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FOCUS

COMPARATIVE PERSPECTIVES ON EVIDENCE LAW: EAST AND WEST

RULEMAKING POSSIBILITIES: EFFORTS OF THE UNITED STATES JUDICIAL CONFERENCE ADVISORY COMMITTEE ON EVIDENCE RULES TO ADDRESS THE CHALLENGES TO FORENSIC EXPERT TESTIMONY

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Abstract This piece is an echo to one of the main subjects of the Sixth International Conference on Evidence Law and Forensic Science which is to determine what evidentiary reforms are necessary for regulating forensic expert testimony, and how those reforms might be implemented. In United States, the predominant way of evidentiary reform is through rulemaking. As the Reporter of Judicial Conference Advisory Committee on the Federal Rules of Evidence since 1996, the author, with a pragmatic spirit throughout the article, examines such an effort at the federal level of U.S. in six parts (levels), starting from the most general, abstract level till finishing with the most detailed and substantive points. Part I begins with a brief introduction of the hierarchies of evidentiary rulemaking authorities at the federal level of the United States, various interested groups and their interesting interactions in the rulemaking process. The author then shifts to the general topic of writing rules with a specific focus on the level of detail that is to be provided in doing so; Part II further narrows down the scrutiny into writing a rule on forensic expert testimony with an emphasis on the necessity of making such a rule change to the current general standards of FRE; Part III directly addresses the challenges of drafting a rule on forensic evidence in FRE, including a comparation of various alternative drafting models; Part IV and Part V respectively discusses the Reporter's comments and the Justice Department's concerns over the drafted rules; and Part VI briefly discusses the feasibility and effectiveness of a Best Practices Manual on forensic evidence in lieu of rulemaking.

Keywords forensics, rulemaking, reliability, expert

I. WRITING RULES ····· 35
II. WRITING A RULE ON FORENSIC EXPERT TESTIMONY ····· 37
III. CHALLENGES OF DRAFTING A RULE ON FORENSIC EVIDENCE ····· 39
IV. REPORTER COMMENTS ····· 40

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V. DOJ CONCERNS ····· 41
VI. BEST PRACTICES MANUAL ····· 41

I. WRITING RULES

I want to shortly discuss the process of evidence rulemaking in the United States, with apologies to those who have a working knowledge of it.

1. Congress has delegated rulemaking authority to the Supreme Court, which has in turn established a rulemaking procedure that starts in the Judicial Conference, which is the policy making body of the Federal Courts. The Conference has a number of committees covering everything from case management to automation, to Rules. The Rules committee is the only committee of the judicial conference that is required to hold meetings open to the public.

2. The Rules committee has five Advisory Committees to cover each of the national rules, and that is where rulemaking starts. The process is deliberate, to say the least. The Advisory Committee proposes a rule, it goes to the standing committee for approval for release for public comment, then back to the Advisory Committee, then back to the Rules Committee, then to the Supreme Court, and then to Congress — with the genius of the enabling act being that with evidence rules such as those dealing with experts, Congressional inaction makes it law.

That process is about three years, and there a bevy of constituencies that must be satisfied;

Courts — judges want rules that are easy to apply, and they are wary about rules that constrain their discretion.

The Justice Department — which is enough said, especially with any rule that could be seen as imposing burdens on them in criminal cases, like limits on forensic evidence.

The defense bar — with of course interests that ordinarily run counter to the DOJ.

Academics — who want to have rules that are theoretically sound, easy to teach, and who always think they can do better than me.

When you think about all of that, it is kind of a miracle that any amendments are ever enacted. And it is kind of understandable that many of them are muted, or technical.

A major question about rule amendments and writing rules is the level of detail that is to be provided. There are a lot of examples but let us take a couple first out of the area of expert testimony:

1. There is a declaration against penal interest exception to the hearsay rule, and one of the admissibility requirements is that the proponent show that there are corroborating circumstances clearly indicating the trustworthiness of the statement. Should the rule set forth guidelines about what those corroborating circumstances might be? A list of factors for a court to use? Such as, the statement was made spontaneously, or to a trusted person, or was corroborated by independent evidence.

a. The answer that the Committee gave was no. The evidence rules do not ordinarily list factors or provide guidelines in the text of the rule. They set basic standards. From the judicial perspective, this is a good thing because it leaves a lot of discretion. Arguably though it is a bad thing because it renders rules unpredictable, creating costs for the parties, and it opens the possibility of inconsistent decision making — so for example, there is a conflict in the courts about whether corroborating evidence can be used to satisfy this admissibility requirement.

i. One reason for not setting out lists of factors — the catalog model — is that they tend to become dispositive, and new factors — or ones never thought about at the time — may come to the fore. The response of course is that you could just make the factors illustrative, with a "such as." But they tend to get hardened over time and courts are often reluctant to expand — thus, 901 authentication are just examples but there is a hurdle to jump if you want to do something outside those examples; and that is probably true with Rules 404(b) and 407 examples as well.

ii. On the other side if they are just non-dispositive examples of factors there is a possibility that they will not be helpful because judges will have discretion to reject them anyway.

iii. Finally, the rules are designed to be applied in a courtroom, theoretically on the fly — so they need to be short and to the point. Nobody should be expected to memorize or have a working knowledge of a municipal code with 100 different factors.

b. A slightly different example on the question of detail is Rule 403, which lays out the broad balancing test of probative value and prejudicial effect. But should there be more guidance on how that balancing test plays out in certain commonly recurring situations? This is not a question of explicating a concept in rule text but rather one of dealing with specific recurring situations that are now handled at a level of high generality. For example, should there be a special rule on evidence of similar circumstances — bringing in evidence of one accident to prove another. The courts have come to the position that the evidence must be of substantial similarity, but would not it be helpful to have that in a rule, and to explain what it actually means? What about the use of illustrative aids?

Again there is caution about getting too far into the weeds — it is not a written policy, but the animating idea is to keep it simple, to set out the generalities, and to allow courts discretion to fill in the details.

2. One possibility for adding detail could be in the Committee Note that accompanies any change to the Federal Rules. The best example of the Note providing the details is the Committee Note to the 2000 amendment to Rule 702, the basic rule on expert evidence. The amendment was in response to Daubert, and was originally designed to clarify that the Daubert gate keeping function applied to both scientific and nonscientific expert testimony.

a. As the rulemaking process was going on and before the rule was enacted, the Supreme Court actually decided that question.

b. But the rulemakers saw value in continuing with the amendment. One reason was that the amendment set forth a better structure for gatekeeping than could be found in all the case law. But the other reason was that the Advisory Committee Note provided great assistance in adding details and in assisting courts and litigants in managing expert testimony.

To some extent, it is fair to say, the amendment to the text was an excuse for having the note.

c. It has been cited and quoted in opinions more than 1,000 times, it is the most cited Committee Note ever.

d. Unfortunately since that Note was written, the Rules Committee of the Judicial Conference — the boss of the Advisory Committee — has taken the position that Committee Notes should not be used to provide guidance for any concept that is not directly in the rule. It should not cite cases (because they could end up being overruled). Essentially committee notes are limited to briefly elaborating on the intent of the amendment and an explanation for why it was necessary. Essentially the rule should speak for itself.

e. This is a most unfortunate and narrow-minded rule, and it has never really been voted on by the Rules Committee, but it has nonetheless been enforced. This makes the Note option for an extensive discussion of forensic evidence pretty unlikely.

f. I note that the PCAST report — the President's Council of Advisors on Science and Technology — specifically suggested that the Advisory Committee draft a Committee Note that will "provide guidance to Federal judges concerning the admissibility under Rule 702 of expert testimony based on forensic feature-comparison methods." But that recommendation is problematic on two counts:

(i) You cannot write a Committee Note without having a rule to append it to. The statute giving authority to make rules contemplates that Committee Notes will be issued only as an accompaniment to an amendment (which is why, I guess, there is a concern about citing cases that could later be overruled, you cannot just go back and fix the Committee Note. There is an original advisory committee note on confrontation that is way out of date).

(ii) As stated before, Committee Notes cannot really set all sorts of standards and guidance anymore — but maybe that might be different if the suggestion comes from PCAST.

II. WRITING A RULE ON FORENSIC EXPERT TESTIMONY

With all this in mind, how do we approach a possible rule that would regulate forensic expert testimony?

This is a question that is something like the one about similar circumstances. The topic is of course already covered as a general matter by Rule 702. PCAST breaks it down this way. There are two standards that must be met for forensic evidence to be properly admitted:

1. Foundational validity — which means that the method has been subjected to empirical testing, under conditions appropriate to its intended use, that provides valid estimates of how often the method leads to an inaccurate conclusion. That is, repeatable, producible, and accurate.

As PCAST recognizes, this factor is already covered in a general sense by Rule 702(c), which provides that the expert's testimony must be "the product of reliable principles and methods," and which is shored up by the 2000 Committee Note which states that an important factor is "Whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give."

2. Validity as applied — which means that the examiner must be capable of reliably applying the method and actually have done so; and that assertions about the probabilities stemming from the expert's conclusion are scientifically valid and do not go beyond what the data actually shows.

As PCAST recognizes, the "as applied" factor is also generally covered by Rule 702 after the 2000 amendment, because that rule requires the proponent to prove that the expert has reliably applied the valid principles to the facts of the case.

There are a number of reasons, though, why this general coverage is arguably not enough, and more needs to be done, *i.e.*, an amendment to the rules:

1. The current general standards have been shown to be clearly inadequate because the courts continue to admit dubious forensic evidence, such as handwriting, latent fingerprinting, and ballistics. Part of this is because these forensic sciences were admitted years ago because they were simply presumed reliable without a real showing, and courts have just continued to give them a pass. Arguably, it takes something more direct and specific than the general principles of Rule 702 to shake courts out of their reverie.

And that probably should be by rule change. Reports from PCAST and the National Research Council are useful and can be and have been used in argument, but there has not exactly been a seismic movement in the case law as a result of those reports. They are not controlling in any court. So specific rulemaking about forensic evidence is probably necessary to catch the attention of the courts that a real change must be made.

2. While the general standards do cover reliability and application, they do not specifically cover one of the biggest problems with the expert testimony in this area — overstating results. Such as to a reasonable degree of ballistic certainty, or an infinitesimally small error rate.

Certainly general principles of reliability and probative value can work to regulate overstatement, as Judge Rakoff did with ballistics testimony. But in the end the more

effective method is undoubtedly to add some specific language dealing with the problem of overstatement.

III. CHALLENGES OF DRAFTING A RULE ON FORENSIC EVIDENCE

So let us assume that the federal rules of evidence should be amended to impose limitations on forensic expert testimony. There are several drafting challenges.

1. Do you define "forensic" expert? Something like comparisons conducted for purposes of identification and purporting to be scientific? That definition may not be right because some courts have readily recognized that some of the methods are not scientific and yet admit them as technical testimony anyway.

2. Do you make the rule part of Rule 702? That is difficult. Rule 702 provides:

Rule 702 Testimony by Expert Witnesses

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and methods; and

(d) the expert has reliably applied the principles and methods to the facts of the case.

Adding a subdivision (e) seems odd because it will overlap with the earlier provisions, and it will be about a specific type of expert testimony whereas the rest of the rule will cover all experts.

It would also mean that you would have a specific tack-on to a general rule.

Another way to do it would be to renumber the section so that the forensic part is a separate subdivision. But that would upset electronic searches and would create transaction costs with a rule that is used very often.

Anyway, here is the Rule 702 solution: adding a new subdivision with a "general title" and shifting what is now a, b, c and d into a1, a2, a3 and a4.

Rule 702 Testimony by Expert Witnesses

(a) In General. A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(1) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(2) the testimony is based on sufficient facts or data;

(3) the testimony is the product of reliable principles and methods; and

(4) the expert has reliably applied the principles and methods to the facts of the case.

(b) Forensic Expert Witnesses. If a witness is testifying on the basis of a forensic

examination [conducted to determine whether an evidentiary sample is similar or identical to a source sample] [or, testifying to a forensic identification], the proponent must prove the following in addition to satisfying the requirements of Rule 702(a):

(1) the witness's method is repeatable, reproducible, and accurate — as shown by empirical studies conducted under conditions appropriate to its intended use;

(2) the witness is capable of applying the method reliably and actually did so; and

(3) the witness accurately states the probative value of [the meaning of] any similarity or match between the samples.

IV. REPORTER COMMENTS

Note that you still have the problem of overlapping standards. Hard to know what to do about that.

Note also that the brackets about comparison would be useful for focusing on what was addressed in the PCAST and NAS reports — ballistics, handwriting, fingerprinting — but would not cover things like an autopsy, or a determination that some substance was found in blood. On the other hand, taking out the brackets means you are relying on an undefined term "forensic" to do all the heavy lifting.

Perhaps the term "forensic identification" — which is used by the National Research Council — would be good. It would cover things like drug tests and autopsies, but not simple identifications by lay witnesses.

Sub b1 — that is the foundational validity that the PCAST report requires. Repeatable, producible, and accurate, as shown by empirical studies. PCAST gets into the concept of "black box" studies, empirically verified by independent evaluators, but that is clearly too much for rule text.

Re sub (b) (3) — the concept is to catch the overstatement problem, which I think it does.

Re probative value of or meaning of — I like the meaning of, I do not think experts should be the ones testifying to the probative value of something.

3. If you make it a new freestanding rule, where does it go?

It has to be 707. Putting it somewhere after Rule 702 would upset electronic searches and settled expectations and nomenclature that have existed for more than 40 years.

Though doing that does not really address the overlap problem.

So here is a crack at a freestanding rule about forensic experts:

Rule 707 Testimony by Forensic Expert Witnesses

If a witness is testifying on the basis of a forensic examination of whether an evidentiary sample is similar or identical to a source sample, the proponent must prove the following in addition to satisfying the requirements of Rule 702:

(a) the witness's method is repeatable, reproducible, and accurate — as shown by empirical studies conducted under conditions appropriate to its intended use;

(b) the witness is capable of applying the method reliably and actually did so; and

(c) the witness accurately states the probative value of [the meaning of] any similarity or match between the samples.

A committee note would explain what is meant by forensic, and that it is not intended to cover, for example, a lay person's testimony that the picture looked like the crime scene that day, or that the hat looked the one the defendant wore, or that this is the defendant's handwriting.

It would explain that there are subjective and objective processes, and that the gold standard is objective, automated processes that have been shown to reach accurate results. But with subjective comparisons, there must be a showing of empirical testing to determine a level of accuracy — what PCAST calls "black box" testing.

It might take a shot at attacking some of the most dubious forensic methods, such as bitemarks.

There are a couple of concerns that need to be addressed, and it is a good question whether they should be in the rule or in the note:

1. There should be a prohibition on testifying to a reasonable degree of [whatever the field is] certainty. As recently stated by the National Academy, that standard has no meaning in medicine or science, and is just confusing to the jury — and violates the principle that an opinion should not be overstated. Putting it into the rule structure I have is difficult because it talks about what needs to be proved, and here we are talking about what cannot be said. It is a judgment call on whether to change the structure to put in a limitation on this kind of testimony in the rule or in the note.

2. The expert should provide a discussion of rate of error — a concept that is part of the probative value or the meaning of a match, but maybe that should be explicated in the text.

V. DOJ CONCERNS

One of the big blockades to any rulemaking reform will be the DOJ. As the PCAST report shows, the DOJ has recognized the need for some reform, having confessed error in hundreds of cases in which their experts overstated the meaning of hair identification.

But these apparent "reforms" are halting, and the DOJ takes the position that certain techniques are valid even though there is not sufficient testing for validity or any objective showing about the rate of error.

Rosenstein's recent statement could be read by an ungenerous reader to mean, sure we want it to be reliable, but human judgment from a qualified person can be reliable without having to show all the validation that PCAST or a scientist would require.

VI. BEST PRACTICES MANUAL

Finally, the PCAST report suggests that the Advisory Committee come up with a Best

Practices Manual, in lieu of rulemaking. The Advisory Committee has indeed begun some Best Practice work that is not a direct part of rulemaking. Just recently a Best Practice manual for authenticating electronic evidence was completed and sent to every federal judge.

But, the Advisory Committee decided that the Best Practices Manual could not go out under its name or imprimatur. There was a concern that it would open up the Committee to criticism that it was engaged in creating what would be treated as rules for courts without going through the rulemaking process. So what happened was essentially that the Committee commissioned myself, Judge Grimm and Greg Joseph to write the Best Practices Manual and we issued it under our name. Thus dooming it immediately to having no more influence than anything some law professor would write.

In the context of forensic evidence, a Best Practices Manual along the same lines would probably have limited value, because the PCAST report is itself a Best Practices Manual. Something coming from but not attributed to the Advisory Committee would probably reach a different and maybe more influential audience in terms of getting changes implemented, but its utility does seem limited.