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

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: December 1, 2020

I. Introduction

The Advisory Committee on Evidence Rules (the "Committee") met virtually on November 13, 2020. The Committee discussed ongoing projects involving possible amendments to Rules 106, 615, and 702. It also discussed the question whether an emergency rule was necessary in the Federal Rules of Evidence.

A full description of all of these matters can be found in the draft minutes of the Committee meeting, attached to this Report.

II. Action Items

No action items.

III. Information Items

A. Possible Amendment to Rule 106

At the suggestion of Hon. Paul Grimm, the Committee is considering 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 create a misimpression about the statement, then the opponent may require admission of a completing statement that would correct the misimpression. Judge Grimm suggests that 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 oral as well as written or recorded statements. Currently, the courts are divided on both questions; and particularly with respect to oral statements, many courts allow them to complete under the authority of Rule 611(a), and sometimes the common law.

After much discussion and consideration, the Committee at its next meeting will be considering, for approval 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 oral as well as written statements. The overriding goal of the amendment is to cover 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 have 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.

The Committee has tentatively rejected a proposed amendment that would provide that the completing statement is admissible only for the non-hearsay purpose of providing context to the initially proffered statement. Admission for context only would result in difficult limiting instructions and would give an unfair advantage to the party that admitted the misleading portion of the statement that the excluded portion is needed to correct.

The Committee plans to consider and vote on the proposed amendment to Rule 106, for release for public comment, at its Spring 2021meeting.

B. Possible Amendment to Rule 615

The Committee is considering 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, but other courts have read the rule as it is written. The Committee has tentatively 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 its November meeting, the Committee, in a nonbinding vote, unanimously voted in favor of an amendment that would limit an exclusion order to just that --- exclusion of witnesses from the courtroom --- but would further provide that the court has discretion to issue a further order to "to prohibit excluded witnesses from obtaining or being provided with trial testimony."

The Committee has also considered whether any amendment to Rule 615 should address whether trial counsel can be prohibited from preparing prospective witnesses with trial testimony. The Committee tentatively 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 favored a minor amendment to Rule 615(b), which currently provides that an entity that is a party is entitled 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 would clarify that the exemption is limited to one officer or employee. If the party seeks exemption for more than one, the party is required to establish that these additional witnesses are "essential to presenting the party's claim or defense" under Rule 615(c).

The Committee plans to consider and vote on the proposed amendment to Rule 615, for release for public comment, at its Spring, 2021 meeting.

C. Possible Amendment to Rule 702

The Committee has been exploring how to respond to the recent challenges to and developments regarding forensic expert evidence since its Symposium on forensics and *Daubert* held at Boston College School of Law in October, 2017. A Subcommittee on Rule 702 was appointed to consider possible treatment of forensics, 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; 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; and 3) It would not be advisable to publish a "best practices manual" for forensic evidence because such a manual could not be issued formally by the Committee, and would involve the same science-based controversy of what standards 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 has 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.

At its November meeting, 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. In a provisional vote, a majority of the members decided that the amendment was not necessary, because Rule 702(d) already requires that the expert's opinion be a reliable application of 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 opinion and conclude that it actually proceeds from a reliable application of the methodology. The change, if finally approved, would amend Rule 702(d) to require the court to find that "the testimony is limited to a reliable application of the principles and methods to the facts of the case."

Finally, the Committee is considering how 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. These statements can be read to misstate Rule 702, because all 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 at the November meeting, there was general agreement 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 in the area of expert testimony that many courts are ignoring 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 favors an amendment to explicitly add the preponderance of the evidence standard to Rule 702. A final vote on the proposal, for release for public comment, will be taken at the Spring, 2021 meeting.

D. The Need for an Emergency Rule in the Evidence Rules

In accordance with the CARES Act, the Committee has considered whether an emergency rule should be added to the Federal Rules of Evidence. The Committee has decided that no such rule is necessary. The Committee reasoned that the Evidence Rules are eminently flexible and grant significant discretion to the trial court --- most notably in Rule 611(a) --- to handle any issue about the form or presentation of evidence that might be affected by an emergency. There is no requirement in the Evidence Rules that would be difficult or impossible to meet in an emergency. For example, there is nothing in any Evidence Rule that requires testimony to be made physically in court. Moreover, the rules are written to allow electronic information to be introduced in lieu of hardcopy.

Given the flexibility in the Evidence Rules, and the discretion provided to trial judges over the form and presentation of evidence, the Committee determined that adding a rule to cover emergencies would do more harm than good. At best it would be superfluous, but at worst it could be considered as a determination by the drafters that the Evidence Rules are not as flexible as they actually are. Consequently, the Committee has not drafted an emergency rule that would be added to the Federal Rules of Evidence.

E. *Crawford v. Washington* and the Hearsay Exceptions in the Evidence Rules

As previous reports have noted, the Committee continues to monitor case law developments after the Supreme Court's decision in *Crawford v. Washington*, in which the Court held that the admission of "testimonial" hearsay violates the accused's right to confrontation unless the accused has an opportunity to cross-examine the declarant.

The Reporter regularly provides the Committee a case digest of all federal circuit cases discussing *Crawford* and its progeny. The goal of the digest is to enable the Committee to keep current on developments in the law of confrontation as they might affect the constitutionality of the Federal Rules hearsay exceptions. If the Committee determines that it is appropriate to propose amendments to prevent one or more of the Evidence Rules from being applied in violation of the Confrontation Clause, it will propose them for the Standing Committee's consideration --- as it did previously with the 2013 amendment to Rule 803(10).

IV. Minutes of the Fall, 2020 Meeting

The draft of the minutes of the Committee's Fall, 2020 meeting is attached to this report. These minutes have not yet been approved by the Committee.