

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

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MEMORANDUM

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

FROM: Hon. Patrick J. Schiltz, Chair
Advisory Committee on Evidence Rules

DATE: December 1, 2023

RE: Report of the Advisory Committee on Evidence Rules

I. Introduction

The Advisory Committee on Evidence Rules (the “Committee”) met on October 27, 2023, at the University of St. Thomas School of Law in Minneapolis. On the morning of the meeting, the Committee convened two panels to get input on possible amendments to the Evidence Rules. The first panel consisted of five Evidence scholars, who provided suggestions for various amendments. The second panel consisted of two experts on Artificial Intelligence who provided an explanation of AI and suggested an amendment to deal with the widespread use of deepfakes. At its subsequent meeting, the Committee processed the comments of the panelists and gave preliminary consideration to two other amendments.

A full description of the Committee's discussion can be found in the draft minutes of the Committee meeting, attached to this Report. A transcript of the panel discussions will be published in the Fordham Law Review this Spring.

II. Action Items

No action items.

III. Information Items

A. Panel Discussions

1. Scholars' Suggestions for Change to the Evidence Rules

Five outstanding Evidence scholars were invited by the Committee to make a presentation on what amendment to the Evidence Rules each thought was most needed. Professor Jeffrey Bellin proposed the abrogation of (or, alternatively, the limitation of) Rule 609, the rule allowing impeachment with prior convictions. Professor Ed Imwinkelried suggested certain minor changes to the process of impeaching a witness with prior bad acts under Rule 608. Professor Hillel Bavli recommended an amendment to Rule 404(b) to clarify that a bad act cannot be admissible for a proper purpose unless the prosecution can show that the evidence is probative of the proper purpose without proceeding through a propensity inference. Professor Erin Murphy suggested adopting a rule to govern the admissibility of false accusations of sexual assault. Finally, Professor Andrea Roth proposed amendments to several rules, including Rule 702, to help courts in reviewing the admissibility of machine-based evidence.

The Committee had a lively discussion with the professors regarding their proposals. At its later meeting, the Committee decided to consider the following possible changes at the Spring 2024 meeting:

1. An amendment to Rule 609 that would delete Rule 609(a)(1), which allows admission of felony convictions not involving dishonesty or false statement --- on the ground that such convictions can be very prejudicial and are not very probative of the witness's willingness to lie under oath. That amendment would have the virtue of applying equally to the prosecution witnesses and to the defendant and the defendant's witnesses, and it would retain the automatic admissibility of convictions that actually involve dishonesty or false statement, as provided by Rule 609(a)(2).

2. An amendment that would add a new Rule 416 to the Evidence Rules to govern the admissibility of false accusations. The Committee resolved to consider options such as

whether to cover all false accusations; whether to limit the rule to false accusations of sexual assault; and whether the rule would be applicable to civil as well as criminal cases.

The Committee decided to defer any consideration of Rule 404(b), as the amendment to the notice requirement of that Rule has been in effect for only three years. The Committee determined it was prudent to wait and see whether the 2020 amendment --- which requires the prosecution to explain how the bad act is probative for a permissible purpose without relying on a character inference --- will provide some of the protections suggested by Professor Bavli.

Finally, the Committee decided that while regulating machine-based evidence was very important, more information was needed on machine-based evidence (specifically how it is generated, what the reliability problems can be, and how human input affects machine data) before any rule could be proposed.

2. Artificial Intelligence and Deepfakes

The Committee invited Dr. Maura Grossman and former Judge Paul Grimm to provide it with background information about Artificial Intelligence and the problems posed by deepfakes. Dr. Grossman provided information on how AI generates information and noted that the ability to detect deepfakes is likely to lag behind the developments in improving and refining deepfakes. Judge Grimm presented a suggestion for an amendment to Rule 901(b)(9) (which provides for authentication of a process or system) that would require the proponent to describe the system and show how it reached a reliable result as to the proffered item. The proposal also provides that an inquiry into authenticity of an alleged deepfake would only occur if the opponent presents some factual foundation for doubting the authenticity of the video or audio.

The Committee recognized the importance of considering an amendment to deal with deepfakes and other AI issues (such as the questions about machine-based evidence raised by Professor Roth). But the Committee decided it needed more information to determine what kind of amendment, if any, would be necessary --- and whether any amendment proceeding through the rulemaking process would be outmoded by the time it was enacted. Therefore, the Committee resolved to hold a conference next fall, inviting experts to discuss how AI generates information, how machine output is affected by human input, and how to treat the evidence issues raised by AI. The Committee believes it needs further guidance before it can proceed in this difficult and complicated area.

B. Rule 801(d)(1): Prior Statements of Testifying Witnesses as Hearsay

At the meeting, the Reporter presented a memorandum suggesting that the Committee consider a possible amendment to Rule 801 that would provide for broader admissibility of prior

statements of testifying witnesses. Prior statements of testifying witnesses are problematic candidates for hearsay, because the declarant of such a statement is by definition available at trial to be cross-examined about it. Currently, Rule 801(d)(1) provides substantive admissibility for only a relative few prior statements of witnesses: (A) only those prior inconsistent statements made under oath at a formal proceeding; (B) only those prior consistent statements that rehabilitate a witness after the witness's credibility has been attacked; and (C) all statements of prior identification.

After discussing the Reporter's memo, the Committee resolved, as a preliminary matter, to consider at the next meeting two different proposals to expand the admissibility of prior statements over a hearsay objection: 1) an amendment that would provide an exception to the hearsay rule for all prior statements of testifying witnesses, leaving any concern about overuse of prior statements to Rule 403; and 2) a narrower amendment that would retain the existing rules on prior consistent statements and prior identifications, but would provide a hearsay exception for all prior inconsistent statements. The Reporter will prepare a memorandum for the next meeting covering both options.

C. Rule 803(4): Statements Made to Doctors for Purposes of Litigation

Rule 803(4) provides a hearsay exception for statements made for purposes of medical treatment or diagnosis. A recent law review article suggests that the Rule should provide that statements made to a doctor for purposes of litigation are excluded from this exception. Currently, statements to litigation doctors are within the exception because the purpose of the communication is for the doctor-witness to diagnose the plaintiff. Professor Richter prepared a memorandum for the Committee on the proposal to narrow the exception. After discussion, the Committee decided not to propose any changes to Rule 803(4). The Committee reasoned that statements to doctors after an injury are often made with mixed motivations, and it could be hard to distinguish those that are primarily motivated for litigation from those that are not. Moreover, if a statement to a doctor is made solely for litigation purposes, the opponent can raise that on cross-examination of the doctor, and the jury should then be able to weigh the statement accordingly.

IV. Minutes of the Fall, 2023 Meeting

The draft of the minutes of the Committee's Fall, 2022 meeting is attached to this report. These minutes have not yet been approved by the Committee.

Attachments:

Draft Minutes of the Fall, 2023 meeting of the Advisory Committee on Evidence Rules.