COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

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MEMORANDUM

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

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

DATE: May 15, 2021

RE: Report of the Advisory Committee on Evidence Rules

I. Introduction

The Advisory Committee on Evidence Rules (the "Committee") met remotely on April 30, 2021. At the meeting the Committee discussed ongoing projects involving possible amendments to Rules 106, 615, and 702. It also considered items to be put on the agenda for further consideration by the Committee.

The Committee made the following determinations at the meeting:

● It unanimously approved proposed amendments to Rules 106, 615, and 702, and is submitting them to the Standing Committee with the recommendation that they be released for public comment;

● It agreed to consider possible amendments to Rules 611, 801(d), and 1006.

● It added, as agenda items, possible amendments to Rules 407, 613(b), 804(b)(3), and 806.

● It decided not to further consider amendments to Rule 611(a) and the Best Evidence Rule.

A full description of all of these matters can be found in the draft minutes of the Committee meeting, attached to this Report. The amendments proposed as action items can also be found as attachments to this Report.

II. Action Items

A. Proposed Amendment to Rule 106, for Release for Public Comment

At the suggestion of Hon. Paul Grimm, the Committee has for the last four years considered and discussed whether Rule 106 --- the rule of completeness --- should be amended. Rule 106 provides that if a party introduces all or part of a written or recorded statement in such a way as to be misleading, the opponent may require admission of a completing statement that would correct the misimpression. The Committee has considered whether Rule 106 should be amended in two respects: 1) to provide that a completing statement is admissible over a hearsay objection; and 2) to provide that the rule covers unrecorded oral statements, as well as written and recorded statements.

The courts are not uniform in the treatment of these issues. On the hearsay question, some courts have held that when a party introduces a portion of a statement that is misleading, it can still object, on hearsay grounds, to completing evidence that corrects the misimpression. Other courts have held essentially that if a party introduces a portion of a statement so that it can mislead the factfinder about the statement actually made, that party forfeits the right to object to the remainder that is necessary to remedy the misimpression. As to unrecorded oral statements, most courts have found that when necessary to complete, such statements are admissible either under Rule 611(a) or under the common law rule of completeness.

After much discussion and consideration, the Committee has unanimously approved, for release for public comment, an amendment to Rule 106 that would: 1) allow the completing statement to be admissible over a hearsay objection; and 2) cover unrecorded oral statements. The overriding goal of the amendment is to treat all questions of completeness in a single rule. That is particularly important because completeness questions often arise at trial, and so it is important for the parties and the court to be able to refer to a single rule to govern admissibility. What has been particularly confusing to courts and practitioners is that Rule 106 has been considered a "partial codification" of the common law --- meaning that the parties must be aware that common law may

still be invoked. One goal of the amendment is to displace the common law --- as it has been displaced by all the other Federal Rules of Evidence.

As to admissibility of out-of-court statements, the amendment takes the position that the proponent, by providing a misleading presentation, forfeits the right to foreclose admission of a remainder that is necessary to remedy the misimpression. Simple notions of fairness, already embodied in Rule 106, dictate that a misleading presentation cannot stand unrebutted. The amendment leaves it up to the court to determine whether the completing remainder will be admissible to prove a fact, or admissible for the more limited non-hearsay purpose of providing context. Either usage is encompassed within the rule terminology--- that the completing remainder is admissible "over a hearsay objection."

As to unrecorded oral statements, the rationale for covering them is that most courts already admit such statements when necessary to complete --- they just do so under a different evidence rule or under the common law. The Committee was convinced that covering unrecorded oral statements under Rule 106 would be a user-friendly change, especially because the existing hodgepodge of coverage of unrecorded statement presents a trap for the unwary. As stated above, the fact that completeness questions commonly rise at the trial itself means that parties cannot be expected to quickly get an answer from the common law, or from a rule such as Rule 611(a), that does not specifically deal with completeness.

It is important to note that nothing in the amendment changes the basic rule, which applies only to the narrow circumstances in which a party has created a misimpression about the statement, and the adverse party proffers a statement that in fact corrects the misimpression. So, the mere fact that a statement is probative and contradicts a statement offered by the opponent is not enough to justify completion under Rule 106.

The Committee unanimously approved the proposed amendment to Rule 106. The Committee recommends that the proposed amendment, and the accompanying Committee Note, be released for public comment.

The proposed amendment to Rule 106, and the Committee Note, are attached to this Report.

B. Proposed Amendment to Rule 615, for Release for Public Comment

Rule 615 provides for court orders excluding witnesses so that they "cannot hear other witnesses' testimony." The Committee determined that there are problems raised in the case law and in practice regarding the scope of a Rule 615 order: does it apply only to exclude witnesses from the courtroom (as stated in the text of the rule) or does it extend outside the confines of the courtroom to prevent prospective witnesses from obtaining or being provided trial testimony? Most courts have held that a Rule 615 order extends to prevent access to trial testimony outside of

court, because exclusion from the courtroom is not sufficient to protect against the risk of witnesses tailoring their testimony after obtaining access to trial testimony. But other courts have read the rule as it is written.

After extensive consideration and research over three years, the Committee agreed on an amendment that would clarify the extent of an order under Rule 615. Committee members have noted that where parties can be held in contempt for violating a court order, some clarification of the operation of sequestration outside the actual trial setting itself is necessary. The Committee's investigation of this problem is consistent with its ongoing efforts to ensure that the Evidence Rules are keeping up with technological advancement, given the increased possibility of witness access to information about testimony through news, social media, YouTube or daily transcripts.

At the Spring, 2021 meeting the Committee unanimously voted in favor of an amendment that limits an exclusion order to just that --- exclusion of witnesses from the courtroom. But a new subdivision would provide that the court has discretion to issue further orders to "(1) prohibit disclosure of trial testimony to witnesses who are excluded from the courtroom; and (2) prohibit excluded witnesses from accessing trial testimony."

The Committee also considered whether an amendment to Rule 615 should address orders that prohibit counsel from preparing prospective witnesses with trial testimony. The Committee resolved that any amendment to Rule 615 should not mention trial counsel in text, because the question of whether counsel can use trial testimony to prepare witnesses raises issues of professional responsibility and the right to counsel that are beyond the purview of the Evidence Rules.

Finally, the Committee approved an additional amendment to the existing provision that allows an entity-party to designate "an officer or employee" to be exempt from exclusion. There is some dispute in the courts on whether the entity-party is limited to one such exemption or is entitled to more than one. The amendment clarifies that the exemption is limited to one officer or employee. The rationale is that the exemption is intended to put entities on a par with individual parties, who cannot be excluded under Rule 615. Allowing the entity more than one exemption is inconsistent with that rationale.

The Committee unanimously approved the proposed amendment to Rule 615. The Committee recommends that the proposed amendment, and the accompanying Committee Note, be released for public comment.

The proposed amendment to Rule 615, and the Committee Note, are attached to this Report.

C. Proposed Amendment to Rule 702, for Release for Public Comment

The Committee has been researching and discussing the possibility of an amendment to Rule 702 for four years. The project began with a Symposium on forensic experts and *Daubert,* held at Boston College School of Law in October, 2017. That Symposium addressed, among other things, the challenges to forensic evidence raised in a report by the President's Council of Advisors on Science and Technology. A Subcommittee on Rule 702 was appointed to consider possible treatment of forensic experts, as well as the weight/admissibility question discussed below. The Subcommittee, after extensive discussion, recommended against certain courses of action. The Subcommittee found that: 1) It would be difficult to draft a freestanding rule on forensic expert testimony, because any such amendment would have an inevitable and problematic overlap with Rule 702; and 2) It would not be advisable to set forth detailed requirements for forensic evidence either in text or Committee Note because such a project would require extensive input from the scientific community, and there is substantial debate about what requirements are appropriate.

The Committee agreed with these suggestions by the Rule 702 Subcommittee. But the Subcommittee did express interest in considering an amendment to Rule 702 that would focus on one important aspect of forensic expert testimony --- the problem of overstating results (for example, by stating an opinion as having a "zero error rate", where that conclusion is not supportable by the methodology). The Committee heard extensively from DOJ on the important efforts it is now employing to regulate the testimony of its forensic experts, and to limit possible overstatement.

The Committee considered a proposal to add a new subdivision (e) to Rule 702 that would essentially prohibit any expert from drawing a conclusion overstating what could actually be concluded from a reliable application of a reliable methodology. But a majority of the members decided that the amendment would be problematic, because Rule 702(d) already requires that the expert must reliably apply a reliable methodology. If an expert overstates what can be reliably concluded (such as a forensic expert saying the rate of error is zero) then the expert's opinion should be excluded under Rule 702(d). The Committee was also concerned about the possible unintended consequences of adding an overstatement provision that would be applied to all experts, not just forensic experts.

The Committee, however, unanimously favored a slight change to existing Rule 702(d) that would emphasize that the court must focus on the expert's opinion, and must find that the opinion actually proceeds from a reliable application of the methodology. The Committee unanimously approved a proposal that would amend Rule 702(d) to require the court to find that "the expert's opinion reflects a reliable application of the principles and methods to the facts of the case." As the Committee Note elaborates: "A testifying expert's opinion must stay within the bounds of what can be concluded by a reliable application of the expert's basis and methodology." The language of the amendment more clearly empowers the court to pass judgment on the

conclusion that the expert has drawn from the methodology. As such it is consistent with the decision in *General Electric Co., v. Joiner,* 522 U.S. 136 (1997), where the Court declared that a trial court must consider not only the expert's methodology but also the expert's conclusion; that is because the methodology must not only be reliable, it must be reliably applied.

Finally, the Committee resolved to respond to the fact that many courts have declared that the reliability requirements set forth in Rule 702(b) and (d) --- that the expert has relied on sufficient facts or data and has reliably applied a reliable methodology --- are questions of weight and not admissibility, and more broadly that expert testimony is presumed to be admissible. These statements can be read to misstate Rule 702, because its admissibility requirements must be met by a preponderance of the evidence. The Committee has determined that in a fair number of cases, the courts have found expert testimony admissible even though the proponent has not satisfied the Rule 702(b) and (d) requirements by a preponderance of the evidence.

Initially, the Committee was reluctant to propose a change to the text of Rule 702 to address these mistakes as to the proper standard of admissibility, in part because the preponderance of the evidence standard applies to almost all evidentiary determinations, and specifying that standard in one rule might raise negative inferences as to other rules. But ultimately the Committee unanimously agreed that adding the preponderance of the evidence standard to the text of Rule 702 would be a substantial improvement that would address an important conflict among the courts. While it is true that the Rule 104(a) preponderance of the evidence standard applies to Rule 702 as well as other rules, it is with respect to the reliability requirements of expert testimony that many courts are misapplying that standard. Moreover, it takes some effort to determine the applicable standard of proof --- Rule 104(a) does not mention the applicable standard of proof, requiring a resort to case law. And while *Daubert* mentions the standard, it is only in a footnote, in a case in which there is much said about the liberal standards of the Federal Rules of Evidence. Consequently, the Committee unanimously approved an amendment that would explicitly add the preponderance of the evidence standard to Rule 702(b)-(d). The Committee Note to the proposal makes clear that there is no intent to raise any negative inference regarding the applicability of the Rule 104(a) standard of proof to other rules --- emphasizing the preponderance standard in Rule 702 specifically was made necessary by the decisions that have failed to apply it to the reliability requirements of Rule 702.

The Committee unanimously approved the proposed amendment to Rule 702. The Committee recommends that the proposed amendment, and the accompanying Committee Note, be released for public comment.

The proposed amendment to Rule 702, and the Committee Note, are attached to this Report.

III. Information Items

A. Possible Amendment to Rule 611 on Illustrative Aids

The Committee is considering a proposal to adopt a rule on the use of illustrative aids at trial. The distinction between "demonstrative" evidence (used substantively to prove disputed issues at trial) and "illustrative aids" (offered solely to assist the jury in understanding other evidence) is sometimes a difficult one to draw, and is a point of confusion in the courts. In addition, the standards for allowing illustrative aids to be presented --- and particularly whether illustrative aids may be sent to the jury --- are not made clear in the case law. The Committee has preliminarily determined that it would be useful to set forth uniform standards to regulate the use of illustrative aids, and in doing so to provide a distinction between illustrative aids and demonstrative evidence.

B. Possible Amendment to Rule 1006

The Committee has determined that the courts are in dispute about a number of issues regarding admissibility of summaries of evidence under Rule 1006 --- and that much of the problem here is that some courts do not properly distinguish between summaries of evidence under Rule 1006, and summaries that are illustrative aids and so are not evidence at all. Some courts have stated that summaries admissible under Rule 1006 are "not evidence." Others have stated that the underlying evidence must all be admitted before the summary can be admitted. The Committee is considering an amendment to Rule 1006 that would provide greater guidance to the courts on the admissibility and proper use of summary evidence under Rule 1006. The proposal to amend Rule 1006 dovetails with the proposal to set forth rules on illustrative aids.

C. A Rule Setting Forth Safeguards When Allowing Jurors to Question Witnesses.

There is controversy in the courts over whether jurors should be allowed to question witnesses at trial. The Committee is not seeking to resolve that controversy in a rule amendment. But the Committee has determined that it could be useful to set forth the minimum safeguards that should be applied if the trial court does decide to allow jurors to question witnesses. Standards regulating the practice can be found in some court of appeals cases, but the Committee has tentatively determined that it would be useful to have a single set of safeguards in an Evidence Rule --- most likely in a new subdivision to Rule 611. The Committee will consider a draft providing safeguards at its next meeting.

D. Rule 801(d)(2) and Successors-in-Interest

Where a person or entity involved in a dispute makes a statement that would be admissible against them as a party-opponent statement, there is a question of whether it remains admissible

against a successor-in-interest. For example, assume an estate brings an action on behalf of a decedent, who made a statement that would be admissible against the decedent as a party-opponent statement had he lived. Courts are in dispute about whether the statement is admissible against the estate. Some circuits would permit the statements made by the decedent to be offered against the estate as party-opponent statements under Rule 801(d)(2), while others would foreclose access to those statements because they are not statements of "the estate" that is technically the party-opponent in the case. The Committee is considering a possible amendment that would provide that the statement is admissible against the successor-in-interest --- on the ground that the successor-in-interest is standing in the shoes of the declarant. Moreover, a contrary rule would result in random application of Rule 801(d)(2), and possible strategic action, such as assigning a claim in order to avoid admissibility of a statement.

The Committee is considering a number of questions, including: 1) whether the issue arises with sufficient frequency to justify an amendment to Rule 801(d)(2); 2) how to choose appropriate amendment language or labels to cover all types of successorship relationships; and 3) how to apply the rule to all of the exceptions for party opponent statements under Rule 801(d)(2).

E. Circuit Splits

At the Spring meeting, the Reporter presented the Committee with a memorandum on a number of circuit splits in interpreting the Evidence Rules. The purpose of the memorandum was to assess whether the Committee was interested in pursuing the possibility of amendment the Evidence Rules to rectify some of these circuit splits. Out of the list, the Committee chose the following issues as warranting further investigation:

- Rule 407 --- does it exclude subsequent changes in contract cases?
- Rule 407 --- does it apply when the remedial measure occurs after the injury but not in response to the injury?
- Rule 613(b) --- to rectify the dispute in the courts on whether a witness must be provided an opportunity to explain or deny a prior inconsistent statement before extrinsic evidence is admitted;
- Rule 804(b)(3) --- to specify that corroborating evidence may be considered in determining whether the proponent has established corroborating circumstances clearly indicating the trustworthiness of a declaration against penal interest in a criminal case;
- Rule 806 --- to rectify the dispute over whether bad acts that could be inquired into to impeach a witness under Rule 608(b) can be offered to impeach a hearsay declarant.

F. Issues the Committee Has Decided Not to Pursue

After review of memoranda by the Reporter and by the Academic Consultant, the Committee decided not to pursue two possible amendments:

1. An amendment to Rule 611(a) to codify some of the actions taken by courts that might be outside the language of the current rule. The Committee decided that courts were not feeling constrained by the text of the rule; that any attempt to codify some of the actions taken by courts under the auspices of Rule 611(a) might be seen as an attempt to actually limit the rule; and that in any case a court's action under Rule 611(a) could probably be justified as within the court's inherent authority.

2. An amendment to the Best Evidence Rules to provide that recordings in a foreign language do not need to be entered into evidence. This amendment would address a Tenth Circuit opinion which reversed a conviction because the prosecution offered a transcript of a conversation in Spanish, but did not attempt to introduce the recording. The Committee determined that lawyers and federal courts are generally handling foreign-language recordings capably and that it would be prudent to wait to see how the Tenth Circuit opinion is received by other courts.

IV. Minutes of the Spring, 2021 Meeting

The draft of the minutes of the Committee's Spring, 2021 meeting is attached to this report. These minutes have not yet been approved by the Committee.