MEMORANDUM

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

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

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

DATE: **November 15, 2014**

I. Introduction

The Advisory Committee on Evidence Rules (the "Committee") met on October 24, 2014 in Durham, North Carolina, at Duke University School of Law. At the meeting, the Committee considered a number of proposals developed from its April, 2014 Symposium on the Challenges of Electronic Evidence. The proceedings from the Symposium will be published in the next edition of the Fordham Law Review.

The Committee also continues to monitor the need for rule changes necessitated by the Supreme Court's decision in *Crawford v. Washington* and its progeny. The Committee is not proposing any action items for the Standing Committee at its January 2015 meeting.

II. Action Items

No action items.

III. Information Items

A. Proposal to Amend or Abrogate the Hearsay Exception for Ancient Documents in Response to Electronically Stored Information.

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, no matter how unreliable those contents may be. For the last year, the Committee has been investigating the possibility of amending or abrogating Rule 803(16), due to the risk that it will become a loophole for admitting unreliable electronically stored information, simply because that information has been stored for 20 years. The ancient documents exception has been tolerated because it has been used so infrequently, and usually because there is no other evidence on point. But because electronically stored information can easily be retained for more than 20 years it is possible that the ancient documents exception will be used much more frequently in the coming years. And it could be used to admit 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 will likely be significant amounts of *reliable* electronic data available to prove any dispute of fact.

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. The Committee also unanimously agreed that an amendment to Rule 803(16) would be appropriate 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 — whether the exception should simply be abrogated, or narrowed to exclude ESI, or amended to require a showing of necessity or reliability before an old document is admitted. 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 amendment to Rule 803(16), it will be held up until it can be proposed as part of a package of amendments.

B. Proposal to Add Hearsay Exceptions for Statements of Recent Perception, to Accommodate "eHearsay"

At the Advisory Committee's Symposium on electronic evidence, held in April 2014, Professor Jeffrey Bellin proposed an amendment to the Evidence Rules that would 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

contends 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 proposes 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 contends 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.

At the Fall meeting, the Committee considered the proposed amendments for recent perception in detail. It determined unanimously that an amendment to Rule 801(d)(1) was not warranted, most importantly because it 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 Committee decided that if any change to Rule 801(d)(1) were to be made, it should be done pursuant to a systematic review of whether prior statements of testifying witnesses should even be defined as hearsay and, if so, what exceptions are appropriate. Thus, a systematic review of the entire category of prior statements of testifying witnesses was thought preferable to adding another hearsay exception to that category without working through how it might affect the other exceptions. The Committee will begin that systematic review at the next meeting.

With regard to the proposal to amend Rule 804, the Committee was concerned that a recent perceptions exception would be likely to allow the admission of unreliable hearsay, and it determined that at least as of now, the existing hearsay exceptions appeared to be working adequately to allow admission of those texts, tweets and other personal electronic communications that are in fact reliable. The Committee directed the Reporter and its consultant Professor Ken Broun to monitor the state and federal case law on how personal electronic communications are being treated in the courts. If it appears that reliable statements are being excluded, or that they are being admitted but only through misinterpretation of existing exceptions, then that might justify a hearsay exception for recent perceptions conditioned on the unavailability of the declarant. The Committee will continue its consideration of a recent perceptions exception at the next meeting, and will review the original Advisory Committee's proposal to determine whether it might be an appropriate starting point if an exception is deemed necessary.

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

At the Fall meeting, the Committee considered whether to develop and propose amendments to the Evidence Rules that would add specific provisions detailing how certain forms of electronic evidence (email, web pages, etc.) could be authenticated. There are of course many 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. The Committee considered whether amendments could usefully codify all this case law. The Committee eventually concluded that setting forth a detailed list of factors in an authenticity rule might do more harm than good. The result would be a highly detailed and complicated rule, when in fact authentication of electronic evidence is in many cases simple and straightforward. Moreover, 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. Finally, there is a danger that rulemaking would not be able to keep up with technological advances, so that specifically stated grounds of authenticity for electronic evidence might become outmoded, thus requiring constant amendment of those rules.

The Committee concluded 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 it should develop a best practices manual that would assist courts and litigants in negotiating the difficulties of authenticating electronic evidence. The Committee will begin working on a best practices manual and will review possible materials and formats at its next meeting. 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.

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

At its Fall meeting the Committee considered a proposal for two additions to Rule 902, the provision on self-authentication. The first would allow self-authentication of machine-generated information (such as a web page) 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 that would be authenticated by a digital process for identification. 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 goal of the proposals is to make 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. The contention behind the proposals is that the types of electronic evidence covered by the two rules are rarely the subject of a legitimate authenticity dispute, so the proponent should not have to go to the expense and inconvenience of producing an authentication witness. These 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.

The Committee unanimously 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.

The Committee unanimously decided to consider, at its next meeting, formal amendments to add Rule 902 (13) (for machine-generated evidence) and 902(14) (for copies of devices, storage media, etc.) to the Evidence Rules. The Committee discussed the possible Confrontation Clause problem posed by submitting certificates of authentication in criminal cases. But it determined that the proposals did not raise a confrontation issue, because the Supreme Court has stated in *Melendez-Diaz v. Massachusetts* that admitting a certificate does not violate the right to confrontation if the certificate does nothing more than authenticate another document or item of evidence. The Committee was also persuaded by the uniform lower court authority holding that certificates prepared under Rule 902(11) do not violate the right to confrontation — authority that relies on the Supreme Court's statement in *Melendez-Diaz.* The Committee resolved that if the proposals are approved, the Committee Notes would specifically caution that the certification would only establish authenticity --- not the evidentiary significance or reliability of the proffered evidence.

E. *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 Fall 2011 Meeting

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