Advisory Committee on Evidence Rules

Minutes of the Meeting of April 4, 2014

Portland, Maine

The Judicial Conference Advisory Committee on the Federal Rules of Evidence (the "Committee") met on April 4, 2014, at the University of Maine School of Law.

The following members of the Committee were present:

Hon. Sidney A. Fitzwater, Chair
Hon. Brent R. Appel
Hon. Debra Ann Livingston
Hon. William K. Sessions, III
Hon. John A. Woodcock, Jr.
Edward C. DuMont, Esq.
Paul Shechtman, Esq.
Elizabeth J. Shapiro, Esq., Department of Justice
A.J. Kramer, Esq., Public Defender

Also present were:

Hon. Jeffrey S. Sutton, Chair of the Committee on Rules of Practice and Procedure
Hon. Richard C. Wesley, Liaison from the Committee on Rules of Practice and Procedure
Hon. Arthur L. Harris, Liaison from the Bankruptcy Committee
Hon. Paul Diamond, Liaison from the Civil Rules Committee
Professor Daniel J. Capra, Reporter to the Committee
Professor Kenneth S. Broun, Consultant to the Committee
Professor Daniel Coquillette, Reporter to the Standing Committee
Catherine R. Borden, Esq., Federal Judicial Center
Jonathan Rose, Chief, Rules Committee Support Office

Professor Deirdre Smith, University of Maine Law School
Professor Jeffrey Bellin, William and Mary Law School
Peter Murray, Esq.
George Paul, Esq.
Daniel Gelb, Esq.

I. Opening Business

Welcoming Remarks

Judge Fitzwater, the Chair of the Committee, greeted the members and thanked Dean Pitegoff and Professor Deirdre Smith of the University of Maine School of Law for hosting the Committee meeting and the Symposium on Electronic Evidence.

Approval of Minutes

The minutes of the Spring 2013 Committee meeting were approved. (The Fall meeting was canceled due to the government shutdown).

New Members and Other Business

Judge Fitzwater introduced and welcomed the new Committee member, Judge Livingston of the Second Circuit Court of Appeals. He also introduced A.J. Kramer, Public Defender for the District of Columbia, who was attending his first meeting in person.

Judge Fitzwater also noted that this would be his last meeting presiding as Chair of the Committee. He congratulated the incoming Chair, Judge Sessions. The Reporter stated that Judge Fitzwater will be honored at the next meeting for his stellar service to and leadership of the Evidence Rules Committee for the past four years.

June Meeting of the Standing Committee

The Chair reported on the January meeting of the Standing Committee. The Evidence Rules Committee presented no action items at the meeting. The Standing Committee did discuss the proposal to amend the Bankruptcy Rules to provide for electronic signatures — a proposal that the Evidence Rules Committee had previously reviewed.

Discussion of the Electronic Evidence Symposium

Judge Fitzwater extended his compliments to all of the panelists at the Symposium on the challenges of electronic evidence, which took place on the morning of the Committee meeting. He noted that a number of detailed and credible proposals for change to the Evidence Rules — to accommodate electronic evidence — were made and discussed by the panelists. The Reporter stated

that these proposals will form the bulk of the Committee's agenda in the next year.

Judge Sutton observed that even if some of the proposals made at the Symposium might not end up to be appropriate for rule amendment — because, for example, they may be too specific or subject to obsolescence due to changes in technology — the Committee might consider working on those proposals with the goal of establishing a "best practices" template that could be distributed to judges and litigants.

II. Privileges Report

Professor 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. This presentation was part of Professor Broun's continuing work to develop an article that he will publish on the federal common law of privileges. 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. He noted that instead of a general rule on waiver, he had included separate waiver rules on each of the privileges, as the waiver rules differed somewhat among the privileges.

The Chair emphasized that Professor Broun's work, when it is published, will neither represent the work of the Committee nor suggest explicit or implicit approval by the Standing Committee or the Advisory Committee.

Professor Broun asked for the Committee's guidance on where to publish the survey rules. The Committee agreed that it would be better to have the survey published in a law review article, or the Federal Rules Decisions, rather than under the auspices of the FJC — in order to avoid any inference that the survey rules had received an imprimatur from the Committee. Once it is published independently, the FJC and the Committee could use Professor Broun's extensive work as a valuable resource.

Committee members expressed profound gratitude to Professor Broun for his excellent work in keeping the Committee apprised of developments in the area of privileges.

III. 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. 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 noted that the exception has been tolerated because it has been used so infrequently, and usually because there is no other

evidence on point. 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. 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 noted that the memorandum on the ancient documents exception and its relationship to ESI was preliminary, and he was simply asking whether the Committee was interested in considering a formal proposal for amendment at the next meeting. A member responded that he was very interested in considering the proposal, noting that the possible widespread application of Rule 803(16) to ESI was an issue that the Committee should address before it becomes a serious problem. That member suggested that the most viable proposal would be to limit applicability of the exception to situations of necessity, i.e., the exception should only apply where the proponent could not find other more reliable information through reasonable efforts. Another Committee member suggested that the exception should be eliminated "before people discover it exists."

Other Committee members noted that before a rule amendment is actually proposed, the Committee has to be sure that its factual premises are sound. That involves two questions: 1) is it really the case that ESI will be preserved for more than 20 years, given the prevalence of data destruction programs?; and 2) even if ESI is preserved unchanged for such a long period, will it be easy to retrieve? The Reporter stated that he would research these questions and seek to provide answers before the next meeting.

The Committee resolved to further consider a possible amendment to Rule 803(16) at the next meeting.

IV. Report on Effect of cm/ecf on the Evidence Rules

The Reporter discussed the work of the Standing Committee's Subcommittee on electronic case filing and case management. The Subcommittee is chaired by Judge Chagares and has members from each of the Advisory Committees. Judge Woodcock is serving as the representative of the Evidence Rules Committee. The Advisory Committee Reporters serve as consultants, and each of the Reporters prepared a memorandum on changes that might be necessary to their respective rules due to electronic case filing. For example, if a rule referred to hardcopy (e.g., covers on a brief, written notice, copies, etc.), or to a physical act (e.g., mailing), it might need to be amended to accommodate electronic information and electronic filing.

The Reporter to the Evidence Rules Committee prepared a report on the possible effect of cm/ecf on the Evidence Rules, and that report was included in the agenda book for the Fall meeting. The report concluded that very few, if any, changes needed to be made to the Evidence Rules, for two reasons: 1) the Restyled 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 Evidence Rules Committee reviewed the report and determined that there was no need at this point to consider any amendment to the Evidence Rules to accommodate electronic case filing.

V. Consideration of Changes to the Hearsay Exceptions

In his concurring opinion in *United States v. Boyce,* 742 F.3d 792 (7th Cir. 2013), Judge Posner proposed three changes to the Federal Rules of Evidence hearsay exceptions:

> 1) Rule 803(1) (the exception for present sense impressions) should be abrogated, because its premise — that declarants don't have time to lie if their statement is made at or near the time of an event — is empirically unsupported and belied by social science research**.**
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> 2) Rule 803(2) (the exception for excited utterances) should be abrogated, because its premise — that declarants can't lie if they are startled — is empirically unsupported and belied by social science research.
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> 3) Rule 807 (the residual exception) should "swallow" most or all of the hearsay exceptions, so that the trial judge would allow hearsay evidence to be admitted whenever the court determines it to be reliable. This proposal was based on Judge Posner's conclusion that the hearsay rule and its exceptions are "too complex, as well as being archaic."

The clerk of the Seventh Circuit referred Judge Posner's opinion to the Advisory Committee for its consideration.

Committee members generally agreed that the empirical support for the stated justifications for Rules 803(1) and 803(2) was weak. But one member argued that statements fitting into these exceptions could be justified on another ground — that they are made at or near an event, so are not memory-dependent and unlikely to be generated for purposes of litigation. Moreover, the Evidence Rules are now operating in a time of great technological change, and abrogating well-established hearsay exceptions may result in unintended consequences. Another member pointed out that in its cases construing the Confrontation Clause, the Supreme Court has expressly relied on the justifications of the excited utterance exception in finding statements in response to an emergency to be properly admitted. In sum, the Committee determined that at this point the case had not been

made for abrogating the hearsay exceptions for excited utterances and present sense impressions.

As to the proposal to scrap the hearsay exceptions in favor of a single rule allowing hearsay to be admitted whenever it was found reliable, Committee members noted that a similar proposal was made by the Advisory Committee when the Federal Rules were being drafted. That proposal was roundly criticized by judges and litigants. Judges opposed the rule because they wanted to have the guidance of categorical rules to apply — they did not want to have to reinvent the reliability wheel for every piece of hearsay offered at a trial. And litigants were concerned about unpredictable results depending on the judge's personal approach to hearsay — thus undermining the possibility of settlement. Committee members saw no reason to think that these criticisms were any less valid today than they were in 1970. Moreover, members expressed concern that there would be little or no effective appellate review of a trial court's hearsay rulings. Finally, the Reporter observed that experience under the residual exception indicated that courts applying a totality of circumstances approach often admitted hearsay of dubious reliability against criminal defendants — until that practice was curtailed by the Supreme Court's Confrontation Clause cases starting with *Crawford.* Thus the track record for a rigorous application of a case-by-case approach to reliability is not strong.

No Committee member moved for further consideration of a proposed amendment to the hearsay exceptions along the lines suggested in *United States v. Boyce.*

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

Evidence 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. The Reporter prepared a memorandum setting forth these suggestions for change.

Committee members found that the Rule rationally distinguished convictions that involved dishonesty or false statement from those that did not. Convictions involving dishonesty or false statement are logically more probative of a witness's character for truthfulness than those that are not. Indeed Congress — which devoted more time and consideration to Rule 609(a)(2) than any other rule — could reasonably have thought that a balancing test would be of little use because a trial judge could plausibly find that falsity-based convictions are probative enough to satisfy any balancing test.

Other Committee members noted that Rule 609(a)(2) has the virtue of simplicity and predictability. They observed that the practice in some states such as New York, in which the courts employ balancing tests for all convictions, results in different rulings from different judges. Other members stated that Rule 609(a) was already a complex and detailed rule, with two separate

balancing tests for non-falsity based convictions, and a distinction between falsity-based misdemeanors (automatically admitted) and non-falsity based misdemeanors (never admitted). So any attempt to add a third balancing test in the rule, for falsity-based convictions, would only add to the complexity of the rule.

The Committee unanimously rejected the proposal to add a balancing test to Rule 609(a)(2).

VI. *Crawford* Developments — Presentation on *Williams v. Illinois*

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 was in flux, and suggested that it was 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.

VII. Next Meeting

The Fall 2014 meeting of the Committee is scheduled for Friday, October 24, at Duke Law School.

Respectfully submitted,

Daniel J. Capra