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

JEFFREY S. SUTTON
CHAIR

JONATHAN C. ROSE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

STEVEN M. COLLOTON
APPELLATE RULES

EUGENE R. WEDOFF
BANKRUPTCY RULES

DAVID G. CAMPBELL
CIVIL RULES

REENA RAGGI
CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

MEMORANDUM

TO: **Hon. Jeffrey S. Sutton, Chair**
Committee on Rules of Practice and Procedure

FROM: **Hon. Sidney A. Fitzwater, Chair**
Advisory Committee on Evidence Rules

RE: **Report of Advisory Committee on Evidence Rules**

DATE: **April 10, 2014**

I. Introduction

The Advisory Committee on Evidence Rules (the "Committee") met on April 4, 2014 at the University of Maine School of Law, Portland, Maine. The meeting was preceded by a Symposium on the Challenges of Electronic Evidence that the University of Maine School of Law hosted at the Committee's request. The Committee is not proposing any action items for the Standing Committee at its May 2014 meeting.

II. Action Items

No action items.

III. Information Items

A. Symposium on the Challenges of Electronic Evidence

Prior to the commencement of the spring meeting, at the request of the Committee, the University of Maine School of Law hosted a Symposium on the Challenges of Electronic Evidence. Symposium panelists addressed topics focused on the intersection between the Evidence Rules and emerging technologies. Their presentations included several thoughtful and detailed proposals that will provide valuable assistance to the Committee as it considers whether to propose amendments

to the Rules of Evidence, or to recommend best practices to the Bench and Bar, to accommodate ever-increasing changes in technology.

The Committee was particularly pleased that Judge Jeffrey S. Sutton, Chair of the Standing Committee, was able to participate as a panelist and present an overview of the challenges of addressing technological change through rulemaking. In addition to Judge Sutton, Judge Paul Grimm (District of Maryland), Chief Judge John A. Woodcock (District of Maine, and a member of the Committee), Gregory P. Joseph, Esquire (private practice, New York City), and John Haried, Esquire (Department of Justice) addressed authenticity issues; Professor Jeffrey Bellin (William and Mary Marshall-Wythe College of Law), Paul Shechtman, Esquire (private practice, New York City, and a member of the Committee), and Professor Deirdre Smith (University of Maine School of Law) discussed hearsay and related issues; Judge Shira A. Scheindlin (Southern District of New York) and David Shonka, Esquire (Federal Trade Commission) addressed adverse inferences; Daniel Gelb, Esquire (private practice, Boston) discussed expert witness issues; Andrew Goldsmith, Esquire (Department of Justice) made a presentation concerning Fed. R. Evid. 502(d) orders in grand jury proceedings; and George Paul, Esquire (private practice, Phoenix), and Paul Lippe, Esquire (CEO, Legal OnRamp) addressed possible forthcoming changes in electronic technology. Committee Reporter, Professor Daniel J. Capra, organized the Symposium and served as moderator.

The proceedings will be published in the *Fordham Law Review*.

B. Proposed Amendments to Rules 801(d)(1)(B) and 803(6)-(8)

As previously reported, the proposed amendments to Rules 801(d)(1)(B) and 803(6)-(8) that the Standing Committee approved at its June 2013 meeting for transmittal to the Judicial Conference were approved by the Judicial Conference on the consent calendar at its September 2013 meeting. The amendments were subsequently adopted by the Supreme Court pursuant to Section 2072 of Title 28, United States Code. The Court submitted the proposed amendments to Rules 801(d)(1)(B) and 803(6)-(8) to the Congress on April 25, 2014.

C. Possible Amendment to Rule 803(16)

The Committee engaged in a preliminary discussion about whether Rule 803(16) — which provides a hearsay exception for "ancient documents" — should be amended or repealed. The Committee intends to discuss this matter further at its fall meeting.

Rule 803(16) provides that, if a document is more than 20 years old and appears authentic, it is admissible for the truth of its contents. Although the rationale for this exception has been questioned, it appears that the exception has been tolerated because it has been used so infrequently, and usually because there is no other evidence on point. This exception may prove to be more problematic, however, with the development and exploding use of electronically stored information ("ESI"). If the premise that ESI can easily be retained for more than 20 years proves to be true over

time, it is possible that the ancient documents exception will be used much more frequently. And Rule 803(16) could be relied on to introduce unreliable hearsay, because reliable hearsay is often admissible under one of the reliability-based exceptions, such as for business records. Moreover, the need for an ancient documents exception is questionable as applied to ESI because there may well be ample reliable electronic data available to prove any dispute of fact.

The Committee identified questions that should be addressed before a decision could be made concerning proposing an amendment to, or the repeal of, Rule 803(16), and this matter will be on the agenda for the Committee's fall meeting.

D. Possible Amendment to Rule 609(a)(2)

The Committee discussed whether Rule 609(a)(2) should be amended and concluded unanimously that it should not.

Rule 609(a)(2) provides that a witness's recent conviction involving dishonesty or false statement is automatically admissible to impeach the witness in any case — no matter how serious the conviction. It is the only Evidence Rule that requires evidence to be admitted automatically, without any consideration of prejudice or cumulative effect. Several law review articles have suggested that Rule 609(a)(2) should be amended to allow the judge to balance probative value against prejudicial and cumulative effect.

Committee members expressed various reasons for retaining Rule 609(a)(2) in its present form, and they voted unanimously to retain it.

E. Possible Amendments to the Hearsay Exceptions

In response to a referral from the Clerk of Court of the Seventh Circuit, the Committee discussed proposed changes to hearsay exceptions in the Rules of Evidence that Judge Posner suggested in his concurring opinion in *United States v. Boyce*, 742 F.3d 792 (7th Cir. 2013). The Committee unanimously concluded that no such changes should be made at this time.

Judge Posner proposed the following three amendments: (1) Rule 803(1) (the exception for present sense impressions) should be abrogated because its premise — that declarants do not have time to lie if their statements are made at or near the time of an event — is empirically unsupported and belied by social science research; (2) Rule 803(2) (the exception for excited utterances) should be abrogated because its premise — that declarants cannot lie if they are startled — is empirically unsupported and belied by social science research; and (3) Rule 807 (the residual exception) should replace most or all of the hearsay exceptions, so that the trial judge would admit hearsay evidence whenever the judge determines it to be reliable. Judge Posner opined that the hearsay rule and its exceptions are "too complex, as well as being archaic."

Although Committee members agreed with Judge Posner in certain respects, there was no sentiment to change hearsay exceptions that have been addressed by the Supreme Court of the United States itself, or to take the significant step of replacing specific, known hearsay exceptions with a balancing test to be applied on an individual-judge basis — a proposal that was rejected when the Rules of Evidence were adopted originally.

Although Judge Posner's suggestions were not adopted, it is possible that the Committee will consider as part of its study of the impact of technological changes on the Rules of Evidence whether changes are needed to any of the hearsay exceptions, including Rule 803(1) and Rule 803(2).

F. Report on the Effect of CM/ECF on the Evidence Rules

The Committee Reporter made a presentation concerning the Standing Committee's Subcommittee on Electronic Case Filing and Case Management ("CM/ECF") and the possible effect of CM/ECF on the Evidence Rules. He concluded that very few, if any, changes needed to be made to the Evidence Rules because (1) the Restyled Evidence Rules already cover electronic information, because Rule 101(b)(6) provides that any reference in the Rules to any kind of written material "includes electronically stored information"; and (2) the Evidence Rules are concerned with admissibility, and generally not with such physical acts as filing and mailing.

The Committee considered the presentation and reviewed the Reporter's written report and determined that there was no need to consider any amendment to the Evidence Rules to accommodate electronic case filing using CM/ECF.

G. *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.

H. "Continuous Study" of the Evidence Rules

The Committee is responsible for engaging in a "continuous study" of the need for any amendments to the Federal Rules of Evidence. The grounds for possible amendments include (1) a split in authority about the meaning of a rule; (2) a disparity between the text of a rule and the way that the Rule is actually being applied in courts; and (3) difficulties in applying a rule, as

experienced by courts, practitioners, and academic commentators. Under this standard, the Reporter periodically presents possible amendments for Committee consideration.

I. Privileges Report

At the spring 2014 meeting, Professor Kenneth S. Broun, the Committee's consultant on privileges, presented his analysis of the state secrets privilege, the informant's privilege, the political vote privilege, and the deliberative process privilege. Professor Broun stated that he had finished all of the survey rules for the privileges that were worthy of treatment in a survey of federal common law.

Professor Broun's work on privileges is informational and is part of his continuing work to develop an article that he will publish on the federal common law of privileges. It neither represents the work of the Committee itself nor suggests explicit or implicit approval by the Standing Committee or the Committee.

IV. Minutes of the Spring 2014 Meeting

The draft of the minutes of the Committee's spring 2014 meeting is attached to this report. These minutes have not yet been approved by the Committee.