**MEMORANDUM**

**TO:** Hon. John D. Bates, Chair
Committee on Rules of Practice and Procedure

**FROM:** Hon. Patrick J. Schiltz, Chair
Advisory Committee on Evidence Rules

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

**DATE:** May 15, 2024

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# I. Introduction

The Advisory Committee on Evidence Rules (the "Committee") met on April 19, 2024, at the Administrative Office in Washington, D.C. On the morning of the meeting, the Committee convened a panel of experts who discussed developments in Artificial Intelligence (AI) and machine learning and provided guidance on how the rules of evidence might need to be adjusted to handle evidence that is the product of AI. At its subsequent meeting, the Committee processed the comments of the panelists, and also considered three possible amendments to the rules. The Committee approved a proposed amendment to Rule 801(d) for public comment and agreed to continue to consider a possible amendment to Evidence Rule 609 and a possible amendment that

would add a rule governing evidence of prior false accusations of sexual misconduct made by alleged victims in criminal cases.

A full description of the Committee's discussion can be found in the draft minutes of the Committee meeting, attached to this Report.

## II. Action Item

### Proposed Amendment to Rule 801(d)(1)(A)

The Committee recommends that a proposed amendment to Rule 801(d)(1)(A) be released for public comment. Currently, Rule 801(d)(1)(A) provides for a very limited exemption from the hearsay rule for prior inconsistent statements of a testifying witness: the prior statement is substantively admissible only when it is made under oath at a formal proceeding. While all prior inconsistent statements are admissible for impeachment purposes, only a very few are admissible as substantive evidence. So in the typical case, a court upon request will have to instruct the jury that a prior inconsistent statement may be used to impeach the witness's credibility, but may not be used as proof of a fact.

The amendment approved by the Committee for public comment would provide that all prior inconsistent statements admissible for impeachment are also admissible as substantive evidence, subject, of course, to Rule 403. The amendment would track the 2014 change to Rule 801(d)(1)(B), which provides that all prior consistent statements admissible to rehabilitate a witness are also admissible as substantive evidence (again, subject to Rule 403). This convergence of substantive and credibility use dispenses with the need for confusing limiting instructions with respect to all prior statements of a testifying witness.

The amendment adopts the position of the original Advisory Committee, which proposed that all prior inconsistent statements would be admissible over a hearsay objection. As the original Advisory Committee noted, the dangers of hearsay are "largely nonexistent" because the declarant is in court and can be cross-examined about the prior statement and the underlying subject matter, and the trier of fact "has the declarant before it and can observe the demeanor and the nature of his testimony as he denies it or tries to explain away the inconsistency." Adv. Comm. Note to Rule 801(d)(1)(A) (quoting California Law Revision Commission). The amendment is consistent with the practice of a number of states, including California.

The current Rule 801(d)(1)(a) limitations are based on three premises. The first premise is that a prior statement under oath is more reliable than a prior statement that is not. While this is probably so, the ground of substantive admissibility is that the very person who made the prior statement is present at trial and, while under oath, is subject to cross examination about it. The problem with hearsay is that the declarant is not subject to cross-examination, but with prior statements of testifying witnesses, the declarant is by definition subject to cross-examination. Moreover, if an oath at the time of the statement is so critical, no explanation is given for why

prior identifications under Rule 801(d)(1)(C) are admissible without an oath requirement. It is anomalous that a prior identification that is inconsistent with a witness's in-court testimony is admissible substantively under Rule 801(d)(1)(C) but not under Rule 801(d)(1)(A), when the rationale for admissibility is the same under both rules.

The second premise for the current rule was a concern that statements not made at formal proceedings could be difficult to prove. But there is no reason to think that an unrecorded prior inconsistent statement is any more difficult to prove than any other unrecorded fact. And any difficulties in proof can be taken into account by the court under Rule 403 -- as the Committee recently recognized in the 2023 amendment to Rule 106, which allows admission of oral unrecorded statements for completion purposes.

The third premise was that if a witness denies making the prior statement, then cross-examination about the statement might be difficult. But there is effective cross-examination in the very denial. *See* Nelson v. O'Neil, 402 U.S. 622, 629 (1971) (noting that the declarant's denial of the prior statement "was more favorable to the respondent than any that cross-examination by counsel could possibly have produced, had [the declarant] 'affirmed the statement as his'").

A majority of the Committee concluded that the amendment would remove an unreasonable limitation on admissibility and end the need for trial judges to give (in virtually all trials) a limiting instruction that is difficult for lay jurors to understand and thus follow.

***The Committee approved the proposed amendment to Rule 801(d)(1)(A) for public comment. Two Committee members dissented, and the Department of Justice abstained.***

***The Committee recommends that the proposed amendment, and the accompanying Committee Note, be released for public comment.***

The proposed amendment to Rule 801(d)(1)(A), and the Committee Note, are attached to this Report.

# III. Information Items

## A. Panel Discussion on AI and Machine Learning

The Committee invited eight experts to present information regarding artificial intelligence and machine learning and asked the experts to assess the possible impact of AI on the Federal Rules of Evidence. The panel included computer scientists from NIST, three leaders in the field who are working to ensure that AI is properly regulated and vetted, and two law professors who provided suggestions on possible amendments to the Evidence Rules. After the very helpful presentations, the Committee discussion indicated several takeaway points:

1. Consideration should be given to a rule covering machine-learning output when it is not accompanied by an expert witness. One possibility is a new rule applying the Rule 702 reliability standards to such machine-learning data. The problems posed by machine-learning data are not ones of authenticity but rather of reliability. One challenge, however, is to draft a rule on machine-learning evidence that will not cover basic, well-established machine-based data such as thermometers, radar guns, etc.

2. The problem of deepfakes is really one of forgery --- a problem that courts have dealt with under the existing rules for many years. This cautions against a special rule on deepfakes --- with the proviso that traditional means of authentication such as familiarity with a voice, and personal knowledge, might need to be tweaked because the authenticating witness may not be able to detect a deepfake.

3. An opponent should not have the right to an inquiry into whether an item is a deepfake merely by claiming that it is a deepfake. Some initial showing of a reason to think the item is a deepfake should be required. The question is whether a rule is necessary to establish the requirement of an initial showing of fakery. Courts currently require some kind of showing before inquiring into whether digital and social media evidence have been subject to hacking; it is not enough for an opponent to contend that the item is inauthentic because, you never know, it might have been hacked. And courts have imposed that initial requirement on the opponent without relying on a specific rule. The question for the Committee is whether a procedural rule to impose a burden of going forward on the opponent is necessary when it comes to deepfakes. Such a rule might be added to Rule 901 as a new Rule 901(c). Former Judge Paul Grimm and Dr. Maura Grossman proposed a Rule 901(c) that the Committee considered at the meeting. The Committee agreed that the proposal could not be adopted in its present form, because it required the opponent to show that it was more likely than not a fake, which seems too high for an initial burden. The Committee remains open to considering a rule that would impose on the opponent a burden of going forward when an item is challenged as a deepfake.

4. It may be that the admissibility of machine-learning evidence could be dependent on validation studies, without the necessity of courts and litigants inquiring into source codes, algorithms, etc. Thought must be given, however, to how such validation studies can be conducted, and how they are to be reviewed by courts.

With the benefit of all that was learned from the panel discussion, the Committee will continue its inquiry into whether and what amendments are necessary to deal with AI and machine-learning evidence. The Committee remains aware of the challenge of drafting rules that take three years to enact, to cover a rapidly developing area in which three years is like a lifetime. The need to avoid obsolescence by the time of enactment requires rules to be general --- perhaps too general to be helpful.

## B. Rule 609(a)(1)

The Committee considered a proposal to eliminate Rule 609(a)(1). Rule 609(a)(1) allows impeachment of witnesses with felony convictions that do not involve dishonesty or false statement. Most importantly, criminal defendants can be impeached with their prior convictions not involving dishonesty or false statement if the court finds that their probative value outweighs their prejudicial effect.

The argument for eliminating Rule 609(a)(1) is that the convictions falling within the rule are not very probative of a witness's character for truthfulness and can be very prejudicial. The convictions that *are* probative --- those that involve dishonesty or false statement --- are and would remain automatically admissible under Rule 609(a)(2). The major expressed concern about Rule 609(a)(1) is that criminal defendants will be prejudiced by their prior convictions, to the point where they decide not to take the stand at all. The Committee was presented with accounts from public defenders nationwide attesting to the fact that broad use of impeachment under Rule 609(a)(1) has a substantial impact on whether the accused will testify at trial. The Committee was also presented with case studies indicating that courts in criminal cases have often allowed impeachment of defendants with inflammatory convictions, violence-based convictions, and most troublingly, convictions that are similar or identical to the crime with which the defendant is charged.

After discussion, a majority of the Committee was opposed to an elimination of Rule 609(a)(1). There was a consensus that a number of courts have erred in admitting convictions that should not have been allowed under the more-probative-than-prejudicial balancing test. But those mistakes did not, in the view of the majority, justify elimination of the rule. The Committee did, however, agree to consider an amendment to Rule 609(a)(1) that would tighten up the balancing test applicable to criminal defendants, by requiring that the probative value must *substantially* outweigh the prejudicial effect before a conviction not involving dishonesty or false statement can be admitted to impeach the accused. That tweak to the applicable balancing test may well encourage courts to more carefully assess the probative value and prejudicial effect of convictions that are similar or identical to the crime charged, or that are otherwise inflammatory or less probative because they involve acts of violence. The Committee will consider the proposed change to the balancing test at its next meeting.

## C. Prior False Accusations Made by Alleged Victims in Criminal Cases of Sexual Misconduct

The Committee considered a proposal for a freestanding rule covering prior false accusations by alleged victims in criminal cases of sexual misconduct. Currently, evidence of false accusations is governed by a scattered set of rules. Some courts apply Rule 404(b), other courts rely on Rule 412, and when the complainant who made a prior false complaint testifies at a sexual assault trial, Rule 608(b) comes into play. The Committee saw the value of having a single rule --

- set forth in the proposal as a new Rule 416 --- to cover the complex questions of admissibility of false accusations. But the Committee decided to defer consideration of any rule until research is conducted into how the states handle evidence of false accusations. False accusations in sexual assault cases obviously arise much more frequently in state courts. The Committee determined that research into state practices is advisable because the state experience might well show the costs and benefits of a single rule to cover evidence of false accusations.

## IV. Minutes of the Spring, 2024 Meeting

A draft of the minutes of the Committee's Spring, 2024 meeting is attached to this report. These minutes have not yet been approved by the Committee.

Attachments:

Proposed amendment to Evidence Rule 801(d)(1)(A), with the recommendation that it be released for public comment.

Draft Minutes of the Spring, 2024 meeting of the Advisory Committee on Evidence Rules.