Advisory Committee on Evidence Rules
Minutes of the Meeting of April 19, 2024
Thurgood Marshall Federal Judiciary Building
Washington D.C.

The Judicial Conference Advisory Committee on the Federal Rules of Evidence (the "Committee") met on April 19, 2024 at the Thurgood Marshall Federal Judiciary Building in Washington D.C.

The following members of the Committee were present:
Hon. Patrick J. Schiltz, Chair
Hon. Valerie E. Caproni
Hon. Mark S. Massa
Hon. Edmund A. Sargus, Jr.
Hon. Richard J. Sullivan
John S. Siffert, Esq.
James P. Cooney III, Esq.
Rene Valladares, Esq., Federal Public Defender
Elizabeth J. Shapiro, Esq., Department of Justice

Also present were:
Hon. John D. Bates, Chair of the Committee on Rules of Practice and Procedure
Professor Catherine T. Struve, Reporter to the Standing Committee
Hon. Edward M. Mansfield, Liaison from the Standing Committee
Hon. Hannah Lauck, Liaison from the Civil Rules Committee
Hon. Michael Mosman, Liaison from the Criminal Rules Committee
Professor Daniel J. Capra, Reporter to the Committee
Professor Liesa L. Richter, Academic Consultant to the Committee
Marshall Miller, Esq., Department of Justice
Timothy L. Lau, Esq., Federal Judicial Center
Tom Byron, Esq., Chief Counsel, Rules Committee Staff
Bridget M. Healy, Esq., Counsel, Rules Committee Staff
Allison A. Bruff, Esq., Counsel, Rules Committee Staff
Shelly Cox, Management Analyst, Rules Committee Staff
Rakita Johnson, Administrative Analyst, Rules Committee Staff
Zachary Hawari, Esq., Rules Law Clerk
Melody Brannon, Esq., Federal Public Defender
Alden Dima, National Institute of Standards and Technology (NIST)
Timothy Blattner, NIST
Michael Majurski, NIST
Bruce Hedin, Hedin B. Consulting
Professor Peter Henderson, Princeton University
Claire Leibowicz, Partnership on A.I.

Present Via Microsoft Teams
Professor Daniel R. Coquillette, Consultant to the Standing Committee
Professor Andrea Roth, U.C. Berkeley
Professor Rebecca Wexler, U.C. Berkeley
Anna Roberts
Asees Bhasin

Cara Salvatore
Daniel Steen
James Comans
John Hawkinson
John McCarthy
Tim Reagan, Esq., Federal Judicial Center
Hon. Amy St. Eve
Professor Julia Simon-Kerr
Professor Maura Grossman
Meredith Mathis
Nate Raymond
Sai
Susan Steinman
Suzanne Monyak
Tejas Bhatt

I. Welcome and Introductions

The Chair welcomed everyone to the meeting and specifically welcomed Judge Michael Mosman, the new Liaison from the Criminal Rules Committee, and Rakita Johnson, a new member of the A.O. staff, to the Committee. The Chair then recognized the U.S. Marshals Service to make a security announcement.

The Chair explained that the Committee would host a symposium on artificial intelligence (hereinafter "A.I.") and its application to the Evidence Rules in the morning followed by the regular Committee meeting to consider potential amendments to the Rules in the afternoon.

II. Symposium on Artificial Intelligence

The Chair introduced the symposium on A.I. by informing participants that the Judicial Conference has been discussing the impact of A.I. on the federal courts and that Chief Justice Roberts has launched an initiative to help courts adapt to A.I. He explained that Evidence is on the cutting edge when it comes to the development and use of A.I. at trial.

The Reporter thanked Tim Lau for his invaluable help in assembling a panel of distinguished experts. He explained that the symposium would proceed in three parts: 1) Presentations from experts at the National Institute of Standards and Technology ("NIST") regarding the development of A.I. and the challenges it presents; 2) Presentations from experts on law and technology to build a bridge between the unique technical characteristics of A.I. and its practical impact on the legal system; 3) Presentations from legal academics with expertise in providing frameworks for the admissibility of A.I. evidence.

The first portion of the symposium featured presentations from Michael Majurski, Alden Dima, and Dr. Timothy Blattner of NIST. They discussed the development of A.I. and deep learning and the reliability and security risks it presents. They described the myriad technologies that are tracking, transcribing, altering, and generating information. They noted the obvious risks of A.I. hallucinations or deepfakes and the need for risk management assessment frameworks. These experts emphasized the importance of developing frameworks to ensure that A.I. systems are reliable and explainable and the ongoing work in that arena.

Professor Peter Henderson, Dr. Bruce Hedin, and Claire Leibowicz gave presentations regarding the legal issues generated by advancing A.I. technologies. They discussed the operation of A.I. in making existing content more accessible, in creating new content, and in analyzing data, emphasizing that A.I. may

produce inaccurate results because it is always working to fill in content and make predictions despite a lack of information. A.I. might translate foreign languages incorrectly, fill in non-existent details to enhance low resolution images, or generate hallucinated source material. The experts emphasized the importance of having access to all A.I. system inputs and outputs to assess reliability, and they described the obstacles to such access created by trade-secret protection. They further noted the difficulty in defining A.I. with any precision. The experts also emphasized the importance of ensuring accountability, transparency, competence, and effectiveness in evaluating the use of technology in the legal sphere and the need for lawyers to improve understanding regarding reliable use of technology in practice. These experts also described the use of deepfakes (or synthetic media) and the rapid increase in the sophistication, volume, and accessibility of deepfake generation. They explained that the risk of false allegations of deepfake evidence (with respect to authentic material) presented just as great a threat to the legal system as deepfakes themselves. They discussed the difficulty in detecting deepfake material with great accuracy given the constant improvement in deepfakes to respond to detection and described various methods for signaling the provenance of media proactively by placing an artifact in the media contemporaneously to demonstrate its authenticity. Widespread use of these artifacts will require collaboration between developers and creators to adopt authenticity infrastructure.

Professor Rebecca Wexler and Professor Andrea Roth from the U.C. Berkeley School of Law both made presentations regarding the problems of authentication of A.I. and other machine-generated output. Professor Wexler argued that there is no need to modify the Federal Rules of Evidence to account for the possibility of deepfakes. She traced the long history of forgery and the ability of the federal courts to account for forgery under existing standards of authentication, arguing that the possibility of deepfakes presents comparable concerns. She noted that Rule 901(b)(5) providing that an "opinion about a voice" is "sufficient" to authenticate media is one Rule that might need to be modified to address A.I. and the possibility of deepfakes.

Professor Roth focused her presentation on all machine-generated evidence and the need to amend the Federal Rules of Evidence to ensure the reliability of machine-generated output admitted into evidence, when not accompanied by an expert. Professor Roth explained that most machine-generated evidence is presented by a trial expert whose testimony is subject to Rule702. But she noted that *Daubert* is inadequate alone to validate the machine-generated output itself and that the use of a certification under Rule 902(13) allows the presentation of machine-generated evidence without a trial witness. Professor Roth emphasized the need for standards in the Federal Rules of Evidence to ensure the reliability of machine-generated output, to allow access to the programs to assess their reliability, and to permit the impeachment of machine output that is admitted at trial.

III. Opening Business

The Chair opened the meeting of the Committee by thanking the panelists for their fantastic contributions on the daunting topic of A.I. He then asked for a motion to approve the minutes of the Committee's Fall 2023 meeting. A motion was made, seconded, and unanimously approved.

The Chair then offered a report on the January 2024 meeting of the Standing Committee. He explained that the Advisory Committee had no action items for approval at the Standing Committee meeting and that he had informed the Standing Committee of the Agenda for the Spring 2024 Advisory Committee meeting. The Chair reported that several Standing Committee members asked him about the proposal to adopt a new Rule 416 on prior false accusations and expressed interest in seeing a draft of the Rule.

The Reporter then noted that this meeting would be the last for Judge Schiltz as Chair of the Evidence Advisory Committee and that his service as Chair had been the latest accomplishment in his remarkable rulemaking career, that included service as Reporter to the Appellate Rules Committee and as a member of

the Standing Committee. The Reporter noted that the Evidence Advisory Committee had completed an unprecedented amount of work during Judge Schiltz's tenure as Chair, successfully drafting and proposing 7 amendments and new Rule 107. The Reporter remarked that it had been an honor to work alongside Judge Schiltz. The Reporter presented Judge Schiltz with a book containing the amendments passed during his time as Chair as a token of appreciation.

Judge Schiltz explained that his work in rulemaking has been a highlight in his career. He opined that the Federal Rules of Evidence are the best of all the rules to work on, due to the important policies and rights they protect and ensure. He noted that the Advisory Committee operates as all government should, with an emphasis on meticulous research and a good-faith effort to find solutions for difficult problems. Judge Schiltz said he would miss the work.

Professor Coquillette commented that Judge Schiltz had also been an example of how to be a great Reporter during his time with the Appellate Rules Committee. Judge Bates agreed that it has been a joy to work with Judge Schiltz in his time as Chair of the Evidence Advisory Committee, noting how amazingly productive the Committee has been during his tenure.

IV. Potential Amendments to Evidence Rules to Address Artificial Intelligence and other Machine-Generated Output

The Reporter invited discussion on the morning symposium regarding A.I. and the Evidence Rules. He reminded the Committee that there were no action items for consideration but that the Committee would be monitoring the development of A.I. and considering whether to advance any proposals for the Fall 2024 meeting.

He called the Committee's attention to proposals to amend Rule 901(b)(9) and to adopt a new Rule 901(c) on page 18 of the Agenda materials that would allocate burdens when parties concede that A.I. evidence is being used and that would place the burden on a party objecting to evidence on the grounds that it is a deepfake. One Committee member noted that proposed Rule 901(b)(9)(B) would operate "if the proponent concedes" that an item was generated by A.I. The Committee member suggested that language should be replaced with "if the court finds" to be consistent with the operation of the Rules generally. Another Committee member commented that he got the sense from the experts during the symposium that the most helpful protection in the A.I. context would come from allowing the opponent of the evidence to test the A.I. The Chair noted that trade secrets often prevent this kind of testing and that an approach that required testing would end up excluding the evidence as a result. One Committee member suggested that exclusion might be appropriate if there could be no testing. The Chair responded that a testing requirement could eliminate commonly admitted and crucial evidence, such as DNA evidence.

Another Committee member noted that Rule 901 governs authenticity but that there really are two problems with any machine or A.I. generated output. There is an authenticity concern but also a separate reliability concern. He commented that the reliability concern would need to be addressed through a provision like new Rule 707 outlined on page 25 of the Agenda materials. The Chair agreed that a provision that addresses authenticity by requiring a showing of reliability is mixing apples and oranges. He further noted that proposed Rule 901(c) on page 18-19 of the Agenda materials would allow a judge to admit evidence whose probative value outweighs prejudicial effect *after* its opponent has shown by a preponderance that the evidence had been "fabricated or altered in whole or in part." He queried how a judge could ever admit evidence that had been shown to be "fabricated" under the proposed balancing test.

The Reporter noted that original Rule 901(b)(9) included an accuracy requirement that did not necessarily fit into an authentication rule and that likely belonged in a separate provision like Rule 707, but

that it would be hard to remove it now. The Reporter said that the existing Rule 901(b) proposals could be reworked.

Another Committee member noted the contrast between the position of Judge Grimm and Professor Grossman, who argue that the Federal Rules of Evidence need a provision to address A.I. because A.I. is so distinct from anything that has been encountered before, and the position of Professor Wexler, who argues that dispute resolution has been dealing successfully with allegations of fakery for hundreds of years and that deepfakes can be handled under existing Rules in the same way that allegations of forged handwriting are managed. This Committee member suggested that there are very few cases dealing with A.I. evidence at this point and that the Committee may need more data to determine how serious a crisis A.I. presents for courts before proceeding with any amendment proposals. The Reporter agreed that there are very few cases addressing the issue but suggested that the Committee might want to get ahead of an onslaught of anticipated cases. Peter Hedin noted that there is a distinction between analytical A.I. and generative A.I. He suggested that DNA analysis relies upon algorithms considered to be A.I. and is routinely admitted into evidence. It is the issue of generative A.I. and specifically deepfakes that is new to the courts.

The Committee member commented that he would like to wait to see how judges handle A.I. evidence before proposing amendments to the Federal Rules of Evidence. He argued that it remains to be seen whether A.I. will cause a crisis for the courts or whether federal judges already possess the tools they need to handle this information. The Reporter noted that similar concerns arose with the advent of social media and that the Committee took a wait-and-see approach that turned out to be justified. The federal courts have had little trouble navigating the admissibility of social media evidence using the existing authentication rules. Another Committee member noted that proposed Rule 707 on page 25 of the Agenda materials was more appealing to deal with the reliability of machine-generated output. Mr. Lau cautioned that the term A.I. may not be capable of definition and that it may be undesirable to import that terminology into the Federal Rules of Evidence. The Reporter agreed, suggesting that other, more flexible terminology might be employed such as "synthetic." Professor Roth also noted that the concern over an opponent's lack of access to the software behind machine-generated output would be reduced if independent bodies such as NIST were given access to perform validating audits.

The Reporter reviewed the various proposals contained on pages 18-26 of the Agenda materials. He opined that Rule 902(13) represents a simple certification provision that need not contain all the authentication requirements if it is tied to other amendments to the authentication provisions. He suggested that there would be no need for the amendment to Rule 902(13) on page 28. Professor Roth suggested that judges likely subject machine-generated evidence to *Daubert*-like standards but that there is no authority for a trial judge to do that in the Rules absent a testifying expert. She explained that proposed Rule 707 would authorize judges to subject machine-generated output to the Rule 702 reliability requirements even in the absence of an expert.

A Committee member opined that trial judges already possess the tools necessary to regulate this type of evidence. She recounted a case in which a city medical examiner refused to provide source code supporting DNA evidence to a defendant in which the judge ordered the source code produced under a protective order. The Committee member suggested that trial judges already have the tools necessary to ensure that machine-generated results are valid and reliable. Another Committee member asked how that approach would work with a third-party private vendor. The Committee member responded that private companies would provide the code if it meant that their results would not be admissible in evidence otherwise. The Reporter suggested that most trial judges do not require the production of source code and that perhaps, an amendment could prompt more trial judges to do so.

Judge Bates asked whether a rule like proposed Rule 707 would apply to basic scientific instruments that are well accepted in federal court. The Chair replied that Rule 707 would apply to even basic

instruments because their results are "machine-generated." He explained that the foundation requirement of Rule 707 would apply to everything, even blood-alcohol analysis. The Chair expressed concern that the proponent of even basic and well accepted machine output would have to proceed through a full *Daubert* analysis every time an opponent objects to that output. He suggested that a rule defined as broadly as the Rule 707 proposal would overwhelm trials and pose a big problem for judges and litigants. The Chair noted that trial judges were able to navigate the admissibility of social media evidence by requiring some basis for an objection to authenticity before proceeding with an assessment of falsification in the absence of any Rules amendments prescribing a procedure. Another Committee member inquired whether an amendment could draw a distinction between systems in everyday use – such as a clock – and forensic systems – such as facial recognition software. Professor Roth suggested that basic machine-generated output like radar guns had been subjected to reliability review for decades and had long since been accepted. Similarly, basic machine-generated receipts would easily pass muster.

The Reporter stated that he would work on a version of Rule 707 for review at the Fall meeting that would address concerns of overbreadth and its application to basic instruments. He stated that he would look at Rule 901(b)(5) that accepts an opinion about a voice as sufficient to authenticate a recording in light of deepfake possibilities as well. The Reporter explained that his current instinct was not to amend Rule 901(b)(9) to include the reliability requirement there. The Chair agreed, noting that it would not work to import reliability into the authentication rules. Judge Bates opined that it may not be possible to leave Rule 901(b)(9) alone in amending the Rules to deal with machine-generated output when Rule 901(b)(9) currently includes an "accuracy" requirement. The Reporter said he would focus on a Rule 707 proposal but would not drop a potential amendment to Rule 901(b)(9). He promised to communicate with Judge Grimm and Maura Grossman about a Rule 901(b)(9) revision.

V. Potential Amendments to Federal Rule of Evidence 609

The Reporter introduced the discussion of Rule 609 by reminding the Committee that Professor Jeff Bellin made a presentation to the Committee at its Fall 2023 meeting in which he proposed the repeal of Federal Rule of Evidence 609 – the Rule that authorizes the impeachment of witnesses with their prior convictions. The Reporter explained that the Committee had not expressed an interest in repealing Rule 609 altogether but had expressed an interest in exploring modifications to Rule 609(a)(1) – the provision that allows impeachment of testifying witnesses with prior felony convictions subject to balancing. He reminded the Committee that Rule 609(a)(1) contains a balancing test more protective than Rule 403 when applied to admissibility of convictions of an accused. That test --- that the probative value must outweigh the prejudicial effect --- was designed to protect the rights of criminal defendants who are subject to unique prejudice when their prior felony convictions are revealed to the jury.

The Reporter explained that the problem with the Rule 609(a)(1) balancing test applicable to testifying criminal defendants is that federal courts are not applying it properly. He referred the Committee to the case law digest behind Tab 5 of the Agenda materials showing that federal courts are properly excluding prior similar convictions of testifying defendants in only approximately 20% of cases. Because the federal courts have not excluded the prior convictions of testifying criminal defendants that bear close similarity to the charged offense, the Reporter proposed the complete abrogation of Rule 609(a)(1) that permits felony conviction impeachment (with a corresponding amendment to Rule 608(b) to prevent use of that provision to impeach with convictions excluded under Rule 609). The Reporter explained that such an amendment would eliminate felony conviction impeachment of all witnesses, not only criminal defendants; and it would leave intact Rule 609(a)(2), providing for automatic impeachment of all witnesses with dishonesty convictions. He noted the legislative history behind Rule 609, explaining that Congress was only one vote away from eliminating felony conviction impeachment for crimes that do not involve dishonesty or false statement when Rule 609 was originally enacted.

The Reporter then described the many reasons for eliminating felony conviction impeachment. First, he noted that the felonies not already covered by the dishonesty provision in Rule 609(a)(2) lack probative value with respect to a witness's truth-telling. Violent crimes or drug offenses tell a jury little about a witness's capacity for lying. Further, the Reporter emphasized that several states have limited prior conviction impeachment due to concerns about its limited probative value and potential for severe prejudice. Most significantly, the Reporter highlighted data showing that felony conviction impeachment prevents criminal defendants from exercising their constitutional right to testify. Given the threat to criminal defendants' constitutional rights, the Reporter proposed that Rule 609(a)(1) should be abrogated. He explained that it would be unfair to allow the defendant to impeach prosecution witnesses with prior felonies if the prosecution is barred from using the defendant's felony convictions. He suggested that there is no reason to retain felony conviction impeachment in civil cases if it is eliminated in criminal prosecutions. The Reporter informed the Committee that the American Association for Justice had advocated the abrogation of Rule 609(a)(1), arguing that plaintiffs are denied recovery on viable civil claims by juries because of the plaintiffs' past criminal convictions.

If Rule 609(a)(1) were abrogated, the Reporter noted that corresponding amendments to Rules 609(b) and 608(b) would be needed to prevent the admission of felony convictions and underlying acts through those provisions. The Reporter directed the Committee to drafting options to accomplish these objectives on page 257 of the Agenda materials. He noted that it would be a good idea to limit Rules 609(b) and 608(b) even without complete abrogation of Rule 609(a)(1). The Reporter pointed the Committee to pages 261-263 of the Agenda materials for differing versions of amendments to Rule 609 to abrogate felony conviction impeachment. One version would retain the existing structure of Rule 609(a) and another version would restructure the Rule completely to avoid leaving an open subsection where Rule 609(a)(1) felony impeachment once was.

The Reporter then invited Melody Brannon, the Federal Public Defender from the District of Kansas, to share her experience with Rule 609(a)(1) impeachment. Ms. Brannon described her substantial experience over more than three decades as a federal defender. She explained that the possibility of felony conviction impeachment has an outsized impact on a criminal defendant's constitutional rights, not merely the right to testify at trial, but also the right to plead not guilty and go to trial at all when a defense is dependent on the testimony of the criminal defendant. Ms. Brannon also argued that the introduction of a criminal defendant's prior felony convictions lowers the government's burden of proof. She emphasized that the impact of a felony conviction is felt long before a trial in a holding cell in considering a plea offer when a defense lawyer informs a defendant that their priors will be admissible if they testify. Ms. Brannon explained that she advises clients that their prior felony convictions are highly likely to be admitted if they testify given the liberal application of Rule 609(a)(1) and that they should expect to be impeached. Defendants are not concerned about the credibility costs, but rather the propensity use of their priors. Ms. Brannon explained that defendants have difficulty understanding why their prior convictions will still be used against them after they have served their debt to society for those crimes. She explained that the prejudice from Rule 609(a)(1) impeachment is enhanced for her clients of color due to their disproportionately higher rates of prior conviction. Ms. Brannon highlighted the widespread criticism of felony impeachment and the empirical data revealing its improper propensity effect on jurors. She noted that, in contrast to the voluminous data showing the dangers of felony impeachment, there is no empirical data suggesting that felony conviction impeachment increases the reliability of verdicts. Ms. Brannon opined that the existing Rule 609(a)(1) balancing test is not protecting criminal defendants and that similar prior convictions are frequently admitted even in close cases where they are used for propensity and have an impact on the outcome. She suggested that there is no effective way to limit the use of prior felony convictions to impeachment and to prevent propensity use once they are admitted because human jurors are incapable of ignoring their propensity relevance. Ms. Brannon closed by explaining that the availability of Rule 609(a)(1) impeachment is preventing criminal defendants from testifying, thus preventing them

from going to trial, resulting in guilty pleas even in cases where there is a viable defense. She urged the Committee to publish a proposed amendment abolishing Rule 609(a)(1) impeachment for public comment.

One Committee member asked Ms. Brannon whether she favored abrogating felony conviction impeachment of government cooperating witnesses, as well as for defendants, and whether the loss of that impeachment evidence for government witnesses would undermine an effective defense. Ms. Brannon responded that she favors the complete abrogation of felony-conviction impeachment, including for government witnesses. She explained that losing felony-conviction impeachment of government witnesses would be well worth it to eliminate similar impeachment of criminal defendants. She explained that there are many ways to attack the credibility of cooperating government witnesses. Many have favorable plea deals which suggest their bias. Many have also made prior inconsistent statements that can be used. Ms. Brannon opined that these methods of impeachment are far more effective than showing that a government witness has a prior manslaughter conviction, which tells the jury little about that witness's truthfulness. She stated that preserving a criminal defendant's right to testify was well worth the loss of this impeachment evidence with nonexistent probative value. A Committee member commented that if you ask any criminal defense attorney whether she would rather retain felony-conviction impeachment of government witnesses or abrogate Rule 609(a)(1) impeachment and eliminate such impeachment of defendants, every defense attorney would choose complete abrogation.

Another Committee member asked whether prosecutors would simply increase their efforts to admit a defendant's past crimes under Rule 404(b) if Rule 609(a)(1) impeachment were eliminated. The Reporter responded that would not be a collateral consequence of abrogation because Rule 404(b)(1) would continue to limit efforts to admit prior convictions and because prosecutors *already* routinely attempt to admit a defendant's prior convictions through both Rule 404(b) and Rule 609 if they can. He opined that there would be no effect on Rule 404(b) if Rule 609(a)(1) were abrogated.

Another Committee member suggested that some attacks on a witness for bias include some reference to the witness's criminal history as in the example of a government cooperator who is biased because he was charged in connection with the case and has accepted a plea deal to testify for the prosecution. The Committee member suggested that any rule change ought to ensure that such attacks on bias remain available. The Reporter responded that attacks on bias are always allowable, and that the abrogation of Rule 609(a)(1) would not alter such bias impeachment. Ms. Brannon agreed that the elimination of Rule 609(a)(1) would not inhibit bias impeachment. She suggested that a witness might be impeached with a violation of probation, for example. The Chair inquired whether it would be okay to have a criminal defendant impeached with a violation of the conditions of supervised release. Ms. Brannon responded that a defendant's violation of the terms of supervised release could be probative of dishonesty where that defendant promised to abide by the conditions of supervised release and then broke those promises. If Rule 609(a)(1) were abrogated, the Chair asked whether the government could impeach a testifying criminal defendant for bias on cross-examination by asking: "You've been in prison before, you'd do anything to avoid going back wouldn't you?" Ms. Brannon replied that a defense lawyer would definitely move in limine to prevent such cross questioning referencing criminal history but that such impeachment would be more probative of honesty than simply the fact of some prior felony.

Another Committee member suggested that the Committee would throw the baby out with the bathwater if it were to eliminate felony conviction impeachment altogether. That member argued that Rule 609(a)(1) is well-written and that the only problem with it is that some judges are not applying it well. The member explained that prior violent felonies should simply not be admitted through the existing balancing test because the probative value to show dishonesty is so low. This Committee member explained that Rule 609(a)(1) does help defendants undermine the government's cooperating witnesses and that it should not be eliminated. This member was not persuaded that felony-conviction impeachment affects a meaningful number of defendants and suggested that there were no trials in many violent crime cases even in the

absence of any prior convictions. This Committee member opined that Rule 609 is well-written and well-conceived and should not be changed at all.

The Chair queried whether there was any concern about abolishing Rule 609(a)(1) and allowing jurors to assume that testifying witnesses *lack* any criminal history. Jurors might assume that, if a witness had prior criminal convictions, he or she would have been asked about them. The Chair wondered whether it would make sense to instruct juries that they are not to make any assumptions about criminal history and that witnesses may or may not have prior convictions.

Ms. Shapiro expressed confusion about concerns regarding prior conviction impeachment for violent crimes such as rape. She opined that such convictions would be excluded by the existing balancing test in Rule 609(a)(1), both because they lack probative value as to dishonesty and due to the high likelihood of prejudice. Ms. Shapiro explained that the current rule would only admit other types of convictions that would have relevance to the defendant's credibility as a witness. Ms. Brannon explained that there is a very narrow subset of convictions that courts will not admit under Rule 609(a)(1). The Reporter agreed, noting that convictions for rape and other violent crimes usually do not get admitted under the existing balancing test, but that even those convictions have been occasionally admitted, as seen in the case digest. Ms. Shapiro responded that this would result from improper application of the existing rule rather than a problem with the language of Rule 609. Mr. Miller agreed, arguing that Rule 609(a)(1) as currently drafted empowers the right people to determine the probative value of a prior felony conviction – federal district court judges. He argued that the protective balancing test that requires the probative value of the prior conviction to outweigh prejudice to the defendant strikes the right balance. If trial judges are applying that test improperly, Mr. Miller suggested that there could be opportunities for judicial education but that a rule amendment was not the correct response.

The Chair agreed that if the existing Rule 609(a)(1) balancing test worked as it was intended to, the Rule would likely operate well. He suggested that an amendment to Rule 609(a)(1) that modified the balancing test would improve application of the Rule. For example, instead of requiring the probative value of a criminal defendant's prior felony conviction to simply "outweigh" any unfair prejudice, the balancing test might be rewritten to require that the probative value "substantially outweigh" any prejudice to the defendant. The Chair suggested that such a modification to the balancing test --- combined with instructive language in the committee note --- could get judges to narrow the range of prior convictions they admit against defendants. Mr. Miller responded that he did not have any sense of whether problems applying the existing Rule 609(a)(1) balancing test are widespread. He remarked that he has seen trial judges diligently apply the Rule 609 test.

The Reporter explained that he had contemplated the idea of a modified balancing test and circulated a draft of a revision to Rule 609(a)(1) that would alter the balancing test required to admit a prior felony conviction against a criminal defendant such that it would be admitted only if its probative value substantially outweighs the prejudice to the defendant. The Chair noted that the Committee would not be taking any votes on the newly circulated proposal.

Judge Bates expressed appreciation for the information about prior conviction impeachment provided by the Federal Public Defender and queried whether a survey from the Federal Judicial Center could provide additional empirical data to help inform the Committee's deliberations concerning Rule 609. The Reporter asked what information could be collected by the FJC and noted that it would be difficult to devise a test of the existing operation of Rule 609. A Committee member agreed with Judge Bates, suggesting that he is skeptical of the anecdotal evidence regarding how frequently Rule 609, in particular, prevents a criminal defendant from testifying. He noted that defendants plead guilty for other reasons, particularly in cases in which there is strong evidence of guilt, and they want to get a three-point reduction at sentencing.

The Reporter suggested that there is sufficient information to support an amendment even without a survey. He analogized the Rule 609 balancing proposal to the recent amendment to Rule 702. Rule 702 was drafted correctly and well, but the cases revealed that some federal courts were applying the wrong standard to admit expert opinion testimony. Rule 702 was amended to emphasize the proper standard and to remedy the problems in the case law. The Reporter explained that the case digest on Rule 609(a)(1) shows improper application of the Rule 609 balancing test, and that this improper application justifies a modest modification to Rule 609(a)(1) to require the probative value of a felony conviction to "substantially outweigh" any prejudice to a criminal defendant at the very least. A Committee member asked whether a new Committee note would accompany the balancing amendment. The Reporter explained that there could be no modification to the Committee notes in the absence of an amendment to rule text, but that the Committee could and would include a new note if it proposed an amendment to the balancing test in the Rule.

Mr. Lau said he would explore the possibility of an FJC study on prior conviction impeachment of criminal defendants. He stated that he was not sure that a survey would be helpful and that it would be better to have information regarding the number of Rule 609 objections made by defendants and the rulings. The Reporter asked whether the FJC would be able to include data from unpublished opinions. Mr. Lau noted that that could be explored and that databases like Westlaw are not necessarily complete. The Chair noted that many Rule 609 rulings are not written down in an opinion because they are made on motions in limine. He inquired whether the FJC could coordinate with the Sentencing Commission to ascertain plea rates among defendants with and without prior convictions. The Chair asked Mr. Lau to check with the FJC regarding the design of a Rule 609 study that might be helpful to the Committee.

Mr. Valladares opined that there is a clear problem with Rule 609 as it is applied to criminal defendants and that it needs to be addressed even if the problem is one of application. He noted that lead academics identify Rule 609 as a significant problem and that the Advisory Committee needs to act to remedy the clear injustice being done by the existing Rule. The Chair asked whether a more protective balancing test with a strong Committee note cautioning against admissibility of certain convictions would be a helpful remedy. Mr. Valladares remarked that Professor Bellin had proposed abrogating Rule 609 in its entirety in his Fall 2023 presentation to the Committee and that the proposal to retain Rule 609(a)(2) dishonesty convictions and abrogate only Rule 609(a)(1) was already a compromise position that cut back on Professor Bellin's proposal. Mr. Valladares urged the Committee to consider abrogation of Rule 609(a)(1) as the appropriate fix, though he agreed that a modification of the balancing test would be better than nothing. He argued that the Committee had to do something to address the harmful impact of the Rule on criminal defendants. Another Committee member agreed, noting that the American College of Trial Lawyers strongly supports a Rule 609 change of some kind.

A Committee member opined that defense lawyers will never let a criminal defendant testify even in the absence of Rule 609(a)(1) impeachment. Another Committee member responded that the problem is that Rule 609(a)(1) creates a true inability to testify for a criminal defendant. The Reporter reminded the Committee that the caselaw clearly shows that criminal defendants do testify and do get impeached with their prior convictions even when those convictions should not pass the Rule 609(a)(1) balancing test, thus justifying a rule change.

Ms. Shapiro suggested that all the evidence regarding defendant impeachment with prior convictions is anecdotal and that prosecutors report that it is indeed very difficult to admit violent felonies to impeach a criminal defendant. She explained that the caselaw digest presents an incomplete picture of the true practice under Rule 609 because it omits the trial court rulings that exclude such felonies that are then never used to impeach the defendant and never challenged on appeal. She noted that it would be helpful to study the states in which prior conviction impeachment is not allowed to ascertain whether criminal defendants testify at a higher rate in those jurisdictions. The Chair noted that the Eighth Circuit opinions appear to

permit prior conviction impeachment quite liberally but that he excludes them in his courtroom and those exclusion decisions are missing from any record of the frequency of Rule 609 impeachment. Mr. Lau promised to explore the kind of data he might be able to obtain to get a sense of practice under Rule 609 and its effect on criminal defendants in different jurisdictions.

Another Committee member asked whether different trial judges might disagree about which felony convictions are probative of dishonesty even if the Rule 609(a)(1) balancing test were strengthened. The Chair responded that there is disagreement in that regard, with some judges viewing *any* conviction as probative of a willingness to testify untruthfully. The Committee member noted that some of the data regarding rates of testimony among criminal defendants was quite old (dating back to the 1950's) and that it would be helpful to have more recent data.

Committee members were then polled about potential amendments to Rule 609. One noted that he was largely persuaded by the arguments of the Department of Justice and that in his experience, prosecutors have a difficult time admitting Rule 609 convictions against criminal defendants. He remarked that he was not certain he would oppose a balancing amendment, but expressed concern that Congress may not favor a change to Rule 609. Another Committee member agreed that a criminal defendant's convictions were not routinely admitted in his experience but opined that it would be problematic if courts were approaching this kind of impeachment differently. He reported that he was open to further consideration of an amendment but not yet persuaded. Another Committee member thought that adding the word "substantially" to the Rule 609(a)(1) balancing test would be a helpful amendment that would send a message but that he would like to see more data. Another Committee member remarked that the member would be opposed to abrogation of Rule 609(a)(1) but could consider a modified balancing standard. Another suggested that admission of prior felony convictions differs from judge to judge and that a modified balancing standard could be a simple way to alert judges who are admitting them too freely to adjust their approach to this evidence. Another Committee member opined that criminal defendants are unlikely to take the stand even if they cannot be impeached with prior felony convictions, but expressed willingness to consider a modification to the balancing test in Rule 609(a)(1). Another Committee member argued that convictions that do not fall within the dishonesty category of Rule 609(a)(2) have no probative value in showing lying and so abrogation of Rule 609(a)(1) is a superior option. That said, the Committee member stated that a more stringent balancing test could be helpful for judges who find some probative value in prior convictions that are not dishonesty convictions. The Reporter explained that he would favor abrogation because the probative value of a non-dishonesty conviction will always be substantially outweighed by prejudice to a criminal defendant. That said, the Reporter explained that a subtle change to the balancing test would be an improvement.

Judge Bates agreed that the proposal to modify Rule 609 deserves serious consideration but that he thought additional data from the FJC would be important in determining an appropriate standard. He noted that we are in a place where only 7 states deviate from the Federal Rule, meaning that 43 states still adhere to felony conviction impeachment of even criminal defendants. Judge Bates noted that the Supreme Court would likely consider Rule 609 to be the substantial majority position. The Reporter reminded the Committee that only one state had a rule on illustrative aids, but that the Committee proposed new Rule 107 to regulate them, nonetheless. Judge Bates replied that it would still be helpful to see the data that the FJC could uncover. A Committee member suggested that seeing criminal trial and defendant testimony rates in states without felony conviction impeachment could be useful information.

The Reporter asked the DOJ representatives for their thoughts on the modification to the Rule 609 balancing test. Mr. Miller responded that the Department would have its subject matter experts review the balancing proposal. The Chair suggested that if violent felony convictions are already not being admitted under the current version of Rule 609, as the Department suggested, making the test more rigorous should not affect outcomes.

The Chair explained that the Reporter would bring back a proposal to modify the Rule 609(a)(1) balancing test, along with any FJC data, at the Fall 2024 meeting. He noted that there would need to be overwhelming approval to proceed with a proposal to abrogate Rule 609(a)(1) altogether and that absent such a groundswell of support for abrogation, the Committee would proceed with consideration of a balancing proposal.

VI. Proposal to Amend Rule 801(d)(1)(A)

The Chair next introduced a proposal to eliminate the "oath" and "prior proceeding" requirements from Rule 801(d)(1)(A), so that all prior inconsistent statements made by testifying witnesses would be admissible for their truth, as well as to impeach. This would treat prior consistent and inconsistent statements of witnesses similarly. When admitted, they are admitted for any purpose for which they are relevant.

The Chair explained that prior inconsistencies are routinely admitted at trial to impeach a witness's testimony, but that very few of them are admissible for their truth because of the oath and prior proceeding requirements. Only when the prosecution has called a witness before a grand jury in a criminal case, for example, would that witness's prior inconsistent statement be admissible to prove the truth of what it asserts. This means that the trial judge must give a limiting instruction for the vast majority of prior inconsistent statements that are admitted, cautioning the jury to use a statement for its impeachment value but not to rely upon it substantively. The Chair opined that juries have difficulty understanding these instructions and often do not follow them. Therefore, many of these prior inconsistencies are in fact being used substantively, but we pretend that they are not. He explained that an amendment that frees a jury to rely upon prior inconsistent statements for their truth aligns the hearsay rule with the reality that jurors often do rely upon these statements, ensuring that the Federal Rules of Evidence honestly match the reality in the courtroom. The Chair reminded the Committee that it had proposed an amendment to Rule 613(b) regarding extrinsic evidence of prior inconsistent statements to match the Rule's requirements with the practice at trial.

The Chair emphasized that there is no hearsay danger in allowing these statements to be relied upon for their truth where the declarant must be on the stand and subject to cross-examination regarding the prior statement. The jury will hear the witness's explanation for their inconsistency and choose the version it finds credible. The Chair closed by noting that 15 states have a similar rule that allows all prior inconsistent statements to be admitted for their truth. He stated that the question for the Committee is whether to publish the proposed amendment appearing on page 224 of the Agenda materials that would allow full use of all prior inconsistent statements. The Reporter noted that the amendment would be quite straightforward, simply eliminating the "oath" and "prior proceeding" requirements from existing Rule 801(d)(1)(A). He also reminded the Committee that these are statements that are already admitted, and that the amendment would simply permit the jury to make fuller use of information it already possesses.

One Committee member expressed support for the proposal but questioned whether the change would allow litigants to defeat summary judgment on the civil side with prior inconsistent statements that would count as substantive evidence. The Chair opined that this would not allow parties to foreclose summary judgement by creating inconsistent statements. He explained that when an opponent of summary judgment seeks to file a new affidavit contradicting prior deposition testimony given in the case (that would otherwise justify summary judgment), courts routinely strike the affidavit as a sham affidavit. Another Committee member expressed concern that substantive admissibility of prior inconsistencies could undermine summary-judgment practice, suggesting a scenario in which a plaintiff's deposition says one thing that would justify summary judgment against the plaintiff but that a third-party witness might file an affidavit stating that the plaintiff told the third party something different/inconsistent that would defeat summary

judgment. If that prior inconsistency is now substantive evidence rather than simply impeachment, it could alter summary judgment practice and outcomes. The Chair suggested that it is already inappropriate to grant summary judgment in the face of evidence that a deponent's version of events is contradicted. He further questioned whether making it easier for defendants to win summary judgment should be a goal of rulemaking for the Federal Rules of Evidence.

Another Committee member noted that the rule change would also have significant consequences in criminal cases. He posed a hypothetical victim who reports to police following a domestic disturbance that her spouse hit her but then testifies at trial that there was no assault and that she fell. Under the current Rule 801(d)(1)(A), the victim's prior inconsistent statement to police is not admissible for its truth and may be used only to impeach the victim at trial. Under the proposed amendment, the victim's prior statement could be used by the prosecution for its truth to convict the defendant which is a significant change. The Chair expressed skepticism that any prosecution would rest *solely* on a prior inconsistent statement. In the domestic-violence context, for example, there is almost always evidence of loud arguments or broken furniture or bruises on the alleged victim. The Chair also reminded the Committee that the victim's statement in this scenario is given to the jury under the existing Rules along with a limiting instruction cautioning them not to rely upon it. He opined that juries do rely upon such statements for their truth, but we operate under the fiction that they do not. The amendment would in no way alter access to prior statements that jurors already enjoy. The Committee member remarked that prosecutors do not currently bring the case with the recanting victim to trial because of the lack of admissible evidence and that the substantive admissibility of prior inconsistencies could affect charging and could result in more of these cases being brought. The Reporter noted that the prosecution would get a benefit in being able to use all prior inconsistent statements for their truth, but that it would be a benefit all parties would enjoy across the board – any party could introduce the prior inconsistent statement of any testifying witness for its truth. The Reporter also stated that in the hypothetical given --- a case of domestic violence --- it is good policy to find substantive admissibility in the statement that is closer to the event, and that the current rule would mean that the domestic violence prosecution could not be brought.

Another Committee member noted that trial judges rigorously enforce limits on impeaching one's own witness with a prior inconsistency not admissible for its truth as an abuse of Rule 607. The Reporter commented that another advantage of the proposed amendment is that it would do away with concerns about a party abusing its right to impeach with prior inconsistencies by calling witnesses it knows will not provide helpful information only to impeach with a prior inconsistency that is not admissible for its truth. If all prior inconsistent statements are admissible for their truth, there can be no abuse of the right to impeach one's own witness and trial judges will no longer need to plumb a prosecutor's motives in calling a witness to the stand in assessing the admissibility of prior inconsistent statements.

One Committee member suggested that the change could be helpful if jurors cannot appreciate the distinction between impeachment and substantive use of prior inconsistent statements. He noted that there could be a benefit to criminal defendants who can argue that the prior inconsistent statements of an informant, for example, are admissible for their truth. Another Committee member explained that a criminal defendant has no burden of proof at trial and, thus, does not benefit from substantive use of prior statements. The Reporter suggested that it may still be helpful for a defendant to be able to argue that the facts given in a prior statement are accurate. Another Committee member agreed that the Rules are disingenuous about the current limit on prior inconsistent statements with many being used for their truth by juries. He commented that the proposed amendment would do away with mini-trials concerning the motivations for calling a forgetful or recanting witness who has made prior helpful statements. One additional Committee member opined that it would be beneficial to simplify Rule 801(d)(1)(A) given that prior inconsistent statements are already admitted and given to juries.

Ms. Shapiro addressed the alternate version of the amendment on page 225 of the Agenda materials that includes a corroboration requirement for prior inconsistent statements, arguing that this requirement should not be adopted because it is unnecessary and detracts from the simplicity of the proposal. The Chair agreed, explaining that the corroboration alternative had been included to address any concerns about a prior inconsistency serving as the sole basis for a conviction. The Reporter noted the consensus among Committee members that a corroboration requirement is not necessary or advisable, stating that the corroboration alternative was not on the table.

Ms. Shapiro informed the Committee that she had collected feedback from DOJ lawyers regarding a potential change to Rule 801(d)(1)(A). She reported that the civil litigators favored the change and expressed no concerns about summary-judgment practice as a result of an amendment. She explained that prosecutors expressed concerns about the amendment, however. Prosecutors noted that prior inconsistent statements that are not given under oath and at a prior proceeding may be unreliable and that jurors should not be permitted to choose such questionable hearsay over the trial testimony given by the witness. Ms. Shapiro explained that cross-examination of the witness regarding the prior inconsistency may be ineffective and inadequate, particularly when the witness denies making the prior statement or claims a lack of memory. The Reporter responded that jurors are frequently permitted to elevate hearsay over trial testimony concerning an event, such as when a witness's excited utterance differs from her trial testimony. Ms. Shapiro noted that hearsay statements admitted through other exceptions, like the excited utterance exception, enjoy special guarantees of reliability that justify their use and that a witness's prior inconsistent statement (not given under oath and at a prior proceeding) enjoys no special reliability. She further emphasized that we expect juries to comprehend and follow instructions throughout the trial process, such that concerns about limiting instructions in this one context cannot justify an amendment to Rule 801(d)(1)(A).

The Chair then inquired whether Committee members would favor publication of the proposed amendment to Rule 801(d)(1)(A). Mr. Valladares expressed a willingness to publish the proposal for the purpose of gathering feedback from the public comment process. Ms. Shapiro abstained from voting on behalf of the Justice Department. One Committee member expressed opposition to publication, explaining that jurors can and do follow instructions and that it is inappropriate to treat prior statements that are inconsistent with trial testimony like other reliable hearsay statements. Another Committee member concurred and opposed publication.

Another Committee member favored publication, explaining that he had practiced in a jurisdiction that allowed substantive use of all prior inconsistent statements and that it had posed no problems and had largely benefited prosecutors. Additional Committee members agreed that the Committee should publish the proposal for notice and comment. The Reporter reminded the Committee that the original Advisory Committee preferred and proposed substantive admissibility of all prior inconsistent statements. After all members had provided input, the vote was 6 Committee members in favor of publication, 2 members opposed to publication, and an abstention on behalf of the Justice Department.

The Chair noted that unanimity among Committee members was not necessary to publish a proposal and a decision was reached to publish the proposed amendment to Rule 801(d)(1)(A) appearing on page 224 of the Agenda materials. Ms. Shapiro recommended deleting the last sentence of the first paragraph of the proposed committee note providing that: "A major advantage of the amendment is that it avoids the need to give a confusing jury instruction that seeks to distinguish between substantive and impeachment uses for prior inconsistent statements." The Chair emphasized that eliminating limiting instructions was one of the major reasons for the amendment and that the note should retain the sentence. All agreed to retain the sentence but to delete the word "confusing" from it. Ms. Shapiro then highlighted a sentence in the second paragraph of the proposed Committee note stating: "Thus any concerns about reliability are well-addressed by cross-examination, the oath at trial, and the fact-finder's ability to view the demeanor of the

person who made the statement." She suggested that the reference to the "oath at trial" ought to be eliminated as unnecessary. The Reporter agreed to remove the reference to "the oath at trial" from the Note. The Chair noted that the proposal to publish the amendment would proceed to the Standing Committee in June.

VII. Potential New Federal Rule of Evidence 416 Governing Prior False Accusations

The Chair next recognized the Academic Consultant, Professor Richter, to give a report on a proposal to adopt new Federal Rule of Evidence 416. Professor Richter directed the Committee to Tab 6 of the Agenda materials and reminded the Committee that Professor Erin Murphy had attended the Fall 2023 meeting and had proposed a new Rule 416 that would allow evidence of a person's prior false accusations to be admitted to suggest the falsity of a current accusation. The Committee had expressed interest in considering the proposal further. Professor Richter reported that the proposal presents some potential benefits but carries some serious risks that should be carefully considered by the Committee. She recommended that the Committee perform additional research if it was inclined to continue consideration of a false-accusations rule.

Professor Richter noted that prior false accusations come up primarily in sex-offense cases and consist of evidence that a victim allegedly falsely accused a different person of a sexual assault on a different occasion. She pointed out that the vast majority of sex-offense cases in which such evidence is at issue are prosecuted at the state level under state evidence rules. She also emphasized the existing empirical data suggesting that a very small fraction of sexual-assault accusations is false. So the problem does not arise frequently.

Professor Richter explained that admitting prior false accusation evidence under the existing Federal Rules of Evidence is complicated to say the least. Evidence that a victim has made a prior false accusation falls under Rule 404(b) as a person's "other crime, wrong, or act." Other acts are typically subject to the *Huddleston* standard of proof such that the proponent needs to present sufficient evidence from which a reasonable jury could find that the person made a prior accusation and that it was false. While there may be unique circumstances in which a victim's prior false accusations are admissible for a permitted purpose through Rule 404(b)(2), they are principally offered to show a victim's propensity to falsely accuse – meaning that evidence of prior false accusations should ordinarily be excluded under Rule 404(b)(1). If a victim testifies at trial, that opens her up to impeachment with prior dishonest acts under Rule 608(b), however. Subject to Rule 403, a defendant may ask a testifying victim about prior false accusations so long as the defendant has a good faith factual basis for the question. If a testifying victim denies the prior false accusation, the defendant may not admit evidence to prove it due to the ban on extrinsic evidence in Rule 608(b).

Whether a defendant seeks to admit evidence of a prior false accusation through Rule 404(b)(2) or to inquire on cross of a victim about such prior accusations, Rule 412 must be considered in sexual-offense cases. That provision protects alleged victims of sexual misconduct by excluding evidence of the victim's other sexual acts or sexual predisposition. The Advisory Committee notes to Rule 412 state that evidence of false accusations is not excluded by the Rule, and most courts agree that prior false accusations show a victim's prior lying behavior rather than prior sexual conduct. The standard of proving the falsity of a prior accusation to remove it from Rule 412's ambit is not clear in the caselaw. Finally, Professor Richter explained that a criminal defendant might have a constitutional right to present evidence of a false accusation or to impeach a testifying victim with such a false accusation in some circumstances.

Professor Richter called the Committee's attention to Rule 416 proposed by Professor Murphy on page 345 of the Agenda materials that would simplify and expand the admissibility of false-accusations evidence. The proposed new rule would allow "extrinsic evidence" of a person's prior false accusation in any case

(civil or criminal and not only in sexual-offense cases) when the falsity of the prior accusation and the person's awareness of its falsity have been established by a preponderance of the evidence. Thus, it would require a finding by the trial judge under Rule 104(a) of a knowing false accusation. The proposed rule would allow trial judges to consider the facts that a complaint was not pursued in the prior case and that the accused denied wrongdoing but provides that those facts are insufficient to establish falsity by a preponderance. Proposed Rule 416 would also require that the prior false accusation was "similar in nature" or "of equal or greater magnitude" to the current accusation. The rule would require written pre-trial notice and compliance with Rule 412(c) where the prior false accusation involves sexual conduct of a victim. Lastly, the rule would specify that a defendant could admit prior false-accusations evidence even if the victim does not testify and could admit extrinsic evidence to prove the prior false accusation if the victim testifies and denies the prior false accusation on cross. Professor Richter noted the many drafting issues and options for crafting a false accusations rule explored in the Agenda materials on pages 345-351 should the Committee decide to pursue one. She noted that the Committee should carefully consider the costs and benefits of a new rule, however, before deciding whether to proceed.

Professor Richter explained that a new Rule 416 would streamline and simplify admissibility of false-accusations evidence and would eliminate the tortured path the evidence must currently take through at least five evidence rules. She noted that admissibility under the existing Federal Rules of Evidence could be considered both under and overinclusive. Because of the limitations on other-acts evidence in Rule 404(b) and on extrinsic evidence under Rule 608(b), it is nearly impossible to admit extrinsic evidence of a prior false accusation. This can be made more difficult in sexual-offense cases in which Rule 412 excludes evidence of a victim's prior acts. This framework may make it too difficult to admit prior false accusations in appropriate circumstances, especially when a criminal defendant could have a constitutional right to do so in certain cases. On the other hand, the current Rules may be too forgiving toward a victim's prior false accusations by requiring only proof sufficient for a jury to find falsity or a good-faith basis for believing an accusation to be false. Such low standards of proof may subject victims to prior-accusations evidence without sufficient findings that they were false. Professor Richter also noted work by esteemed Evidence scholar Ed Imwinkelried positing that false accusation evidence should be admissible in sex-offense cases to create symmetry between the admissibility of a defendant's prior wrongful acts of sexual misconduct under Rule 413 and an alleged victim's prior wrongful acts of false accusation. In sex-offense cases where credibility issues are often dispositive and where a defendant's prior acts are aired before the jury, Professor Imwinkelried has argued that admission of a victim's prior falsehoods is important to create a balanced presentation. Impeachment of a victim with such prior falsehoods is often ineffective without the ability to produce extrinsic evidence following a denial.

On the other hand, Professor Richter explained that there are some serious risks associated with a false-accusations rule. First, such evidence is almost exclusively proffered in sexual-offense prosecutions that are pursued almost entirely in state court, reducing the need for a federal rule on the matter. There are some limited avenues for admitting false-accusations evidence even through the existing Federal Rules, furthering undermining the need for a bespoke provision. More importantly, a rule that allows a victim's prior false accusations to be admitted to show the falsity of a current accusation reverses longstanding prohibitions on propensity evidence and on extrinsic evidence of a testifying witness's dishonest acts. There is no evidence suggesting that victims (of sexual assault in particular) are unusually likely to fabricate accusations or to falsely accuse people repeatedly to justify the reversal of the ban on propensity evidence with respect to their conduct. Indeed, the evidence that does exist suggests a low rate of false accusations, at least in sex-offense contexts. Further, the ban on extrinsic evidence of a witness's prior dishonest acts also serves important purposes in preventing distracting detours into prior conduct. Even if a defendant can establish the falsity of a prior accusation by a preponderance, it seems likely that a victim could still deny making a false accusation and that the jury would be dragged into a dispute about a prior circumstance and the truth or falsity of a previous accusation. Most concerning is the possibility that the rule might telegraph that victims are unusually likely to make false accusations of sexual assault. Creating a rule blessing the

admission of prior false accusations could increase fishing expeditions into the past of sexual-assault victims to mine for such material. Although well-intentioned, the rule could turn back the clock on protections for victims in sexual-assault cases and deter victims from pursuing charges out of fear that their sexual history will be litigated (even in a pretrial context) for evidence of false accusations. Lastly, crafting a standard that balances the rights of victims with the constitutional rights of criminal defendants would be challenging. If the bar for admissibility is set too low, victims suffer, whereas the rights of defendants may be compromised by a standard that is too stringent.

If the Committee wishes to pursue the proposal further, Professor Richter suggested additional study. In particular, she recommended a 50-state survey in an effort to locate optimal drafting alternatives for a federal provision, a survey of sexual-offense cases under the Military Rules of Evidence, and finally exploration of empirical data regarding the incidence of false accusation in sex-offense cases.

One Committee member opined that the proposal was worth pursuing. He noted that the rule would have impact in federal sexual-offense prosecutions in Indian territory and that the lack of any clear path to admissibility under the existing Rules justified additional investment in time to explore the possibility of a new rule. Another Committee member agreed, explaining that most courts review prior false accusations evidence under Rule 412 and that many of the cases involve child victims. Another Committee member agreed, explaining that his jurisdiction adopted caselaw on the issue of false accusations prior to the adoption of the Federal Rules and that it required some legal gymnastics to reconcile judge-made exceptions allowing this evidence with the Federal Rules. Another Committee member expressed concern about any implication underlying a new rule that sexual-assault victims are more likely to fabricate and suggested that the states ought to lead in this area given their experience with this evidence. The Committee member also opined that a good cross of a testifying victim could be effective without extrinsic evidence of a false accusation but stated that the proposal was worth exploring further. Judge Bates agreed that the proposal merits further exploration but thought that getting detailed information on how the states handle this evidence would be crucial to any ultimate determination regarding a Federal Rule.

The Chair noted that there are some significant policy concerns inherent in a false-accusations rule and cautioned that the Federal Rules may not want to lead in this area when the vast majority of cases involving this evidence are prosecuted in state court. Still, he agreed that further study could be performed to ascertain whether any state has crafted an optimal approach to false-accusations evidence. Professor Richter agreed to pursue further study of state practice for the Committee's Fall 2024 meeting.

VIII. Closing Matters

The Chair thanked everyone for attending and for their helpful input. He informed the Committee that the next meeting will be held on November 8, 2024.

Respectfully submitted,
Liesa Richter