of trial. Committee members agreed that a change to the notice provisions alone could not resolve all the concerns about the admissibility of Rule 404(b) evidence because such a change would not alter the current standard for admitting Rule 404(b) evidence. Still, greater specificity could assist the defense and the trial judge in considering such evidence.

Committee members also discussed whether there is a "Circuit-split" with respect to the admissibility of Rule 404(b) evidence that could be resolved by an amendment to the Rule. The representative for the Department of Justice noted that the Solicitor General has taken the position before the Supreme Court that there is no genuine Circuit-split with respect to Rule 404(b) evidence. The Reporter noted that the cases in the Seventh and Third Circuits --- that prohibit any other act evidence relying on a propensity inference --- do depart from decisions in other Circuits that permit such inferences, and could reasonably be seen as creating a "split."

At the conclusion of the discussion, Judge Sessions noted that the question for the Committee was whether to continue consideration of Rule 404(b) at the Fall meeting or whether to abandon efforts to improve the operation of the Rule for the time being. The consensus of the Committee was that Rule 404(b) is one of the most important and most litigated evidence rules and that the issues it raises merit further consideration. The Committee members agreed that adding an "active contest" requirement to the Rule was ill-advised, but resolved to devote more attention to the issues of the "inextricably intertwined doctrine," the division in courts about proper articulation of non-propensity inferences, and the Rule 404(b) notice requirements. The Reporter stated that he would provide the Committee with a Rule 404(b) case outline for its Fall meeting, including district court opinions, to help determine the level of care applied to Rule 404(b) rulings in criminal cases. One Committee member suggested that the Committee, at the very least, could rely on the case digest to formulate a best practices manual for Rule 404(b) evidence, should the Committee decide not to proceed with amendments to the Rule.

V. Conference on Expert Evidence

The Reporter gave the Committee an update on preparations for the Conference on expert evidence, to take place on the morning of the Fall Advisory Committee meeting, October 27, at Boston College Law School. The Reporter stated that the Conference will address the admissibility of forensic evidence, as well as other issues under Rule 702, including problems applying *Daubert* to various practice areas, problems with non-forensic expert testimony in criminal cases, and inconsistent applications in the courts. The Reporter informed the Committee that he had already secured the participation of noted experts in the field of forensic evidence, as well as Judge St. Eve to speak on *Daubert* as applied to soft-science, and Judge Grimm to comment on criminal cases. He invited the Committee to offer suggestions for invitees, as well as other Rule 702 topics for discussion. The Reporter announced that a transcript of the Conference, as well as supporting articles by participants, will be published in the Fordham Law Review.

VI. Closing Matters

The Reporter referred the Committee to case law digests on Confrontation Clause jurisprudence and on the purported need for a recent perceptions exception to the rule against hearsay. These digests are maintained and updated to assist the Committee in monitoring case law developments as they might bear on the need to propose rule amendments in these important areas.

Finally, once again Committee members expressed their deep gratitude to Judge Sessions for his stellar leadership as Chair of the Committee.

VII. Next Meeting

The Fall, 2017 meeting of the Evidence Rules Committee --- together with a Conference on Expert Evidence --- will be held at Boston College Law School, on Friday, October 27.

Respectfully submitted,

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