Advisory Committee on Evidence Rules

Minutes of the Meeting of October 24, 2014

Durham, North Carolina

The Judicial Conference Advisory Committee on the Federal Rules of Evidence (the "Committee") met on October 24, 2014, at Duke University School of Law.

The following members of the Committee were present:

Hon. William K. Sessions, Chair
Hon. Brent R. Appel
Hon. Debra Ann Livingston
Hon. John T. Marten
Hon. John A. Woodcock, Jr.
Daniel P. Collins, Esq.
Paul Shechtman, Esq.
Elizabeth J. Shapiro, Esq., Department of Justice
A.J. Kramer, Esq., Public Defender

Also present were:

Hon. Sidney A. Fitzwater, Former Chair of the Committee
Hon. Richard Wesley, Liaison from the Committee on Rules of Practice and Procedure
Professor Daniel J. Capra, Reporter to the Committee
Professor Kenneth S. Broun, Consultant to the Committee
Catherine R. Borden, Esq., Federal Judicial Center
Jonathan C. Rose, Chief, Rules Committee Support Office
Julie Wilson, Rules Committee Support Office
John K. Rabiej, Duke University Law School
David Levi, Dean, Duke University Law School
Donald Beskind, Duke University Law School

I. Opening Business

Welcoming Remarks

Judge Sessions welcomed everyone to the Committee meeting. He noted that it was his first meeting as Chair, and that he was grateful to the outgoing Chair, Judge Fitzwater, for doing so much to assure a smooth transition. He expressed his appreciation to Duke Law School, and especially to Dean David Levi and John Rabiej, for hosting the Committee.

Approval of Minutes

The minutes of the Spring 2014 Committee meeting were approved.

New Members

Judge Sessions introduced and welcomed the new Committee members, Judge Marten of the District of Kansas, and Daniel Collins, Esq., partner in the law firm of Munger, Tolles & Olsen.

Tribute to Judge Fitzwater

The Committee gave a well-deserved tribute to Judge Fitzwater, the departing Chair. The Reporter commented that Judge Fitzwater led the Committee with brilliance, dignity and grace, and that it was his guidance that let the Committee to sponsor three important Symposia — on the Restyling effort, Rule 502, and electronic evidence. The proceedings from all three Symposia have been published in law reviews, and the Electronic Evidence Symposium helped the Committee to establish its agenda for the current meeting and meetings going forward. The Reporter also noted that it was Judge Fitzwater who crafted the language for the amendment to Rule 801(d)(1)(A) that solved the problems that some had raised with the initial draft of the rule, and that led to the passage of the rule. Judge Sessions complimented Judge Fitzwater for his remarkable contributions to the rulemaking process and for his stellar qualities as a person and a leader.

Judge Fitzwater spoke and stated that being the Chair of the Evidence Rules Committee was the "best job" he ever had. He emphasized the importance of the Committee's work and the brilliance and dedication of members of the Committee, who were "the best and the brightest.". He thanked the AO staff for their dedicated efforts on behalf of the Committee. Judge Fitzwater noted that he had worked with the Reporter on the egovernment project when he was a member of the Standing Committee and that he and the Reporter continued that productive partnership while working on the Evidence Committee. He complimented the Reporter for his efforts for the Committee. Finally, Judge Fitzwater stated that Judge Sessions was an outstanding selection for the new Chair, and that the appointment of a person as accomplished as Judge Sessions was a tribute to the Evidence Rules Committee and the importance of its work.

June Meeting of the Standing Committee

Judge Fitzwater reported on the January meeting of the Standing Committee. The Evidence Rules Committee presented no action items at the meeting. Judge Fitzwater reported to the Standing Committee on the Electronic Evidence Symposium held in April 2014, and told the Standing Committee that the Evidence Committee's agenda in the future would be influenced by the ideas expressed at the Symposium.

II. Possible Amendment to Rule 803(16)

Rule 803(16) provides a hearsay exception for "ancient documents." If a document is more than 20 years old and appears authentic, it is admissible for the truth of its contents. At the Spring meeting, the Committee considered the Reporter's memorandum raising the possibility that Rule 803(16) should be amended because of the development of electronically stored information. The rationale for the exception has always been questionable, for the simple reason that a document does not become reliable just because it is old; and a document does not magically become reliable enough to escape the rule against hearsay on the day it turns 20. The Reporter's memorandum noted that the exception has been tolerated because it has been used so infrequently, and usually because there is no other evidence on point. But if it is the case that electronically stored information can easily be retained for more than 20 years, it is then possible that the ancient documents exception will be used much more frequently in the coming years. And it could be used to admit only unreliable hearsay, because if the hearsay is in fact reliable it will probably be admissible under other reliability-based exceptions, such as the business records exception. Moreover, the need for an ancient documents exception is questionable as applied to ESI, for the very reason that there may well be a lot of *reliable* electronic data available to prove any dispute of fact.

The Reporter prepared three possible alternatives for amending the Rule: 1) abrogation; 2) limiting the rule to hardcopy; and 3) adding the necessity-based language from the residual exception, so that information could not be admitted under Rule 803(16) unless the proponent could show that it was more probative than any other reasonably available evidence that could be admitted under one of the reliability-based exceptions.

Committee members at the Spring meeting expressed interest in a proposed amendment but asked the Reporter to provide more information on the factual premises supporting the change — specifically, whether ESI that is more than 20 years old is and will be widespread (as opposed to deleted), and whether it is easily retrievable.

At the Fall meeting, the Reporter prepared a detailed memo indicating that old ESI in fact is and will become even more prevalent, and that much of it is easily retrievable. Examples include the materials from every posted web page, which can easily be found on and retrieved from the

Internet Archive; personal emails, texts, and social media postings; information in cloud storage; and databases of old books and public documents.

At the Fall meeting, Committee members unanimously agreed that Rule 803(16) was problematic, as it was based on the false premise that authenticity of a document means that the assertions in the document are reliable — this is patently not the case. The Committee also unanimously agreed that an amendment would be necessary to prevent the ancient documents exception from providing a loophole to admit large amounts of old, unreliable ESI. But the Committee was divided on two matters: 1) whether an amendment was necessary at this point, given the fact that no reported cases have been found in which old ESI has been admitted under the ancient documents exception; and 2) which alternative for amendment should be chosen.

On the first question of whether an amendment is necessary at this point: Some members argued that the obscurity of the ancient documents exception will not last now that ESI either has reached or is reaching the 20-year-old point. They noted that litigation incentives will be bound to lead to proffers of old, unreliable ESI that could not be admitted under any other exception. As one member stated, "this is a time bomb." But others, including the DOJ representative (after speaking with others at the Department) thought it appropriate to wait and monitor developments; the worst that could happen is that there would be a period of time in which old ESI would be admitted before an amendment would take effect. Another member observed that the time period required for admissibility provided at least some protection against widespread abuse, as it is unusual that a document more than 20 years old will be useful in a litigation; thus the risks involved in waiting were not overwhelming. But another member noted that especially in criminal cases, where statutes of limitation have been lengthened as to many crimes, the risk of admitting old and unreliable ESI was quite real — especially user-sourced information such as texts, tweets and social media postings. Another member stated that if the rule is wrong, something should be done about it — there is no reason to wait and have a rule that is wrong on the merits remain on the books.

Finally, members, as well as Judge Fitzwater, noted that in any case the proposal should be held up until it could be packaged with other amendments.

On the second question of which alternative to adopt: A number of Committee members felt that the rule should just be abrogated, as it is based on a fundamentally flawed premise that authenticity of a document means that its contents are reliable. One member argued that the exception was especially pernicious because if unreliable hearsay is admitted, it will be especially hard to rebut after the passage of so much time. Another member stated that if the Committee were drafting the rules from scratch, it should not propose an ancient documents exception, but that abrogating an exception was a somewhat radical step.

One member preferred the proposal that would distinguish between paper documents and ESI. That member worried about the growing volume of ESI that is in fixed form, and noted that people don't stockpile paper the way they stockpile ESI. But other members noted that there might be a problem in distinguishing between ESI and paper. For example, why is a printout of a

newspaper article on a website any different from the hardcopy of the newspaper? What rule would apply to a scan of an old hardcopy document?

One member suggested that the necessity-based alternative was preferable because abrogation seems extreme and it is appropriate to leave the matter of admissibility to the judge, with the instruction that the judge should be more careful in admitting old and potentially unreliable information. The necessity-based model is just telling the judge to be more careful.

Another member suggested yet another alternative, in the nature of burden-shifting. Under this alternative, hearsay could be admitted under the ancient documents exception unless the opponent could show that it was untrustworthy. The Reporter noted that this alternative could be effectuated by importing the untrustworthiness clause of the business records exception (Rule 803(6)) into the ancient documents exception. Another member argued, however, that this alternative would not be sufficiently protective, because with ancient documents, the very problem is that they are so old that it will be difficult to prove their untrustworthiness.

The Committee ultimately determined to revisit the proposed amendment to Rule 803(16) at the next meeting. The Reporter was directed to work up a formal proposal for each of the alternatives discussed. If the Committee decides to propose any amendments to other rules at that time, then any proposed change to Rule 803(16) might be part of a package.

III. Possible Addition of Hearsay Exceptions for Recent Perceptions (eHearsay)

At the Advisory Committee's Symposium on Electronic Evidence, Professor Jeffrey Bellin proposed amending the Evidence Rules to add two new hearsay exceptions: one to Rule 804(b), which is the category for hearsay exceptions applicable only when the declarant is unavailable to testify; the other to Rule 801(d)(1), for certain hearsay statements made by testifying witnesses. Both exceptions are intended to address the phenomenon of electronic communication by way of text message, tweet, Facebook post, etc. Professor Bellin contended that the existing hearsay exceptions, written before these kinds of electronic communications were contemplated, are an ill-fit for them and will result in many important and reliable electronic communications being excluded.

To solve the perceived problem, Professor Bellin proposed a modified version of the hearsay exception for recent perceptions --- an exception that the original Advisory Committee approved but which was rejected by Congress. Professor Bellin contended that the proposal will allow most of the important and reliable tweets and texts to be admitted, while retaining sufficient reliability guarantees that will exclude the most suspect of this category of statements. And he contended that the proposal fits well within evidentiary doctrine because it derives from a hearsay exception that the Advisory Committee approved --- an exception that though rejected by Congress has actually been adopted and applied in a handful of states.

The Committee considered the recent perceptions proposal at the Fall meeting. Preliminarily, there was general agreement that one part of the proposal — amending Rule 801(d)(1) to add an exception for recent perceptions — should not be adopted. The Committee was concerned that admitting prior statements of a testifying witness, on the ground that they are based on a recent perception, would create problems in integrating with the other Rule 801(d)(1) exceptions. For example, the amendment would allow certain prior inconsistent statements to be admitted substantively even though they would not be admissible under the constraints imposed by Congress in Rule 801(1)(d)(1)(A) — the rule allowing only prior inconsistent statements made under oath to be admissible for their truth. The rule would also allow certain prior consistent statements to be admitted substantively even though they would not be admissible under the recently amended Rule 801(d)(1)(B). Moreover, the recent perceptions exception adopted by the original Advisory Committee was addressed to situations in which the declarant was unavailable. The Committee was not convinced that the reasons for admitting a recent perceptions statement when the declarant was unavailable were equally applicable to situations in which the witness *was* available for cross-examination.

The Reporter proposed that if the Committee were interested in revisiting the entire category of hearsay exceptions for prior statements of testifying witnesses, then he would provide the Committee with the necessary background for a systematic review of the subject at a future meeting. That review would include consideration of whether prior statements of testifying witnesses ought to be defined as hearsay in the first place, given the fact that by definition the person who made the statement is subject to cross-examination about it. The Committee agreed that a systematic review of the entire category of prior statements of testifying witnesses would be preferable to adding another hearsay exception to that category without working through how it might affect the other exceptions.

The Committee then turned its attention to the proposal to add a recent perceptions exception to Rule 804. One member found that the requirements that Professor Bellin proposed to add to the original Advisory Committee proposal were problematic. For example, Professor Bellin proposed to limit the exception to "communications" rather than any statement; but this member found that distinction to be unwarranted because private statements can be just as reliable, or unreliable, as communications. Thus the distinction resulted in line-drawing without any payoff in terms of differentiating reliability. This member concluded that if an exception for recent perceptions were found appropriate, then the Committee should propose the exception as it was proposed to Congress in the 1970's. As to that proposal, he wondered whether there should be deference to the Congressional decision to reject the proposed amendment back then.

On the question of deference, another member responded that times had changed since the 1970's, most particularly in the explosion of electronic communications such as texts, tweets, and Facebook status updates. If the proposed exception covers the most reliable of those statements — and those statements would not otherwise be covered by the existing exceptions — then that would be sufficient justification for revisiting the recent perceptions exception as the Advisory Committee had proposed it, to be revised as necessary.

Professor Broun, the consultant to the Committee, then reported on the research he had done into how the recent perceptions exception had been applied in the few states that had adopted it. His review of the reported case law led to the following conclusions: 1) the exceptions had not been subject to widespread abuse and in fact had been used relatively infrequently — most often in cases involving domestic abuse; 2) in many of the cases in which the exception was used, the hearsay statement might well have been admitted as a present sense impression or an excited utterance; 3) that said, the exception had been usefully applied in a number of cases where the statement was made a few hours or more after the event — more than would be permitted under the present sense impression exception — but appeared to be reliable under the circumstances.

Professor Broun acknowledged that a review of reported decisions does not provide a completely accurate account of how the exception is working, because the real work on the exception is done in trial courts, and a trial court's evidentiary rulings either admitting or rejecting the proffered hearsay are unlikely to be reviewed. A Committee member suggested that if the Committee decided to continue its work on the amendment, then it might be useful to call prosecutors and other litigators in the states using the exception to see how it has affected their practice.

Several members then expressed the concern that a recent perceptions exception would lead to the admission of unreliable evidence. One member noted that a written text or tweet might be difficult to interpret, given the lack of context that would exist with an oral communication. That member also noted that the more time that passes between the event and the statement, the more likely it is that the person who sends the text or tweet is relying not only on his own personal knowledge but also the texts or tweets of others about the event. Thus there is a risk that electronic communications well after the event are the result of crowdsourcing without any guarantee of reliability. Moreover, the nature of text messages and tweets is that they often describe an event that can't be verified as having occurred. This member suggested that if recent-but-not immediate statements are in fact reliable, they could be admitted under the residual exception. This member suggested that the residual exception might be more appropriate because it would focus the judge directly on questions of reliability — perhaps more effectively than the categorical requirements of a new exception.

Another member, in response, argued that the problem of determining whether a person who sends a text is relying on his personal knowledge as opposed to crowdsourcing is a question of foundation — adopting a recent perceptions exception would not mean that all statements made recently after an event would be admissible automatically, because the proponent would also have to establish a foundation of personal knowledge. This member also stated that the residual exception solution is problematic because the residual exception was intended to be used in only rare and exception circumstances; it would not be appropriate to essentially create a new exception for reliable texts and tweets in the residual exception, as that would lead to unpredictability and too much judicial discretion.

Another member contended that to the extent the recent perceptions exception was intended

to expand admissibility of personal electronic communications, it would lead to the collateral cost of more disputes on authenticity. Questions would abound on whether a particular text or tweet was actually made by a particular person. While courts are of course already deciding authenticity questions presented by electronic evidence, a new exception embracing this evidence would raise more authenticity questions.

Both the public defender and the DOJ representative reported that an informal survey of their respective constituencies indicated uniform opposition to a proposed exception for recent perceptions. The public defender found no shortage of hearsay being introduced in a criminal trial, particularly under the broad exception for coconspirator statements. He contended that there was no need for another potentially broad exception that would admit texts and posts made so far after the event that memory has faded. He argued that experience shows that texts and other electronic personal communications can be quite unreliable, and unverified. The DOJ representative reported that the prosecutors and bureau chiefs she had contacted were opposed to the exception because it might open up a Pandora's box, and that they had found no problem in admitting reliable hearsay under the existing exceptions.

Other members expressed concern that with all the volume of potentially low quality material being produced by text and tweet — with information misreported and then those misreports widely distributed.

Ultimately, the Committee decided not to proceed on Professor Bellin's proposal to add a recent perceptions exception to Rule 804. It did not reject a possible reconsideration of a recent perceptions exception, however. The Committee asked the Reporter and Professor Broun to monitor both federal and state case law to see how personal electronic communications are being treated in the courts. Are there reliable statements being excluded? Are such statements being admitted but only through misinterpretation of existing exceptions, or overuse of the residual exception? The Reporter also suggested that he could go back to the original Advisory Committee proposal for recent perceptions and try to refine it for consideration by the Committee at the next meeting. The Committee agreed with the Reporter's suggestion. The Committee resolved to continue its consideration of a recent perceptions exception at the next meeting.

IV. Proposal to Amend Rules 901 and 902 to Provide Specific Grounds for Authenticating Certain Electronic Evidence

At the Electronic Evidence Symposium in April, Greg Joseph made a presentation intended to generate discussion about whether standards could be added to Rules 901 to 902 that would specifically treat authentication of electronic evidence. There are dozens of reported cases, both Federal and State, that set forth standards for authenticating electronic evidence. These cases apply the existing, flexible provisions on authenticity currently found in Federal Rules 901 and 902 and their state counterparts. Greg crafted specialized authenticity rules to cover email, website evidence

and texts; these draft rules are intended to codify the case law, as indicated by the extensive footnoted authority that Greg provided. Greg suggested that analogous standards could be set up for other forms of electronic evidence such as online chats.

At the Fall meeting, the Committee reviewed the draft rules to determine whether to propose them, along with any revisions, as amendments to Rule 901 and 902. One member noted that the proposed rule on emails had been adapted from Rule 901(b)(6), governing authentication of phone calls. He argued that the telephone rule was different at least in part because the major purpose of that rule was to establish who it was that answered the call; in the email situation, there is rarely a question of who received the email. Another member noted that the question of receipt of an email is not really about authenticity but rather about a presumption, that something properly sent is received.

One member argued that the proposal was a very helpful compendium of factors that might go into the authenticity question, but that it was too detailed for a rule. In many cases, none of the details in the proposal would actually be applicable, because the evidence could be authenticated in a simpler manner. He noted that the telephone rule itself was not detailed — it did not lay out all the factors that could ever be relevant to the authenticity question.

Another Committee member noted that listing authenticity factors in a rule might lose sight of the point that the factors must be weighed in each individual case, and that some factors might weigh more in some cases than others. That weighing process cannot be encapsulated easily in a rule. Other Committee members noted that the deliberate nature of the rulemaking process raises the danger that specifically stated grounds of authenticity for electronic evidence will be outmoded before they are even enacted. Such rules would probably have to be constantly amended to keep up with technology — which does not appear to be a problem with the flexible and broadly stated standards in the existing rules.

Another Committee member observed that none of the other Evidence Rules provide a list of factors that are relevant in determining whether an admissibility requirement is met — much less text that would provide the court guidance on how to weigh those factors. And while such guidance might once have been provided in a Committee Note — such as the Committee Note to the 2000 amendment to Rule 702 — the Standing Committee has recently discouraged the use of Committee Notes to provide significant detail that is not covered by the text.

In the end, the Committee determined that it would not proceed at this time with a rule amendment that would provide guidance on how to establish the authenticity of electronic evidence. But Committee members unanimously determined that the Committee could provide significant assistance to courts and litigants in negotiating the difficulties of authenticating electronic evidence, by preparing and publishing a best practices manual —along the lines of the work done by Greg Joseph in footnoting the support for his draft amendments. A best practices manual could be amended as necessary, avoiding the problem of having to amend rules to keep up with technological changes. It could include copious citations, which a rule could not. And it could be set forth in any

number of formats, such as draft rules with comments, or all text with no rule.

The Committee directed the Reporter to prepare a memorandum on how a best practices manual on authentication of electronic evidence might be developed and prepared. The Reporter will provide a sample format on one or more types of electronic evidence. Once the best practices manual is prepared and approved, the Committee will determine (after consultation with the Standing Committee) on the best way to have it published, whether under the auspices of the Committee or with some other designation.

Finally, the Committee considered, and rejected, a possible amendment to Rule 901 that would provide that production of an item in an action would constitute authentication of that item. The Reporter noted that the courts were divided on whether production equals authentication, and that it could be argued that the act of production of an item in discovery is tantamount to saying that the item is what the producer says it is. But several members of the Committee argued that a party to a litigation might produce a document knowing that it is inauthentic, e.g., a forged check. Thus it would be overbroad to conclude that all production concedes authenticity.

V. Proposed Amendment to Rule 902 to Allow Certification of Authenticity of Certain Electronic Evidence

At the Electronic Evidence Symposium in April, John Haried made a proposal for two additions to Rule 902, the provision on self-authentication. The first would allow self-authentication of machine-generated information, upon a submission of a certificate prepared by a qualified person. The second proposal would provide a similar certification procedure for a copy of an electronic device, media or file by its "hash value" or other indication of reliability. These proposals are analogous to Rule 902(11) of the Federal Rules of Evidence, which permits a foundation witness to establish the authenticity and admissibility of business records by way of certification.

The proposals have a common goal of making authentication easier for certain kinds of electronic evidence that are, under current law, likely to be authenticated under Rule 901 but only by calling a witness to testify to authenticity. Mr. Haried argued that the types of electronic evidence covered by the two rules are rarely the subject of a legitimate authenticity dispute but that the proponent is nonetheless forced to produce an authentication witness, often at great expense and inconvenience --- and often, at the last minute, opposing counsel ends up stipulating to authenticity in any event.

The self-authentication proposals, by following Rule 902(11)'s provision covering business records, essentially leave the burden of going forward on authenticity questions to the opponent of the evidence. Under Rule 902(11), a business record is authenticated by a certificate, but the opponent is given "a fair opportunity" to challenge both the certificate and the underlying record.

The proposals for a new Rule 902(13) and 902(14) would have the same effect of shifting to the opponent the burden of going forward (not the burden of proof) on authenticity disputes.

The Committee engaged in discussion on the certification proposals. Members uniformly agreed that it would be useful to promote rules that would make the process of proving authenticity for electronic evidence simpler, cheaper, and more efficient. Many Committee members remarked on the unnecessary expense, in the current practice, of having to call a witness to authenticate a web page or other machine-produced evidence, when it ordinarily ends up that the witness is not cross-examined or that authenticity is stipulated at the last minute.

Discussion indicated three concerns about the proposal. First, in a criminal case, would admission of the certificates under the proposed rules violate the defendant's right to confrontation? As to this question, the Reporter commented that the Supreme Court has stated in *Melendez-Diaz v. Massachusetts* that admitting a certificate prepared for litigation does not violate the right to confrontation if the certificate does nothing more than authenticate another document or item of evidence. The Reporter also stated that the lower courts had uniformly held that certificates prepared under Rule 902(11) do not violate the right to confrontation, relying on the Supreme Court's statement in *Melendez-Diaz.* The problem with the affidavit found testimonial in *Melendez-Diaz* was that it certified the accuracy of a drug test that was itself prepared for purposes of litigation. The certificates that would be prepared under proposed Rules 902(13) and (14) would not be certifying the accuracy of any contents or any factual assertions. They would only be certifying that the evidence to be introduced was generated by the machine (Rule 902(13)) or is a copy of the original (Rule 902(14)).

One Committee member observed that any constitutional concern about the certification provisions would be satisfied by including a notice-and-demand provision in each of the proposed rules. Under a notice-and-demand provision, the government would provide pretrial notice of the intent to use the certification process, and authentication could then be proved by certificate unless the defendant timely demanded production of the foundation witness. But after consideration, the Committee unanimously determined that a notice-and-demand provision was unnecessary. Such provisions cure confrontation concerns because they are a means of obtaining a waiver of the defendant's confrontation rights — a means approved by the Supreme Court in *Melendez-Diaz.* But because the certification process itself does not appear to raise confrontation concerns (as all that is being done is certifying authenticity) there is no reason to provide for the notice-and-demand procedure. Moreover, adding a notice-and-demand procedure to proposed Rules 902(13) and (14) would raise a question about why similar provisions are not added to the rules permitting certification of business records in criminal cases: Rule 902(11) for domestic records and 18 U.S.C. § 3505 for foreign records.

The second expressed concern about the proposed certification provisions was related to the first: any proposed Rule would have to clarify that all that the certification is doing is establishing that the proffered evidence is authentic. That is, there can be no certification about the accuracy of the underlying information in the proffered item. Thus, when Rule 902(13) provides for certification of authenticity for records generated "by a process or system that produces an accurate result" the

certification would not mean that the specific results were indisputably reliable, only that the system described in the certificate produced the item that is authenticated. Similarly, a certificate offered as proof of authenticity of a web page does not dispose of a hearsay exception with respect to the content of the webpage. And a certification that the proffered item is a copy of the hard drive from the defendant's computer does not alleviate the government from having to prove that the defendant is the one who downloaded the information onto the original harddrive. Committee members resolved that the necessary clarification about the limits of the certification proposals should be set forth in the Committee Notes to the proposed rules.

The final expressed concern was about proposed Rule 902(14) specifically. That proposal would permit authentication of a copy of an electronic device or storage medium by way of certification where the copy is shown to be authentic by its "hash value or a similar process of digital identification." Committee members concluded that the use of the term "hash value" was problematic because that term would be unknown to many people, and more importantly it could become outmoded by technological advances. The Committee unanimously agreed that the proposal should be changed to allow certification of authenticity of a copy that is found to be authentic by a "process of digital identification."

The Committee unanimously determined to proceed with drafting a formal amendment and Committee Note for proposed Rules 902(13) and (14), for consideration at the Spring 2015 meeting. The Reporter was directed to prepare language to the Committee Note that would specifically address any concern that certification of a copy of on electronic device or storage medium might be misused as certification of content, or as proof of any underlying connection between the defendant and the item in a criminal case.

VI. *Crawford* Developments

The Reporter provided the Committee with a case digest and commentary on all federal circuit cases discussing *Crawford v. Washington* and its progeny. The cases are grouped by subject matter. The goal of the digest is to allow the Committee to keep apprised of developments in the law of confrontation as they might affect the constitutionality of the Federal Rules hearsay exceptions.

The Reporter's memorandum noted that the law of Confrontation continued to remain in flux. The Supreme Court has denied certiorari in a number of cases raising the question about the meaning of the Supreme Court's muddled decision in *Williams v. Illinois*: meaning that courts are still trying to work through how and when it is permissible for an expert to testify on the basis of testimonial hearsay. Moreover, the Supreme Court has recently granted certiorari to review whether statements made by a victim of abuse to a teacher are testimonial, when the teacher is statutorily required to report such statements. The Court's activity, and the uncertainty created by *Williams* and other decisions, suggests that it is not appropriate at this point to consider any amendment to the Evidence Rules to deal with Confrontation issues. The Committee resolved to continue monitoring

developments on the relationship between the Federal Rules of Evidence and the accused's right to confrontation.

VI. Next Meeting

The Spring 2015 meeting of the Committee is scheduled for Friday, April 17 at Fordham Law School.

Respectfully submitted,

Daniel J. Capra